Issue: Group II Written Notice with termination (due to accumulation) (misuse of state property, abuse of state time, and failure to follow management instructions regarding personal use of the Internet); Hearing Date: 08/30/05; Decision Issued: 08/31/05; Agency: VITA; AHO: David J. Latham, Esq.; Case No. 8159

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8159

Hearing Date:	August 30, 2005
Decision Issued:	August 31, 2005

APPEARANCES

Grievant
Information Technology Manager
Advocate for Agency
One witness for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group II Written Notice issued for misuse of state property, abuse of state time, and failure to follow

management instructions regarding personal use of the Internet.[1] Due to the accumulation of active disciplinary actions, grievant was removed from state employment effective June 9, 2005. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2] The Virginia Information Technologies Agency (Hereinafter referred to as "agency" or "VITA") has employed grievant as an information technologies (IT) specialist for one year.[3] His responsibilities include working on the IT "helpdesk" (answering customer calls for assistance with technical computer problems) and assisting with printer maintenance. Helpdesk employees are required to complete a ticket for each call from a customer who requests help.

Grievant has one other active disciplinary action – a Group II Written Notice for misuse of state property, abuse of state time and failure to follow management instructions regarding personal use of the Internet.[4] Grievant was advised in that disciplinary action that if he did not correct the situation (i.e., curb his excessive personal use of the Internet), he would be subject to further disciplinary action. Grievant also has one inactive disciplinary action for excessive use of the Internet. After that discipline, grievant asked that his access to the Internet be restricted because "he didn't think he could control himself." His access was reinstated in 2004 because his supervisor felt that grievant needed such access to fulfill his job responsibilities.

The Commonwealth's policy on Use of the Internet and Electronic Communications Systems allows for incidental and occasional personal use of state-owned computers unless it interferes with productivity or work performance, adversely affects computer system operation, or violates any applicable policy or law.[5] Grievant has also read the disclaimer that appears on all agency computer screens when signing on.[6] The disclaimer prohibits storing information with sexually explicit content, consistent with the Commonwealth's policy on Use of Electronic Communications Systems.[7]

VITA employees who work at customer sites such as VDOT must comply with many of the host agency's policies. As such grievant's use of computers was subject to whatever restrictions VDOT may have on its own employees. However, grievant is an employee of VITA and is managed by VITA employees.

---

[1] Agency Exhibit 1. Written Notice, issued June 9, 2005.
[2] Agency Exhibit 2. Grievance Form A, filed June 27, 2005.
[3] Prior to his employment with VITA, grievant performed similar work as an employee of the Virginia Department of Transportation (VDOT) for five years. With the creation of VITA in 2004, grievant and other IT employees were transferred from VDOT to VITA.
[4] Agency Exhibit 6. Group II Written Notice, issued January 3, 2005. [NOTE: A Hearing Officer's Decision that upheld this disciplinary action is currently in the appeal process. See footnote 18 for additional comments.]
[5] Agency Exhibit 5. Department of Human Resource Management (DHRM) Policy 1.75, *Use of Internet and Electronic Communication Systems*, August 1, 2001.
[6] Grievant Exhibit 1. Disclaimer.
[7] Agency Exhibit 5. *Ibid.*, defines Prohibited Activities to include storing information with sexually explicit content. *See also* Va. Code §§ 2.2-2827 & 18.2-390.

Therefore, he is also subject to VITA policies and the instructions of his VITA managers.

The VITA Information Technologies Manager oversees the work of approximately 70 employees, most of whom work at customer locations throughout the Commonwealth. These employees are VITA employees but are physically working at the locations of customer agencies. For example, grievant and seven other employees are assigned to work at a district office of the Virginia Department of Transportation (VDOT). As part of his responsibilities, the VITA IT Manager regularly reviews weekly Internet Activity Analysis reports for all 70 employees.[8] In reviewing those reports, he observed that grievant accessed the Internet more frequently and for much longer periods of time than all other employees. His volume of Internet use was approximately two to three times that of other employees. Because grievant's use of the Internet appeared to be almost all personal use and in excess of occasional and incidental use, the IT Manager obtained a detailed Internet Activity Log for grievant for the weeks of May 2, 2005[9] and May 23, 2005.

