

Issue: Group II Written Notice with suspension (failure to comply with established written policy); Hearing Date: 08/23/05; Decision Issued: 09/20/05; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8151; **Administrative Review: HO Reconsideration Request received 10/11/05; Reconsideration Decision issued 10/19/05; Outcome: No newly discovered evidence or incorrect legal conclusion. Request Denied. Administrative Review: EDR Ruling Request received 10/11/05; EDR Ruling No. 2005-1180 issued 12/28/05; Outcome: HO neither erred nor abused his discretion in upholding the disciplinary action; Administrative Review: DHRM Administrative Review Request received 10/11/05; Outcome pending**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8151

Hearing Date: August 23, 2005
Decision Issued: September 22, 2005

PROCEDURAL HISTORY

On November 5, 2004, Grievant was issued a Group II Written Notice of disciplinary action with suspension for failure to comply with established written policy, namely DHRM Policy 1.75, *Use of the Internet and Electronic Communications*. He was suspended for 15 days but that suspension was later reduced to 10 workdays.

On December 10, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On July 25, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 23, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUE

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Transportation employs Grievant as a Facilities Manager at one of its Facilities. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

Grievant uses a personal computer while at work. The Agency has provided him with a log on identification. He enters a password in order to log on to the Agency's computer system. Grievant can access the internet using his work computer.¹

Grievant has several hobbies and interests requiring his use of the internet.² For example, he regularly used ebay.com and paypal.com in order to transact personal business. He accessed websites translating English into German in order to communicate with Germans interested in his hobbies. Grievant forwarded emails sent to his personal email address to his VDOT email address.

In order to avoid the loss of electronic information, VDOT adopted a practice of backing up its employee's computer files. As an employee logged off of his computer, the main computer system would backup that employee's files. Each employee was permitted to maintain a PST file to hold information related to that employee. An employee's PST file could contain both personal and business-related files. When the Agency backed up each employee's files, PST files were included in the backup process. The length of time necessary to backup an employee's computer files varied with the size of that employee's files including the PST file.

¹ DHRM Policy 1.75 defines computer network as, "[t]wo or more computers that can share information, typically connected by cable, data line, or satellite link."

² DHRM Policy 1.75 defines internet as "[a]n international network of independent computer systems. The World Wide Web is one of the most recognized means of using the Internet."

The size of Grievant's PST file was brought to the Agency's attention through an IT HelpDesk call in March 2004 that revealed an excessive amount of PST files in Grievant's account.³ Also during the first quarter of 2004, the Agency began the process of moving PST files from Outlook folders to the "H" Drive and a report was generated by the IT Section showing employee names and the PST file sizes. Grievant's PST file was substantially larger than the similar file of any other employee working at his regional office.

The volume of information stored on a computer is measured in bytes. A byte is a unit of storage capable of holding a single character. For example, the letter "C" would be stored on a computer as one byte. MB stands for megabyte and represents 1,000,000 bytes of information.⁴ GB stands for gigabyte and represents 1,000,000,000 bytes of information.⁵ One GB equals 1,024 MB.

Within Grievant's PST was a folder called "PERSONAL." In November 2003, this folder contained 22MB of information. In January 2004, the folder contained 25.8MB. In March 2004, however, the folder size jumped to 2.08GB. In May 2004, the folder size decreased to 78.1MB. In June 2004, the folder contained 1.05GB of information. The folder size remained unchanged in July 2005 at 1.05GB.

