Issue: Group III Written Notice with suspension (violation of internet and computer usage policies); Hearing Date: 12/15/05; Decision Issued: 12/22/05; Agency: VITA; AHO: David J. Latham, Esq.; Case No. 8218; Outcome: Agency upheld in full; **Administrative Review: HO Reconsideration Request received 01/05/06; Reconsideration Decision issued 01/11/06; Outcome: Original decision affirmed (agency upheld in full); Administrative Review: EDR Ruling Request received 01/06/06; EDR Ruling No. 2006-1250 issued 03/09/06; Outcome: Original decision affirmed (agency upheld in full); Administrative Review: DHRM Ruling Request received 01/06/06; DHRM Ruling issued 12/01/06; Outcome: HO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8218

Hearing Date: December 15, 2005
Decision Issued: December 22, 2005

PROCEDURAL ISSUES

Grievant asked that he not be subjected to retaliation because of his grievance. The grievance procedure prohibits an agency from retaliating against anyone who participates in the grievance process. Any employee may ask the Department of Employment Dispute Resolution to investigate allegations of retaliation. The results of such an investigation will be given to the agency head.[1]

APPEARANCES

Grievant
Information Technology Manager
Advocate for Agency
One witness for Agency

[1] § 1.5. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual,* August 30, 2004.

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 III Written Notice issued for violation of Policy 1.75 and related Internet and computer usage policies.[2] As part of the disciplinary action, grievant was suspended without pay for three weeks. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[3] The Virginia Information Technologies Agency (Hereinafter referred to as "agency" or "VITA") has employed grievant as an information technologies (IT) specialist for over one year.[4] Previously he had been employed for six years with the Department of Corrections (DOC) performing the same duties, i.e., providing technical expertise for managing DOC computer systems.

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] The policy also states that the conduct of computer users who send e-mail may be perceived as reflecting on the character and professionalism of the agency. Grievant has received and agreed to abide by agency policy for acceptable Internet and e-mail usage.[6] The policy prohibits storing information with sexually explicit content, transmission of obscene materials, and knowingly uploading commercial software not supported by VITA consistent with the Commonwealth's policy on Use of Electronic Communications Systems.[7] Agency policies require employees to report any non-compliance with all applicable VITA policies.[8] The Code of Virginia defines "sexually explicit content" to include, *inter alia,* any description of sexual conduct.[9] Information on Internet

[2] Exhibit 1. Written Notice, issued September 15, 2005.
[3] Exhibit 2. Grievance Form A, filed October 13, 2005.
[4] Prior to his employment with VITA, grievant performed similar work as an employee of the Virginia Department of Corrections (DOC). With the creation of VITA in 2004, grievant and other IT employees were transferred from DOC to VITA in September 2004.
[5] Exhibit 9. Department of Human Resource Management (DHRM) Policy 1.75, *Use of Internet and Electronic Communication Systems*, August 1, 2001.
[6] Exhibit 6. Acknowledgement of Policy receipt, signed September 17, 2004.
[7] Exhibit 13. *Acceptable Internet Use Policy*, defines Prohibited Activities to include storing information with sexually explicit content. See also Va. Code §§ 2.2-2827 & 18.2-390.
[8] Exhibit 13. *Acceptable Internet Use Policy*. See also Exhibit 15. *Information Security Access Agreement.*
[9] Exhibit 8. Va. Code § 2.2-2827.A.

usage is a matter of public record and subject at all times to inspection by the public.

During the summer of 2005, the DOC Information Security Officer had been conducting an investigation into the activities of a supervisor in the VITA Technical and Communications Services unit. During the course of that investigation, the Security Officer discovered that grievant (and other employees) had been playing computer games on state-owned computer equipment and exchanging e-mails containing obscene language. It also appeared that the games had been played, and e-mails exchanged, during working hours. The Security Officer turned over to VITA the information he had acquired. The e-mail messages contained obscene language including references to ass kicking, puss girls, slut, fucking and, anal beads.[10] In some of the e-mails, words were disguised (@ss, $lut, where the F@!? is …, fuck1ng) by grievant and others to avoid detection by screening software.