The IT Manager carefully analyzed the line-by-line Activity Log and found that during the ten work days of the two weeks, grievant accessed the Internet for a total of 8 hours and 12 minutes. From that total, he deducted unknown time (nearly nine minutes), time for work-related Internet access (almost 13 minutes), and time that appeared to be Internet access during grievant's two 15-minute breaks and 30-minute lunch (a total of 1 hour, 10 minutes).[10] The remaining time of 6 hours and 40 minutes was non-work-related, personal Internet access time, *excluding* lunch and breaks. During the week of May 2, 2005, grievant averaged over 49 minutes per day of such personal, non work-related Internet access (in addition to more such access during his lunch and breaks). During the week of May 23, 2005, the average was 38 minutes per day beyond lunch and breaks.[11]

The grievant's personal Internet use time was calculated based on the actual amount of time documented on the Activity Log. Grievant was not charged with time which occurred between personal and work-related accesses, e.g., when grievant accessed a job search website at 7:26 and then accessed a VITA site at 7:32, he was not charged with those six minutes even though he may very well have been looking at the job search site for that entire time.

---

[8] Agency Exhibit 4. Internet Activity Analysis report for grievant, week of May 23, 2005.

[9] Agency Exhibit 3. Internet Activity Log, week of May 2, 2005 through May 6, 2005.

[10] The manager recognized that, due to the nature of grievant's work, break times and lunch periods vary from day to day. Therefore, the manager assumed that the period of highest Internet accesses in mid-morning, mid-afternoon, and between 11:00 a.m. and 12:45 p.m. were the times of grievant's two breaks and lunch, respectively. This resulted in viewing grievant's Internet access in the light most favorable to him, even though grievant *may not* have been taking breaks or lunch at the periods of highest Internet activity.

[11] Grievant worked only half-days on May 26 and 27, 2005. Accordingly, the non-work related total of 2 hours 33 minutes for the week was divided by four to arrive at a 38-minute daily average since the grievant only worked 32 hours that week.

One other VITA employee had been found to be using the Internet excessively and was disciplined in early 2005.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[12]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include

[12] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective August 30, 2004.

acts and behavior that are more severe in nature, and are such that an accumulation of two Group II offenses normally should warrant removal from employment.[13] Abuse of state time is a Group I offense; failure to follow a supervisor's instructions, and unauthorized use or misuse of state property are two examples of Group II offenses.

The Code of Virginia defines "sexually explicit content" to include, *inter alia,* any photograph depicting a lewd exhibition of nudity.[14] The Code also defines nudity to include a showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple.[15] The Code does not define "lewd," however *Black's Law Dictionary* defines this term as "Obscene, lustful, indecent, lascivious, or lecherous." The agency cited grievant for accessing websites that contain "sexually provocative" content. Testimony indicated that the websites at issue included pictures of women in swimsuits. Since women in swimsuits are commonly seen throughout this country at beaches, most people do not consider such attire unusual. Each person has their own idea of what is sexually provocative.[16] However, state policy does not specifically prohibit sexually provocative content – it prohibits only sexually *explicit* content as defined in the statutes. While the agency mentioned in the Written Notice attachment that grievant had accessed sexually provocative content, it did not specifically charge him with accessing sexually *explicit* content. Grievant was charged only with the offenses of misuse of state property, abuse of state time, and failure to follow management instructions. Accordingly, it is concluded that grievant did not access websites containing sexually explicit content.

The agency has demonstrated, by a preponderance of evidence, that grievant's personal Internet usage was excessive. His usage was two to three times greater than that of other similarly situated employees at VITA. The amount of time grievant spent accessing personal Internet sites is an abuse of state time. State employees are paid to work eight hours per day; they are not paid to work only seven hours and spend an up to an hour viewing non work-related material (whether on the Internet or in a magazine). Similarly, using state computers for more than occasional and incidental access of the Internet constitutes a misuse of state property. Most importantly however, grievant had been warned on two prior occasions that his use of the Internet was excessive. Notwithstanding being twice disciplined for this offense, grievant continued his pattern of excessive use. This was a flagrant failure to follow management instructions; such insubordinate behavior is a Group II offense.