The Agency monitored Grievant's computer usage from May 5, 2004 through July 7, 2004. Software was placed on Grievant's computer that recorded how his computer screen appeared every 15 minutes he was on the computer. For example, at 11:55 a.m. on May 5, 2004, Grievant's computer screen showed a list of emails with "Questions for seller" and giving items numbers and the senders' email addresses. At 12:25 p.m., Grievant's computer screen showed a list of items from ebay such as a refrigerator express kit, snow plow kit model, and vintage cast white metal mail boxes. At 12:40 p.m., Grievant's computer screen showed a paypal transaction for the sale of a "Kyosho Gas Powered R/C Porsche 1/8 Scale." At 1:40 p.m., Grievant's computer screen shows a Word document where Grievant is writing about a Syracuse China Milk pitcher. At 1:55 p.m., Grievant's computer screen shows his Outlook sent file which shows emails he has sent. There appears a list of folders referring to Kyosho and car parts and engine parts, etc. At 2:10 p.m., Grievant's computer screen shows he was accessing the internet website modellbaeuecke.de, a German website. At 2:25 p.m., Grievant's computer screen shows him accessing a spreadsheet related to his hobbies. At 2:40 p.m., Grievant's computer shows a screen of his personal folder containing 236 objects and 2.08GB of data. At 2:55 p.m., Grievant's computer shows a screen of a spreadsheet entitled Modellbaeuecke – Robbe – Text.xls. At 3:40 p.m., Grievant's computer screen shows a spreadsheet containing German text and relating to Grievant's hobbies. At 5:10 p.m., Grievant's computer screen shows him accessing a

³ The Agency also received a complaint through the State's complaint hotline.

⁴ In some contexts the number of bytes is 1,048,576.

⁵ In some contexts the number of bytes is 1,073,741,824.

language translation website. At 5:25 p.m., Grievant's computer screen shows him accessing the internet website modellbauecke.de. At 5:40 p.m., Grievant's computer screen shows him accessing a website written in German and relating to his hobbies.

The Agency presented screen shots showing Grievant accessed similar websites on other days.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).⁶ Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

DHRM Policy 1.75 permits State employees to use the internet for personal use within certain parameters as follows:

Personal use means use that is not job-related. In general, incidental and occasional personal use of the Commonwealth's Internet access or electronic communication systems is permitted; however, personal use is prohibited if it:

- interferes with the user's productivity or work performance, or with any other employee's productivity or work performance;
- adversely affects the efficient operation of the computer system;
- violates any provision of this policy, any supplemental policy adopted by the agency supplying the Internet or electronic communication systems, or any other policy, regulation, law or guideline as set forth by local, State or Federal law. (See Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001.)

The amount of personal information Grievant stored on his computer exceeded what could be considered incidental or occasional use. A CD-ROM stores approximately 650MB of data. This is enough space to store approximately 300,000 text pages. In March, June, and July 2004, Grievant had personal information on his computer well exceeding 300,000 of text pages. Screen shots taken of Grievant's

⁶ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

internet activity confirmed he was actively involved in pursuing personal matters using his State computer. In addition, the amount of personal information Grievant held on his computer affected the efficient operation of the computer system because the size of his personal files contributed to the disruption the Agency's process of backing up data.⁷ Grievant acted contrary to DHRM Policy 1.75 because the amount of personal information he stored on the Agency's computer system exceeded what would be considered incidental and occasional personal use.

"Failure to follow ... comply with established written policy" is a Group II offense.⁸ An employee receiving a Group II Written Notice may be suspended for up to ten workdays. Grievant failed to comply with DHRM Policy 1.75 thereby justifying issuance of a Group II Written Notice with a ten workday suspension.⁹

Grievant contends that he repeatedly attempted to remove personal information from his PST file but that the information would unexpectedly re-appear on his computer and he would have to remove it again. Grievant contends the size of his PST reflected the Agency's computer system automatically restoring deleted information thereby making his PST appear to be gigantic. Grievant presented testimony of employees in his unit who experienced mysterious documents appearing within their computer files. This occurred only infrequently. No reason could be discovered to explain why these documents suddenly appeared. Grievant also presented testimony of a technician who had removed files from his PST at Grievant's request and placed those files on a series of Compact Disks.

The Hearing Officer has devoted a considerable amount of time trying to verify Grievant's claim. The possibility that Grievant's claim is accurate certainly exists. The likelihood of his assertion, however, is not substantiated.

No evidence was presented showing any other employee's PST was growing dramatically and unexpectedly in size. Not every file on Grievant's computer was presented as evidence, however, a close review of the files presented does not show any material change of file size over time.¹⁰ For example, the file, "A cell of 5 terrorists.doc" has the size of 20KB and the date modified of 10/19/01 in March 2004,

⁷ On May 25, 2004, Grievant's PST folder disconnected from the server because of the volume of information contained in the PST folder.

