

Issue: Group III Written Notice with termination (accessing sexually explicit material using a State computer); Hearing Date: 07/31/04; Decision Issued: 08/13/04; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 775



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 775

Hearing Date: July 31, 2004
Decision Issued: August 13, 2004

PROCEDURAL HISTORY

On May 6, 2004, Grievant was issued a Group II Written Notice of disciplinary action with removal for using Agency owned computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content contrary to *Va. Code § 2.2-2827*. On June 4, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On July 7, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 31, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with removal for accessing sexually explicit content while using the Agency's computer equipment.

BURDEN OF PROOF

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

FINDINGS OF FACT

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

The Virginia Department of Transportation employed Grievant as an Engineer I at one of its offices. On October 4, 2002, Grievant received a Group II Written Notice with ten workday suspension for abuse of state time and violation of the Agency's computer policy by using the Internet to visit non-work related sites during work hours.¹

The Agency conducted an audit of employee internet use. The IT Audit Manager reviewed Grievant's internet usage for February 24, 2004, February 27, 2004, and March 24, 2004. He concluded that Grievant may have accessed inappropriate websites. The IT Audit Manager also examined the files contained on the hard drive of Grievant's computer. Within a folder referred to as C:\Documents and Settings\[Grievant's name]\My Documents\My Pictures contained eleven pictures forming a slide show.

On April 13, 2004, the IT Audit Manager submitted six files to an Assistant Attorney General for a legal determination whether the files met the criteria for sexually explicit content. The files were entitled: 2_27_2004.jpg; 3_11_2004.jpg; 3_12_2004.jpg, 3_23_2004.jpg; Adult_friend_finder_11c.jpg; and Lineup.gif. Although the fourth file was entitled 3_23_2004.jpg, Grievant accessed the website containing the picture on March 24, 2004. Grievant testified that he received an email with the Lineup.gif as an attachment and downloaded it onto his computer. The .gif had been on his computer prior to October 2002.

¹ Agency Exhibit 4.

The Assistant Attorney General concluded that the fourth file (i.e. 3_23_2004.jpg) and the sixth file (i.e. Lineup.gif) met the definition of sexually explicit content.² He concluded that the other files did not meet the definition of sexually explicit content.

File 3_23_2004.jpg shows two young adult women. One woman on the left is wearing a yellow top similar to a bikini bathing suit top. Her body is turned to the viewer's left with her face turned towards the viewer. She is leaning forward slightly so as to have her rear end protrude backwards. She is wearing short yellow pants that are grasped and being pulled down by a second woman who is positioned on her knees directly behind the woman dressed in yellow. The second woman is wearing a black top showing her midriff. She is wearing black shorts. The woman wearing black is shown with her face approximately one inch from the rear end of the woman wearing yellow.

The Lineup.gif is series of eleven pictures presented as a slide show. It represents a parody of a criminal lineup where five woman are observed by two unidentified voices who are attempting to determine which woman committed a crime. Six of the eleven pictures show five women in them. Five of the eleven pictures show comments made by two unidentified persons.

With respect to the six pictures showing women, the first picture shows five women fully clothed facing to the viewer's left. They appear standing next to a wall as if in a criminal line up. The second picture shows the five women facing forward after having removed their shirts. The third picture shows the women facing to the right after having removed their pants and lowered their bras showing the sides of their breasts. The fourth picture shows the women turned facing the wall behind them and placing their hands on the wall. None of the women are wearing clothing. The fifth picture shows the women facing forward with their hands covering their genitals. The sixth picture shows the women facing forward with their hand on the sides and showing their breasts and genitals. The fourth person from the left appears to be a women but has male genitals.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work

² The Assistant Attorney General did not testify at the hearing. The IT Audit Manager testified incorrectly that the Assistant Attorney General focused on picture number 4 within the Lineup.gif as being problematic. After reviewing the Assistant Attorney General's email, the Hearing Officer finds that the Assistant Attorney General considered the Lineup.gif file as a whole to be sexually explicit. When the Assistant Attorney General referred to picture 4, he was referring to the fourth file out of the six files presented to him for consideration. The fourth file is a picture entitled 3_23_2004.jpg. Regardless of this confusion, the Hearing Officer must consider all documents presented into evidence which would include 3_23_2004.jpg and all of the pictures contained in the Lineup.gif slide show.

force.” DHRM § 1.60(V)(B).³ Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DHRM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

DHRM Policy 1.75 governs State employee use of the internet. This policy provides:

Certain activities are prohibited when using the Internet or electronic communications. These include, but are not limited to:

- accessing, downloading, printing or storing information with sexually explicit content as prohibited by law (see Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001);

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

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

- violates any provision of this policy, any supplemental policy adopted by the agency supplying the Internet or electronic communication systems, or any other policy, regulation, law or guideline as set forth by local, State or Federal law. (See *Code of Virginia* §2.1-804-805; §2.2-2827 as of October 1, 2001.)

Va. Code § 2827(B) provides:

Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content. Agency approvals shall be given in writing by agency heads, and any such approvals shall be available to the public under the provisions of the Virginia Freedom of Information Act (§ 2.2-3700).

Sexually explicit content is defined by *Va. Code* § 2827(A) as:

³ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

(i) any description of or (ii) any picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a **lewd exhibition of nudity**, as nudity is defined in § 18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, coprophilia, urophilia, or fetishism. (Emphasis added).