---

[13] Agency Exhibit 7. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[14] Va. Code § 2.2-2827.A.
[15] Va. Code § 18.2-390.
[16] Certain religious groups believe that exposure of any part of a female's body is sexually provocative and therefore, women in those societies must wear a burka that covers the entire body from head to toe.

Grievant asserts that, in his "helpdesk" work, customers might have a problem accessing the Internet and that he would have to access the Internet site himself to ascertain what the problem is. However, the IT Manager reviewed all helpdesk tickets completed by grievant during the weeks at issue and found that no customer called with an Internet access problem. In fact, the Manager further researched this issue and found that less than one percent of all helpdesk calls involve Internet access questions. Grievant also asserted that his access of commercial wireless technology sites was work-related. However, the IT Manager offered unrebutted testimony that the VDOT district office had previously evaluated wireless technology and decided not to pursue it. Grievant's supervisor had not directed him to research wireless technology. In fact, grievant lives on a mountain and had been exploring wireless technology (and accessing topological websites) for his personal use.

Grievant contends that, because he works at a customer (VDOT) location, he is governed by that agency's Internet policy.[17] Certainly, it is true that grievant must abide by the host agency's rules. He cannot exceed whatever parameters that agency has established for Internet use by its own employees. However, the salient fact is that grievant is an employee of VITA – not VDOT. As such, grievant must also abide by whatever rules his employing agency has established. In this case, VITA had made very clear to grievant that its rules are different from that of the host agency and that his use of the Internet was not acceptable to VITA. VITA also advised grievant in writing that a repeat offense would result in additional discipline.

Unfortunately, it appears that grievant has succumbed to the Pygmalion effect. He had told his supervisor after he was first disciplined for Internet abuse that he didn't think he could control himself. Since that time, in a self-fulfilling prophecy, grievant has twice more committed the same offense. Grievant also testified that, following the previous disciplinary action, he concluded on his own that he wasn't violating the Internet policy. Therefore, he decided to continue accessing the Internet just as he had prior to the disciplinary action.

Mitigation

The normal disciplinary action for a second active Group II offense is removal from employment. The policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. There are no compelling conditions in this case. Grievant is not a long-term employee and his performance has been marginal. In addition, the fact that grievant has previously been twice disciplined for the same offense

[17] In support of his position, grievant offered an EDR Hearing Decision (Grievant Exhibit 3 – Case # 7928) involving Internet abuse by a VDOT employee. That case is not on point with this case because it involved a VDOT employee who was disciplined according to VDOT policy. Grievant, on the other hand, has been employed by VITA since June 2004 and, therefore, his discipline was administered by VITA pursuant to VITA management instructions.

constitutes an aggravating circumstance that outweighs any possible mitigating consideration. Based on the totality of the evidence, the hearing officer concludes that mitigation of the discipline is not warranted.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and grievant's removal from state employment are hereby UPHELD.[18]

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

---

[18] The basis for grievant's removal from employment is accumulation of discipline. The Standards of Conduct provides that the normal disciplinary action for two active Group II Written Notices is removal. In this case, grievant had an active Group II Written Notice issued prior to the disciplinary action in the instant case. While a hearing officer has upheld that disciplinary action (Case # 8051 & 8052), grievant has requested that the EDR Director review the Hearing Officer's Decision for alleged failure to comply with grievance procedure. In addition, grievant still has available the possibility of judicial review (if there is a disputed issue of law) after the EDR Director's review. Thus, the previous Hearing Officer's Decision has not yet become final. If that decision should be overturned in the appeal process, the instant decision to uphold grievant's removal from employment would have to be amended. I.E., since a reversal of the earlier disciplinary action would leave grievant with only one active Group II Written Notice, grievant would have to be reinstated. Accordingly, this decision upholds grievant's removal from employment contingent upon the upholding of the prior disciplinary action.

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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.[19] 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.[20]

[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]

____

David J. Latham, Esq.
Hearing Officer

[19] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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