⁸ DHRM § 1.60(V)(B)(2)(a).

⁹ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

¹⁰ In other words, if the backup process was affecting Grievant's computer files, the backup process was not taking an existing file of 90KB and later restoring the same file as 180KB. Grievant testified that he attempted to delete personal files and he asked another employee to help remove at least two CD's of his personal files. Although Grievant may have attempted to remove personal information, the fact remains that a sizable amount of original personal information made its way into Grievant's personal files. Grievant was solely in control of the original files transferred into his personal storage space.

May 2004, June 2004, and July 2004. In addition, the number of sub-folders within the Personal file increased over time. In November 2003, Grievant had 20 sub-folders within the Personal file. In January 2004, the number increased to 21. In March 2004, the number increased to 24. In May 2004, Grievant had 30 sub-folders. In June and July 2004, Grievant had 31 sub-folders. There is no reason to believe that the backup process would create new sub-folders. Although the data size stored in the additional sub-folders was not presented as evidence, it is reasonable to conclude that Grievant did not create new sub-folders and kept them empty. By increasing sub-folders, Grievant likely added additional data to his PST which is consistent with the Agency's assertion that he was actively involved in personal use of his computer.¹¹

Grievant presented evidence showing that the software the Agency used to backup files sometimes had problems or was ineffective. If the Hearing Officer assumes for the sake of argument that the Agency's backup software was inadequate, no explanation was offered regarding why only Grievant's computer files were mishandled during the backup process. Surely all computer users whose files were backed up would experience the same problems Grievant supposedly experienced. No evidence was presented explaining why Grievant would have been the only person to experience this problem.

Grievant suggested that someone may have accessed his computer information or the storage system and intentionally placed additional data under his personal files. No credible evidence was presented to support this assertion. The Hearing Officer has no reason to believe anyone intentionally manipulated Grievant's files.

Grievant presented testimony from co-workers who noticed files belonging to other employees suddenly appearing on their computers without explanation. Although this evidence suggests there may be some defect in the Agency's computer system, that defect did not affect Grievant. Grievant did not identify any of the documents in his personal files as being drafted by or belonging to another employee. It appears that all of Grievant's personal files originated from his personal use.

Grievant argues that the software the Agency placed on his computer to take screen shots resulted in a lot of storage space being devoted to holding the screen shots. This argument is untenable. No evidence was presented to show that the screen shots were stored as part of Grievant's personal folders. In addition, the software was placed on his computer in May 2004, yet he had over 2GB of personal information on his computer in March 2004 before the software was installed.

DECISION

¹¹ Data size from January 2004 to March 2004 increased dramatically from 25.8MB to 2.08GB. By May 2004 the size dropped to 78.1MB but rose again in June and July 2004 to 1.05GB. This pattern is consistent with Grievant's testimony that he removed a significant number of files in his PST, but it also shows he did not remove enough files and then continued to add data.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹²

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8151-R

Reconsideration Decision Issued: October 19, 2005

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant argues that the written notice does not mention the amount of time required to back up his files as a factor in its issuance. In a memorandum dated November 10, 2004 entitled “Issuance of Group II Notice”, the Agency advised Grievant of the facts supporting its issuance of disciplinary action. It is not necessary for the Agency to include in the written notice every fact upon which it relied to take disciplinary action. The memorandum provides adequate notice to Grievant of the material facts upon which it based Grievant’s disciplinary action.

Grievant contends the Agency’s evidence regarding his personal folder is incorrect. He says he asked the Agency to remove the data during his August 12, 2004 meeting with Internal Audit but since the Agency did not remove the data, the Agency’s inaction shows he was not in violation of policy. The period of time during which Grievant was disciplined ended in July 2004. Thus, what actions the Agency may not have taken in August 2004 are not relevant. The Agency presented evidence showing Grievant’s folder size contained too much personal data that he obtained using the internet.

Grievant argues the amount of time he spent accessing websites was only a few minutes on three days in May 2004 and one day in June 2004. The Agency did not discipline Grievant for the amount of time he spent accessing personal website. How much time Grievant spent accessing websites is not relevant.