Grievant had installed on his home computer a game known as Half Life. He brought the hard drive containing the game to work and connected the hard drive to his state-owned laptop computer. He played the game on his laptop, and utilized both the laptop and a state-owned BlackBerry™ device to send e-mails containing obscene language. Grievant never reported to anyone that his supervisor had encouraged him to play the game, that others were playing the game on state time and equipment, or that obscene e-mails were being exchanged.

A VITA manager was assigned to further investigate the information provided by DOC. From his additional investigation the manager was able to confirm that grievant had been playing the proprietary game and sending obscene e-mails on state-owned equipment. The manager discovered many additional e-mail messages to confirm that grievant and others had been using obscene language. A total of seven employees including grievant were involved in the gaming and e-mail activity and subject to discipline. Of the seven, two resigned and the other five were given Group III Written Notices (all but two[11] were suspended in lieu of termination).

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

[10] Exhibit 4. E-mail messages discovered by DOC Security Officer, July & August 2005.
[11] Exhibit 11. Two Group III Written Notices without suspension.

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 of Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.[13]

The agency has shown, and grievant has admitted that he violated agency policy by connecting his personal hard drive to an agency computer and thereafter uploaded and played an unauthorized software game on state-owned computer equipment. Grievant also admitted that he utilized the same state-owned computer equipment and the Internet to send e-mail messages containing obscene and vulgar language.

Based on the available evidence, it appears that grievant's use of the Internet and electronic communications systems was not extensive or pervasive and therefore constitutes incidental and occasional personal use. Incidental and

---

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

[13] Exhibit 10. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

personal use is permissible under Policy 1.75. However, the policy does not permit incidental and occasional use when such use constitutes specified prohibited activities. In this case, grievant loaded and stored an unauthorized computer game onto state-owned computer equipment, and transmitted obscene and vulgar e-mail messages. Both of these activities are specifically prohibited.

Grievant asserts that the agency disciplined him, in part, for offenses that occurred prior to his employment with the agency. It is true that the agency may not discipline grievant for offenses that occurred before he was transferred from DOC to VITA (September 2004). However, the majority of the evidence presented by the agency was for offenses that occurred subsequent to September 2004. The agency did include in the 41 pages of e-mails, three e-mail strings from the spring of 2004. Because this evidence is prior to grievant's employment with VITA, the three e-mail strings are rejected as evidence and are not given any weight in this decision.

Grievant alleged in a memorandum to the Information Technology Manager that grievant's supervisor pressured, threatened, and coerced him into playing the computer game.[14] However, during the hearing grievant failed to offer any testimony or evidence to support this allegation. Moreover, grievant never reported this allegation to his supervisor's manager, the human resources department, or anyone else in a position of authority.

Grievant contends he only engaged in the prohibited activity during his lunch hour or after work had ended. Grievant's scheduled work hours were 7:00 a.m. to 3:30 p.m. with a 30-minute lunch that he took sometime between 11:00 a.m. and 2:30 p.m. While grievant sent some e-mails during lunch or after hours, he sent other e-mails during working hours (9:00 a.m., 2:44 p.m., 2:45 p.m., & 3:23 p.m.).[15] Accordingly, grievant was involved in this activity during working hours on a number of occasions. Moreover, even if grievant had only engaged in the prohibited activity during lunch or after hours, the fact remains that the activity is prohibited <u>at any time</u> on state-owned equipment.

The agency concluded that grievant's behavior was sufficiently severe to constitute a Group III offense. The agency took into account that some of the inappropriate language was used in e-mails for at least two years, that the language was particularly vulgar and obscene, that grievant had attempted to avoid screening software by using disguised words, and that these e-mails could eventually surface in court as a result of a criminal case against another employee. Another factor is that grievant works at a customer agency of VITA, uses DOC computer equipment, and his time is charged to DOC. Grievant's use of customer equipment and time to play computer games and send vulgar and obscene e-mails is a detriment to good relations between VITA and DOC. In

[14] Exhibit 3. Memorandum from grievant to Information Technology Manager, September 14, 2005.
[15] Exhibits 4 & 5.

addition, it is troubling that grievant testified that he did not consider his vulgar and obscene language to be inappropriate.

