

Issue: Group II Written with suspension (gambling on state property, workplace harassment, and abuse of state time); Hearing Date: 10/11/05; Decision Issued: 10/13/05; Agency: DMV; AHO: David J. Latham, Esq.; Case No. 8173; **Administrative Review: HO Reconsideration Request received 11/14/05; HO Reconsideration Decision issued 11/14/05; Outcome: Request untimely and will not be addressed; Administrative Review: DHRM Ruling Request received 11/14/05; DHRM Ruling issued 12/12/05; Outcome: Request untimely and will not be reviewed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8173

Hearing Date: October 11, 2005
Decision Issued: October 13, 2005

APPEARANCES

Grievant
One witness for Grievant
Representative for Agency
Assistant for Agency Representative
Four witnesses for Agency

ISSUES

Did the grievant's actions warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group II Written notice for gambling on state property, workplace harassment, and abuse of state time.¹ As

¹ Agency Exhibit 3. Written Notice, issued April 12, 2005.

part of the disciplinary action, grievant was suspended from work without pay for ten work days. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.² At hearing, the parties submitted a joint stipulation of uncontested facts signed by both parties.³ The agency agreed, *inter alia*, that grievant did not engage in behavior that constituted workplace harassment or that created a hostile environment, and that grievant's participation in the prohibited activity at work occurred during lunch or outside of working hours. The Department of Motor Vehicles (Hereinafter referred to as "agency") has employed grievant as a classified employee for seven years; she is a customer services generalist.

In 2002, a coworker of grievant had been playing an Internet-based game known as Pro Football Pick'em (PFP).⁴ The Yahoo! sponsored game does not involve payment of money, does not award prizes, is for entertainment purposes only, and may not be used in connection with any form of gambling or wagering.⁵ The PFP web site also allows participants to establish a Private Group of up to 50 friends and office mates. Yahoo! performs the functions of gathering scores and computing results for both Public and Private Groups. The person who establishes and coordinates a Private Group is designated "commissioner." In 2002, the coworker took over a Private Group and became "commissioner." He recruited 35 friends, relatives, and agency employees (including grievant) to join his private group. He gave participants an option to play in the Private Group for free, or to pay a season fee of \$15 each; 25 people including grievant opted to play for money and paid the \$15 fee. The fee was used to pay a weekly monetary prize of \$5 to the person making the most correct picks, and to pay a prize to the person who made the most correct picks for the entire season. Grievant paid the \$15 fee to the "commissioner."

During the 2003 football season, the "commissioner" and a male coworker had a heated discussion in the office in the presence of other employees. The discussion involved a dispute about the payment of money as a result of the coworker's wife's participation in the PFP game. Although the office was closed to the public at the time, grievant and one other employee were concerned about the heated nature of the discussion; they went to a back room and told the assistant manager what was happening and suggested she should do something. The assistant manager did not take any action and the discussion between the coworker and the "commissioner" ended after two minutes without further repercussions. The office manager learned about the incident the following day. She told the grievant and the entire office staff that the use of

² Agency Exhibit 4. *Grievance Form A*, filed May 11, 2005.

³ Agency Exhibit 21. Stipulation of Uncontested Fact, October 8, 2005.

⁴ Agency Exhibit 16. Description from Yahoo! Web site. Pro Football Pick'em is available through Yahoo! Sports and is described as "a weekly game that lets you show your smarts by picking the winner of the year's regular season games." Participants enter selections weekly and receive points for each correct pick. Yahoo! gathers results and computes point totals and standings.

⁵ Agency Exhibit 17. Yahoo! terms for participation.

state computers to play a game involving the winning of money is considered gambling and is prohibited. Grievant did not play the game on state computers after the office manager's admonition.

From September 2003 through March 2005, the agency became aware of concerns in the customer service center because of statements from employees and the manager of the office, a grievance filed by one employee, and complaints made to a General Assembly Delegate who contacted the agency. The agency pursued "various initiatives"⁶ to look into the concerns and eventually undertook a detailed investigation in January 2005. The agency concluded its investigation in April 2005 and disciplined seven employees including grievant.⁷

The Customer Service Operations Director counseled grievant in writing in March 2005 that she should cease any gambling activities on state property.⁸ In the same letter, he advised grievant that he might be subject to disciplinary action and gave her five days to submit any mitigating facts regarding her involvement in the gambling activities. Grievant submitted a written response.⁹ Discipline was issued on April 12, 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

⁶ Agency Exhibit 12. CSC Report, undated.

⁷ Two other employees were counseled.

⁸ Agency Exhibit 3. Letter from CMSA Director to grievant, March 25, 2005.

⁹ Agency Exhibit 2. Letter from grievant, March 29, 2005.

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 grievant must present her evidence first and prove her claim by a preponderance of the evidence.¹⁰

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 (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. 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 DHRM *Standards of Conduct* Policy provides that Group II offenses include 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.¹¹ Gambling on state property or during work hours is a Group III offense; abuse of state time is a Group I offense.

The agency charged grievant with three offenses in the attachment to the written notice – gambling on state property, workplace harassment, and abuse of state time. Each charge is addressed separately below:

Gambling on state property

The agency has shown, by a preponderance of evidence, and grievant has acknowledged, that she paid \$15 to participate in the PFP Private Group and utilized a state-owned computer to access the web site on which the game was played. The remaining issue is whether grievant's participation in the game constituted gambling. Gambling is most commonly used to describe the activity of a person who places a bet or wager on an event with the hope of winning an advantage – typically a monetary return. Grievant asserts that she believed the annual \$15 fee was just to have access to the game and that she was unaware she could win money.