Va. Code § 18.2-390(2) defines nudity as:

a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

Va. Code § 2827 does not define “lewd exhibition of nudity.” *Va. Code § 18.2-374.1* uses the same phrase and that section has been interpreted by Virginia courts. In Pederson v. City of Richmond, 219 Va. 1061, 1065 (1979), the Virginia Supreme Court considered the meaning of the terms, “lewd, lascivious, or indecent” and held:

These words have meanings that are generally understood. We have defined ‘lascivious’ to mean ‘a state of mind that is eager for sexual indulgence, desirous of inciting to lust or of incident sexual desire and appetite.’ ‘Lewd’ is a synonym of ‘lascivious’ and ‘incident.’ Webster’s Third New International Dictionary 1301 (1969).

In Frantz v. Commonwealth, 9 Va. App. 348, the defendant took pictures of nude children but there was no evidence that the children assumed erotic or provocative poses. The Virginia Court of Appeals concluded the pictures were not legally obscene. Id. at 353. “[N]udity alone is not enough to make material legally obscene.” Freeman v. Commonwealth, 223 Va. 301, 311 (1982). In Foster v. Commonwealth, 6 Va. App. 313, 329 (1988), the Virginia Court of Appeals held:

The photographing of exposed nipples, while within the literal definition of nudity under *Code § 18.2-390*, is not, without more, the *lewd* exhibition of nudity required under *Code § 18.2-374.1* (1983).

In Asa v. Commonwealth, 17 Va. App. 714, the Virginia Court of Appeals distinguished between mere nudity and sexually explicit photographs. The Court held:

Asa’s photographs of the teenager in this case include photographs depicting her posing in a sexually provocative manner, with the camera’s eye focused on her genitalia. Included in the seized photographs are close-up photographs depicting the teenager’s genitalia as the primary object depicted in the photograph. “Patently offensive representations or descriptions of ... lewd exhibition of the genitals’ are among the ‘plain

examples of what a state statute could define for regulation.” *Freeman v. Commonwealth*, 223 Va. 301, 311, 288 S.E.2d 461, 466 (1982) (quoting *Miller v. California*, 413 U.S. 15, 25, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973)). These photographs, which contain as their primary focus the close-up views of the teenager’s genitalia, depict the teenager sitting with her knees up to her breast and her legs widely spread to expose a frontal view of her genitalia. Those photographs are sexually explicit within the meaning of *Code* § 18.2-374.1.

Va. Code § 18.2-390(3) defines "Sexual conduct" as:

actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.

Picture of Two Women. The internet picture showing two women does not display nudity. Although the woman wearing black appears to have pulled down the shorts of the woman in yellow, the woman’s left hip is uncovered. Her buttocks and gentiles are not showed. The internet picture does not show “female breast with less than a fully opaque covering of any portion thereof below the top of the nipple.” Accordingly, the internet picture is not a lewd depiction of nudity.

The internet picture showing two women does not depict sexual conduct because there is no “physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.” Although the woman wearing black has her face within a few inches of the other woman’s buttocks, the picture does not show physical conduct with the woman’s buttocks. Accordingly, the internet picture is not a depiction of sexual conduct.

Women in Lineup Slideshow. The lineup slideshow contains a lewd exhibition of nudity. The fourth picture⁴ shows five nude women facing a wall and showing their buttocks. The woman with the shoulder length straight black hair has arched her back in a manner so as to draw focus on her buttocks and expose a portion of her genitalia. The sixth picture shows the women having uncovered their genitalia and holding their hands to the side or on their hips. Each woman has spread her legs wide enough to expose her genitalia. The fourth person from the left appears in every manner to be a woman except that she has male genitalia. The sixth picture is intended to draw the viewer’s attention to genitalia because one of the five has male genitalia whereas the viewer was led to believe in the prior slides that all five persons are female. Accordingly, the Agency has established that Grievant downloaded and stored pictures containing sexually explicit content contrary to *Va. Code* § 2.2-2827.

⁴ This is the fourth picture out of the six pictures showing women standing in a lineup. Other pictures showed text without images of people.

Grievant argues that since the offense occurred during non-working hours, his actions do not warrant removal. *Va. Code* § 2.2-2827, however, does not distinguish between work and non-work hours. There is no reason to create a distinction between work and non-work hours. The computer was owned by the Agency at all times.

Grievant argues that the offense did not have any impact on his job performance. *Va. Code* § 2.2-2827 does not require a showing that the offense impacted the employee's job performance. When employees download sexually explicit material, this increases the risk to an agency that other employees may allege the agency has created a hostile work environment. Even though Grievant's actions may not have affected his work performance, his actions had an impact on the Agency.

Grievant contends he did not intend to violate the State and Agency policy. It is not necessary for the Agency to show that Grievant intended to violate State or Agency policy. The Agency has established that Grievant intended to download sexually explicit material contrary to State statute. Grievant adds that he did not know the .gif file contained sexually explicit content because the software he used to access the file only permitted him to view the first slide. Assuming Grievant's statement is to be believed, nothing in *Va. Code* § 2827 requires the employee to have viewed all of the slides of a sexually explicit file. It is sufficient that Grievant intended to download and store the file.

Grievant contends the disciplinary action should be mitigated. *Va. Code* § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..."⁵ Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Accumulation of a second active Group II Written Notice "should normally result in removal."⁶ Grievant has a prior active Group II Written Notice issued October 4, 2002. Accordingly, the Agency's removal must be upheld.

DECISION

⁵ *Va. Code* § 2.2-3005.

⁶ DOCPM § 5-10.16(C)(2).

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

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

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

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

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

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

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 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 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁷

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

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

Carl Wilson Schmidt, Esq.
Hearing Officer