Mitigation

The normal disciplinary action for a Group III 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. The agency did, however, give consideration to the fact that grievant's supervisor had promoted and encouraged the playing of the computer game.[16] It also considered the fact that grievant had an otherwise good performance record. For these reasons, the agency elected to suspend him for three weeks in lieu of removing him from state employment. Based on the totality of the evidence, and the aggravating circumstances described in the preceding paragraph, further mitigation of the discipline is not warranted.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and three-week suspension are hereby 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

[16] The Written Notice erroneously states that there were no circumstances that mitigate the offense. However, the Information Technology Manager's testimony established that, in fact, the agency took into account the mitigating factors discussed above and reduced the discipline for this Group III Written Notice to a suspension in lieu of removal from employment.

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.[17] 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.[18]

[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]

S/David J. Latham

_____
David J. Latham, Esq.
Hearing Officer

[17] 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).

[18] 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:

Case No: 8218

Hearing Date:	December 15, 2005
Decision Issued:	December 22, 2005
Reconsideration Request Received:	January 5, 2006
Response to Reconsideration:	January 11, 2006

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request 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 request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. 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.[19]

OPINION

Grievant requests reconsideration of the Decision based on several enumerated points listed in his request. The following response is provided in the same order listed in grievant's request.

1. The decision found as fact that Policy 1.75 prohibits many activities including the storing of sexually explicit content. As stated in the Decision, the definition of sexually explicit content includes any *description* of sexual conduct. The e-mails forwarded by grievant (and therefore stored on his computer) included descriptions of sexual conduct. *See* Exhibit 5.

[19] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

2. Policy 1.75 also prohibits uploading commercial software. Grievant admitted to playing the commercial game Half Life on his state-owned laptop but he asserts that he did not upload the game to his laptop. However, grievant connected his personal hard drive to the laptop via USB cable. This exposed the state-owned computer to the game (and other programs) just as though grievant had physically installed his hard drive in the laptop. Grievant has not demonstrated that there is any operational difference between the two.

3. Contrary to grievant's contention, the Written Notice states (as the third policy listed) that grievant violated the Acceptable Internet, E-mail, and Other Electronic Communications Usage Policy. Also contrary to grievant's contention, testimony during the hearing established that the e-mails at issue were sent via the Internet.

4. See item 1, *supra*.

5. See item 3, *supra*.

6. While certain four-letter words were not authored by grievant, he forwarded them and thereby stored them on his computer.

7. Grievant alleged that his supervisor pressured and coerced him into playing the game. He never reported to anyone that his supervisor had applied such pressure and coercion. If grievant's supervisor was coercing him into performing an activity that he knew was prohibited, grievant could have reported it to higher level management, human resources, and/or the Fraud, Waste and Abuse Hotline.

8. It is correct that the *Standards of Conduct* provides that a first use of obscene language, by itself, is normally a Group I offense. However, the disciplinary action in this case was based upon more than just a single use of obscene language.

9. It is correct that the evidence did not reveal a policy that specifically prohibits the connection of a personal hard drive to a state-owned computer. However, when that connection is established, data and programs on the personal hard drive can affect the state-owned computer in adverse ways (such as the transmission of viruses, etc.). Therefore, as a practical matter, personal hard drives are not to be connected to state-owned equipment for the same reason that unauthorized software is not to be installed on state-owned equipment.

10. See item 2, *supra*.

11. Testimony of the Technology Information Manager established that the e-mails at issue *were* sent via Internet. Moreover, even if grievant's assertion was correct, he admits that the e-mails were sent through a server on the DOC network. DOC is a separate agency from VITA. Therefore, grievant sent these e-mails through the computer system of a customer agency – not through a VITA internal system.

12. See item 3, *supra*.

13. See item 2, *supra*.

14. It is correct that the agency did not introduce any policy that specifically prohibits playing games on state computers. However, it was commonly known throughout state government that a previous governor had issued an executive order specifically banning the playing of games on state computers. It is obvious that playing a game by connecting a personal hard drive to the state computer was an attempt to circumvent the prohibition against installing the game directly on the state-owned computer. If grievant believed that no such prohibition existed, it would have been more logical to install the game directly on the state computer rather than going to the trouble of bringing his personal hard drive to the work site. Moreover, the agency showed that the use of unauthorized software (which includes unauthorized games) on state computers is prohibited at all times.