Grievant objects to footnote seven in the hearing decision. The Agency did not allege this during the hearing and, thus, it should not have been included in the hearing decision. Accordingly, the Hearing Officer will strike footnote seven from the final hearing decision.

Grievant argues that he disconnected the PST file from the server and the disconnection was not caused by the size of the file. Assuming Grievant's assertion is true, the outcome of this case would not be affected. The Agency has demonstrated Grievant's abuse of the Agency's internet access.

Grievant argues that because DHRM Policy 1.75 does not mention storage of personal information on a computer system, he did not act contrary to policy. Grievant argues that the policy only prohibits the sending and receiving of messages. If Grievant had not utilized the internet to receive the personal information that he stored on the Agency's computer system, Grievant's argument may have some validity.¹³ The evidence, however, showed that Grievant was actively engaged in a hobby requiring a significant amount of his time to monitor. He transacted business related to his hobby using the Agency's internet access. The amount of data stored on his computer traveled across the Agency's internet to find its way onto Grievant's computer. The large amount of data stored on his computer showed that a large amount of data crossed the Agency's internet before Grievant stored it on his computer. Grievant admitted to deleting several disks of personal data from the computer system. The amount of data stored on Grievant's computer understated the amount of personal data Grievant accessed using the Agency's internet.

Grievant contends DHRM Policy 1.75 permits incidental and occasional use within work hours and without regard to non-work hours. Nothing in DHRM Policy 1.75 defines "incidental" or "occasional" personal use as depending on working hours, lunches, or breaks. An agency may choose not to consider an employee's personal activities during lunch when determining whether the employee has acted contrary to Policy 1.75, but nothing in the policy requires this. For example, if an employee whose regular work schedule is Monday through Friday spent 10 hours on a Saturday transacting business on ebay using the agency's internet access, that employee's personal use would not suddenly become incidental or occasional simply because it occurred on the employee's day off from work.

Grievant re-states his argument that someone at the Agency installed additional data on his computer. He cannot identify the person who added data to his personal files. A person adding data to Grievant's personal files would have to have a level of security access which was not widely granted to employees. Grievant cannot identify

¹³ In other words, if Grievant had brought several disks of personal data from his home and loaded it directly onto the Agency's computer, a question may arise regarding whether Grievant acted contrary to DHRM Policy 1.75. In this case, the excessive amount of data stored on Grievant's computer reached his computer because Grievant sent and received messages through the internet.

with any specificity how someone supposedly accessed his computer data. Grievant's assertion remains a possibility, not a fact.

Grievant asserts the Agency's witnesses lacked credibility. The Hearing Officer found the Agency's witnesses to be credible.

Grievant argues that the number of sub-folders within his Personal file increased because of his activity relating to another grievance, his VDOT career, benefits, and other business related information. In November 2003, Grievant had a sub-folder entitled "aGRIEVANCE" among 20 sub-folders. In January 2004, he added a sub-folder entitled "PERSONAL DOCUMENTS". In March 2004, he added sub-folders entitled "CD Creator", "Deleted", and "Outlook Archives". In May 2004, he added sub-folders entitled "Automobile Atlanta – Porsche...", "Handle", "New Folder", "Optimist", "Personal Files – CD", and "TODAY". In June 2004, Grievant added a sub-folder entitled "PayPal". It is difficult for the Hearing Officer to believe these sub-folders related to Grievant's prior grievance and to his other VDOT business especially when the sub-folders have names such as "Automobile Atlanta – Porsche..." and "PayPal".

Grievant objects to the Agency's failure to take progressive action. Nothing in DHRM Policy 1.60 requires the Agency to progressively discipline employees.

Grievant argues the Agency disciplined him with the assumption that his offense was a second offense yet the prior alleged offense was subsequently reversed on appeal. Grievant contends the Agency should have set his discipline with the assumption that it was a first offense. The testimony showed the written notice forming the basis of this appeal provided for a suspension of 15 days because of the prior disciplinary notice. Once that prior notice was reversed, the Agency reduced Grievant's suspension from 15 days to 10 days. The Hearing Officer finds that when the Agency re-affirmed the written notice giving rise to this appeal by giving Grievant a ten work day suspension, it did so with the knowledge that this would be Grievant's first offense.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant's request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer

