Issue: Group III Written Notice with suspension (violation of internet and computer usage policies); Hearing Date: 12/21/05; Decision Issued: 12/27/05; Agency: VITA; AHO: David J. Latham, Esq.; Case No. 8224; Outcome: Agency upheld in full

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8224

Hearing Date: December 21, 2005
Decision Issued: December 27, 2005

APPEARANCES

Grievant
Attorney for Grievant
Four witnesses for 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 III Written Notice issued for violation of Policy 1.75 and related Internet and computer usage

policies.[1] 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.[2] 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.[3] Previously he had been employed for 18 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.[4] 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.[5] 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.[6] Agency policies require employees to report any non-compliance with all applicable VITA policies.[7] Information on Internet usage is a matter of public record and subject at all times to inspection by the public. As a user of DOC equipment in a DOC facility, grievant was also responsible to comply with applicable DOC policies. One such policy defines as unacceptable, inappropriate and unauthorized usage of computers the "access, use or distribution of computer games that are unrelated to the DOC's mission, goals and purposes, or employees' job responsibilities and activities …"[8] Grievant had access to all of the above policies through the agency Extranet (internal electronic communications system).

During the summer of 2005, the DOC Information Security Officer had been conducting an investigation into the activities of a supervisor in the VITA

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[1] Agency Exhibit 1. Written Notice, issued September 13, 2005.
[2] Agency Exhibit 1. Grievance Form A, filed October 11, 2005.
[3] 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.
[4] Agency Exhibit 6. Department of Human Resource Management (DHRM) Policy 1.75, *Use of Internet and Electronic Communication Systems*, August 1, 2001.
[5] Agency Exhibit 4. Acknowledgement of Policy receipt, signed September 17, 2004.
[6] Agency Exhibit 9. *Acceptable Internet E-mail, and Other Electronic Communications Usage Policy*, defines Prohibited Activities to include storing information with sexually explicit content. See also Va. Code §§ 2.2-2827 & 18.2-390.
[7] Agency Exhibit 9. *Ibid*. See also Agency Exhibit 4. *Information Security Access Agreement,* signed by grievant May 8, 2005, and, Agency Exhibit 8*, Personal Computer and Local Area Network Policy.*
[8] Agency Exhibit 10. DOC Operating Procedure 310.2, *Information Technology Security*, September 1, 2004.

Technical and Communications Services unit. During the course of that investigation, the Security Officer discovered that grievant (and other employees) had been playing a computer game called Half Life on state-owned computer equipment and exchanging e-mails containing obscene language. It also appeared that the game had been played, and e-mails exchanged, during working hours. The Security Officer turned over to VITA the information he had uncovered. The e-mail messages contained obscene language including references to ass, mule dick, cumbag, and anal sex. In some of the e-mails written by others, words were disguised (a$$ and fuck3d) to avoid detection by screening software. In one e-mail, grievant stated, "Any way we can cut down on all the emails? *Bad enough we're doing dismissible activities* with out having to provide a bunch of documentation as well."[9] (Italics added).

Grievant had installed on his home computer a game known as Half Life. He transferred the game to a USB device (hard drive), took it to work and connected the device to his state-owned laptop computer. Once connectivity is established via USB cable between a hard drive and a state-owned laptop, the state computer is potentially subject to viruses, worms, and spyware. Typically such gaming software programs also alter the computer's configuration files. Grievant 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. Several employees including grievant were involved in the gaming and e-mail activity and subject to discipline. The others either resigned or were disciplined with Group III Written Notices.

During an interview with the regional service director, the unit manager, and the VITA Network Manager, grievant acknowledged that he started playing the game at work in May 2005 during his lunch period.[10] He asserted that his supervisor had encouraged him to purchase the game after which grievant loaded it on his home computer and then brought it to work on his USB device to connect to the agency's laptop computer. Grievant denied that game playing adversely affected his ability to perform his job. Both the unit manager and the VITA Network Manager reviewed the regional service director's notes taken during the interview after they were typed and agreed that the notes accurately reflected grievant's admissions.

[9] Agency Exhibit 3. E-mail from grievant to others, June 3, 2005.
[10] Agency Exhibit 2. Notes made by Regional Service Director, August 15, 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.[11]

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

[11] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective August 30, 2004.

serious nature that a first occurrence normally should warrant removal from employment.[12]

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 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 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 e-mail messages. Both of these activities are specifically prohibited.