15. As the hearing officer noted in the first paragraph of the Findings of Fact, it is correct that grievant has worked for VITA for less than two years (since September 2004). However, the evidence reflected that e-mails had been exchanged for at least two years including part of the time that grievant was employed by DOC.

16. The testimony of an agency witness established that there is a potential for the e-mails to surface in the criminal case against another employee; grievant did not rebut this testimony during the hearing. The agency is concerned that such e-mails could be damaging to its reputation should they become part of the criminal case and thereby become known to the public. This factor was mentioned by the agency as one of the concerns that caused it to take disciplinary action.

17. The agency is held to what the Written Notice states. However, it became apparent from testimony at the hearing, as well as the fact that grievant was given a suspension in lieu of termination, that mitigation was applied. Grievant has not explained why he objects to this clarification when it worked in his favor.

DECISION

Grievant has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered grievant's arguments and concludes that there is no basis to change the Decision issued on December 22, 2005.

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 HRM, 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.[20]

S/David J. Latham

_____

David J. Latham, Esq.
Hearing Officer

[20] 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).

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
Virginia Information Technologies Agency
December 1, 2006

The grievant has requested an administrative review of the hearing officer's decision in Case No. 8218. The grievant was issued a Group III Written Notice and suspended for three weeks without pay. He filed a grievance to have the disciplinary action reversed. In his decision, the hearing officer upheld the disciplinary action. The grievant asked for and received an administrative review from the Department of Employment Dispute Resolution (EDR) and a reconsideration decision from the hearing officer. The EDR deferred the policy issue for the Department of Human Resource Management (DHRM) to rule on and the hearing officer held to his original decision. In his request, the grievant stated that there are discrepancies in the hearing officer's decision and inconsistencies in his interpretation of relevant policy. Specifically, the grievant asserts that the hearing officer erred when he permitted VITA to combine violations in order to issue a higher level of disciplinary action; and that downloading programs from his home computer to a USB drive and then to the state computer does not constitute a violation. The agency head of the Department of Human Resource Management has asked that I respond to this request for an administrative review.

FACTS

The Virginia Information Technologies Agency employed the grievant as an Information Technology Specialist. In his position, the grievant provides "…technical expertise in Microsoft (MS) Windows NT and 2000 for managing computer systems, TCP/IP network administration, performance monitoring, accounting and mail management, hardware and software support, project planning, development of technical standards and policies, and providing overall technical leadership." On September 15, 2005, the agency issued him a Group III Written Notice with a three-week suspension for violating Department of Human Resource Management Policy No. 1.75, "Use of Internet and Electronic Communication Systems;" DHRM Policy 1.60, "Standards of Conduct"; Virginia Information Technologies Agency (VITA) "Acceptable Internet, E-mail, and Other Electronic Communications Usage Policy"; VITA's "Personal Computer and Local Area Network Policy"; VITA's Employee Standards of Conduct Special Provisions; VITA's Employee Code of Ethics, and VITA's "Information Security Access Agreement".

Based on an investigation into the activities of another VITA employee, it was discovered that the grievant and other employees had been playing computer games on state-owned computer equipment and exchanging e-mails containing obscene language. The grievant installed a game called Half-Life on his home computer. He installed the game on a USB drive and took the USB drive to work. He attached the USB drive to his state-owned computer in order to play the game at work. He also used his state-owned Blackberry to send e-mails containing obscene language.

The relevant policy governing workplace behavior, DHRM Policy 1.60, states as its objective, "It is the Commonwealth's objective to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance. Accordingly, this policy sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems." Section V, Unacceptable Standards of Conduct, of that policy sets forth

examples of unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive. This policy also authorizes agencies to promulgate policies that are related to the respective agencies' business.