Grievant's assertion is less than credible for three reasons. First, it is highly unlikely that grievant would willingly pay money to participate without

¹⁰ § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

¹¹ Agency Exhibit 20. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

inquiring whether there would be any return on her initial investment. Second, given that so many office employees were playing this game, and that office talk regularly included discussion about the weekly winner, it is difficult to believe that grievant would not have heard about the weekly monetary payout during the long football season. Third, in her interview with one of the investigators, grievant referred to a football “pool” and stated that “we all bet on teams.”¹² Common usage of the terms football “pool” and “betting on teams” means that the person betting in the pool hopes to win something. It is just not credible that grievant would describe her participation in PFP in these terms and yet be unaware that she could win money. Therefore, it is concluded that grievant was aware that her participation in the PFP game included a chance that she could win money. Such activity constitutes gambling which grievant knew, or reasonably should have known, is a prohibited activity on state computers.

Grievant maintains that, because her participation in the PFP game was not during work hours, it was a permissible personal use of the computer. However, because gambling is an illegal activity at *any* time, it is not permitted on state computers at *any* time. Accordingly, it is irrelevant whether grievant’s betting occurred during her lunch period or after hours. The fact is that state computers may not be used for gambling at *any* time.

Workplace harassment

As noted in the Findings of Fact, the agency has stipulated that grievant did not engage in behavior that constituted workplace harassment or that created a hostile environment. Therefore, the agency has effectively rescinded this charge as a component of the disciplinary action.

Abuse of state time

Grievant offered un rebutted testimony that office management had permitted employees to use state-owned computers for personal use during their lunch period or before and after working hours. The agency has stipulated that grievant’s use of the state-owned computer for playing PFP occurred either during lunch or before and after working hours. Absent a specific prohibition against playing games on state-owned computers, such use is permissible providing it is in compliance with the Commonwealth’s policy on Use of Internet and Electronic Communication Systems. That policy provides, *inter alia*, that incidental and occasional personal use is permitted if it does not interfere with worker productivity, adversely affect efficient computer system operation, or violate any policy or law.¹³ In this case, office management permitted employees to use computers for incidental and occasional personal use providing it was during non-working hours. Accordingly, grievant’s use of the state-owned

¹² Agency Exhibit 12. CSC Report, undated.

¹³ DHRM Policy 1.75, *Use of Internet and Electronic Communication Systems*, August 1, 2001.

computer for the personal purpose of playing the PFP game was not an abuse of state time because she did not play during her assigned hours of work.

Mitigation

Gambling on state property is a Group III offense for which the discipline is normally removal from employment. The agency considered grievant's years of experience and otherwise satisfactory performance as mitigating circumstances and issued only a Group II Written Notice and 10 days suspension.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and ten-day suspension are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

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

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.¹⁴ 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.¹⁵

[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

¹⁴ 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).

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Grievance No: 8173

Hearing Date:	October 11, 2005
Decision Issued:	October 13, 2005
Reconsideration Request Received:	November 14, 2005
Response to Reconsideration:	November 14, 2005

ISSUE

Has grievant submitted a timely request for reconsideration pursuant to Section 7.2 of the Grievance Procedure Manual?

FINDINGS OF FACT

On November 14, 2005, the hearing officer received from grievant a request for reconsideration of a Decision of Hearing Officer issued on October 13, 2005. The Decision was mailed to grievant by certified mail. The United States Postal Service attempted delivery on October 15, 2005. Because delivery could not be effected, a notice was left for grievant to pick up the Decision at the post office. Grievant waited for more than two weeks before going to the post office; she picked up the Decision on November 1, 2005. When grievant filed her request for reconsideration, she failed to provide a copy of her request to the agency.

APPLICABLE LAW AND PROCEDURE

A hearing officer's original decision is subject to administrative review. The Grievance Procedure Manual addresses administrative review of Hearing Decisions and states, in pertinent part:

However, all requests for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A copy of the requests must be provided to the other party. A request to reconsider a decision is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.¹⁶

The Grievance Procedure Manual further provides that a hearing officer's decision becomes final as follows:

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of 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 HRM, the hearing officer has issued a revised decision.¹⁷

OPINION

In order to be a timely request, a request for reconsideration must be received by the Hearing Officer within 15 calendar days of the date of the original hearing decision. The date of the original hearing decision was October 13, 2005; the decision was mailed to grievant on October 13, 2005. In order to be a timely request, the final date by which a request for reconsideration must be received was October 28, 2005. Grievant's request for reconsideration was received by the Department of Employment Dispute Resolution on November 14, 2005.

¹⁶ § 7.2(a) Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective August 30, 2004.

¹⁷ § 7.2(d) *Ibid.*

The grievant has submitted her request for reconsideration after the 15-day period mandated by the Grievance Procedure Manual. Once grievant was notified of the arrival of certified mail from the Department of Employment Dispute Resolution, it was her responsibility to pick up the Decision from the post office. Grievant's delay in picking up the decision and waiting another two weeks before filing her request were solely within her control. Therefore, grievant has not shown good cause for filing her request after the time limit. Accordingly, grievant's request for reconsideration was not timely submitted or received. The hearing decision became final on October 28, 2005 when the 15-day appeal period expired.

DECISION

Grievant's request for reconsideration was not filed in accordance with the Grievance Procedure because: 1) grievant failed to provide a copy of her request to the agency and, 2) grievant failed to file her request within the 15-day filing limit. Therefore, the Hearing Officer's original decision has become final pursuant to § 7.2(d) of the Grievance Procedure Manual.

APPEAL RIGHTS

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.¹⁸

David J. Latham, Esq.
Hearing Officer

¹⁸ 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).