Grievant contends that his supervisor encouraged him to purchase and play the game. However, even if true, the evidence is sufficient to conclude that grievant knew that what he was doing was contrary to policy. Grievant loaded the game on a home computer and then used a portable hard drive to play the game at work on his state-owned laptop computer. This method of playing the game was obviously used in an attempt to avoid detection by agency monitoring. Grievant admitted in an e-mail message that what they were doing was a *dismissible activity*, and that documenting that activity with incriminating e-mail messages was only compounding the problem.[13] Notwithstanding grievant's knowledge of and concern about engaging in dismissible activities, he never reported this activity to his supervisor's manager, the human resources department, or anyone else in a position of authority.

Grievant suggests that his supervisor's encouragement of running or jogging during lunch hours and the exchange of e-mails related to the running was also an inappropriate activity.[14] However, grievant offered no evidence to support his theory. In fact, the e-mails he submitted as evidence appear totally benign; there is no obscene or vulgar language contained in these messages. Moreover, the activity of running during a lunch period is not prohibited. In fact, the hearing officer takes administrative notice that repeated pronouncements by the current governor, and various official publications such as Commonhealth,

[12] Agency Exhibit 7. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

[13] During the hearing, grievant contended that he didn't know what he had in his mind when he wrote *dismissible activities*, however, in view of the totality of the evidence, this contention is simply not credible.

[14] Grievant Exhibit 2. E-mails from April 26, 28 & 30, 2004.

actually promote physical activity as a way to improve the health of state employees.

Grievant contends that the dictionary definition of the word ass includes "donkey" and, "stupid, obstinate, or perverse person," and that these uses of the word are not obscene.[15] However, the same dictionary definition includes as meanings for ass: anus - often considered vulgar, and sexual intercourse – usually considered vulgar. In any case, when considering the meaning of a word, one must be largely guided by the context in which the author used the word. Here, grievant stated in the e-mail that "His ass is now ruined. His ass was already ruined. His ass likes being ruined," as a direct response to an e-mail he received that said, "So when I say that [name] fuck3d you in the a$$ last night …" From this context, there can be no doubt that grievant's use of the word ass was intended to refer to the anal intercourse described in the e-mail he received.

Grievant objected to the agency submission of Agency Exhibit 9 (Acceptable Internet, E-mail, and Other Electronic Communications Usage Policy) because the agency had given grievant an earlier revision of that policy (Grievant Exhibit 4). However, a comparison of the two policies reveals little substantive change. Both revisions of the policy prohibit downloading or installing software not supported by VITA, both make it clear that the policy does not attempt to define all unacceptable personal use, both state that e-mail is considered equivalent to a message on agency letterhead, both prohibit obscene remarks, and both provide that violation of the policy will be subject to disciplinary action up to and including removal from employment. The newer revision of the policy specifically identifies games as prohibited while the previous revision stated "software not supported by VITA." Since the latter phrase would include commercial games such as Half Life, the fact the earlier revision did not include the word games is not a significant difference in the two revisions.

Grievant argued that DOC has a more relaxed approach to computer usage and implied that his activity would not have been seen as inappropriate by DOC. However, it was DOC that initially reported grievant's activity to VITA. DOC reported the activity because it considered such game playing and obscene e-mails to be a violation of its policy.

Finally, grievant argued that it was "difficult" to access the various Internet and electronic communications policies. Grievant is charged in his employee work profile with, *inter alia*, leading system management, performing high-level administration, account and mail management, creating and implementing expert technical solutions, project management, providing technical leadership, and developing and implementing security policies, procedures and processes. It is just not credible that such a high-level technical computer expert as grievant

[15] Grievant Exhibit 3. Webster's New Collegiate Dictionary.

would have any difficulty in accessing policies that are made available to all employees. Grievant never advised any management person that he did not understand the applicable policies or that he could not access them. Grievant said he was given inadequate time to review the policies when he transitioned from DOC to VITA. However, grievant could have reviewed such policies at any time after the transition date. Moreover, grievant knew that another employee downloaded and printed the policies but grievant never bothered to borrow them or copy them to read at his own convenience.

The agency concluded that grievant's behavior was sufficiently severe to constitute a Group III offense. The agency took into account that the language was particularly vulgar and obscene, that there had been an attempt 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 obscene e-mails is a detriment to good relations between VITA and DOC.

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 has long state service and an otherwise good performance record. It also considered that grievant told the truth when asked about his involvement, accepted responsibility for his actions, and was very cooperative during the investigation. 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.

[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.

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 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

[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

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

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David J. Latham, Esq.
Hearing Officer

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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.