Also, additional policies and documents, namely Department of Human Resource Management Policy No. 1.75, "Use of Internet and Electronic Communication Systems;" Virginia Information Technologies Agency (VITA) "Acceptable Internet, E-mail, and Other Electronic Communications Usage Policy" and "Personal Computer and Local Area Network Policy;" VITA's Employee Standards of Conduct Special Provisions, Employee Code of Ethics, and Information Security Access Agreement, set guidelines for employee usage of the Internet and electronic mail system.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the instant case, the hearing officer stated, "The agency has shown, and the grievant has admitted that he violated agency policy by connecting his personal hard drive to an agency computer and thereafter uploaded and played an unauthorized software game on state-owned computer equipment. Grievant also admitted that he utilized the state-owned computer equipment and the Internet to send e-mail messages containing obscene and vulgar language." The hearing officer also stated, "Based on the available evidence, it appears that grievant's use of the Internet and electronic communications systems was not extensive or pervasive and therefore constitutes incidental and occasional personal use. Incidental and personal use is permissible under Policy 1.75. However, the policy does not permit incidental and personal use when such use constitutes specified prohibited activities. In this case, grievant loaded and stored an unauthorized computer game onto state-owned computer equipment, and transmitted obscene and vulgar e-mail messages. Both of these activities are specifically prohibited." He stated further, "Grievant contends he only engaged in the prohibited activity during his lunch hour or after work had ended. Grievant's scheduled work hours were 7:00 a.m. to 3:30 p.m. with a 30-minute lunch that he took sometime between 11:00 a.m. and 2:30 p.m. While grievant sent some e-mails during lunch or after hours, he sent other e-mails during work hours (9:00 a.m., 2:44 p.m., & 3:23 p.m.). Accordingly, grievant was involved in this activity during working hours on a number of occasions. Moreover, even if grievant had only engaged in the prohibited activity during lunch or after hours, the fact remains that the activity in prohibited at any time on state-owned equipment." The hearing officer continued, "The agency took into account that some of the inappropriate language was used in e-mails for at least two years, that the language was particularly vulgar and obscene, that grievant had attempted to avoid screening

software by using disguised words, and that these e-mails could eventually surface in court as a result of a case against another employee. Another factor is that grievant works at a customer agency of VITA, uses DOC computer equipment, and his time is charged to DOC. Grievant's use of customer equipment and time to play computer games and send vulgar and obscene e-mails is a detriment to good relations between VITA and DOC. In addition, it is troubling that grievant testified that he did not consider his vulgar and obscene language to be inappropriate."

Concerning whether DHRM Policy No. 1.60 permits aggregating lesser level offenses to become a single higher-level offense, Policy No. 1.60 permits for an accumulation of written notices that may result in disciplinary actions such as transfer, demotion, suspension, etc., but does not permit combining violations in order to issue a higher level of discipline. The hearing officer did not find any evidence that the agency aggregated the offenses in order to issue a more severe disciplinary action than would have been supported by a single violation. Concerning the level of offense for the violations the grievant committed, DHRM Policy No. 1.60 and DHRM Policy No. 1.75 provide sufficient guidance. The hearing officer is authorized to weigh the evidence and to make his decision based on his assessment of the evidence.

In his request for an administrative review, grievant provided a ruling issued by a different hearing officer on a similar case that prohibited the same agency from aggregating violations in order to issue a higher-level disciplinary action. In that case, the hearing officer reduced the disciplinary action because the level of disciplinary action was based on an accumulation of repeated and similar lesser violations over a period of time. In the present case, a different hearing officer made a decision using a set of circumstances different from the ones in the aforementioned decision. Also, the evidence does not support that the offenses were accumulated in order to issue a disciplinary action at a higher level. In a ruling by the Department of Employment Dispute Resolution, that agency stated, "While the grievant is correct that the hearing officers reached different conclusions in these two cases, hearing decisions do not carry precedential weight. In the absence of an existing DHRM ruling interpreting a particular policy, each hearing officer may reach his or her own determination regarding the proper interpretation of that policy." Based on the foregoing ruling by EDR, no further discussion of this matter is warranted.

The grievant asserts that the use of a personal hard drive to play games on state-owned equipment is not a violation of policy, where the software was not installed or loaded. Policy 1.75 states, in part, under "Violations", "The appropriate level of disciplinary action will be determined on a case-by-case basis by the agency head or designee, with sanctions up to or including termination depending on the severity of the offense, consistent with Policy 1.60 or the appropriate applicable policy." This represents an evidentiary issue in that DHRM cannot determine if playing or installing a game on the system can compromise the integrity of the system. As such, this Agency has no authority to intervene. Therefore, this Agency has no basis to interfere with the execution of the decision.

Ernest G. Spratley
Manager, Employment Equity Services