Issue: Group III Written Notice (internet abuse and misuse of State equipment); Hearing Date: 01/19/06; Decision Issued: 01/23/06; Agency: VITA; AHO: Carl Wilson Schmidt, Esq.; Case No. 8233; Outcome: Employee granted partial relief; **Administrative Review: EDR Ruling Request received 02/07/06; EDR Ruling issued 03/24/06 [2006-1272]; Outcome: Affirmed. Request referred to DHRM for policy interpretation; Administrative Review: DHRM Ruling Request received 02/07/06; 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 Number: 8233

Hearing Date: January 19, 2006
Decision Issued: January 23, 2006

PROCEDURAL HISTORY

On September 15, 2005, Grievant was issued a Group III Written Notice of disciplinary action for violating:

> Department of Human Resource Management (DHRM) 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;" DHRM's Standards of Conduct; VITA's Employee Standards of Conduct Special Provisions, Employee Code of Ethics, and Information Security Access Agreement.

On October 13, 2005, 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 he requested a hearing. On December 13, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 19, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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 Information Technologies Agency employs Grievant as an Information Technology Specialist III. The purpose of his position is:

> To provide 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.[1]

[1] Agency Exhibit 4.

Grievant's work performance was satisfactory to the Agency. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

Grievant enjoyed playing a computer game called Half-Life.[2] He purchased the game for his personal use. He installed the game on a Universal Serial Bus hard drive that he owned and brought the USB hard drive into work. Each time he wished to play the game, he attached the hard drive to a USB compatible port on an Agency owned computer. Several of Grievant's co-workers also enjoyed playing the game. Half-Life allows users to play as individuals or in teams. Grievant and several co-workers played the game using the Agency's computer system.

The Agency learned Grievant and approximately five other employees were playing the game on the Agency's computer system based, in part, on emails sent between Grievant and the other game players. The first email was sent in January 7, 2004, while Grievant was employed by the Department of Corrections.[3] Another email was sent on May 14, 2004.[4] An email was sent on March 30, 2005 with an image of the game attached.[5] On April 13, 2005, Grievant sent an email with image from the game attached.

Grievant was initially an employee of the Department of Corrections. In September 2004, he and many other information technology employees of DOC were transferred to the newly created Virginia Information Technologies Agency.

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 force." DHRM § 1.60(V)(B).[6] 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).

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[2] The game enables players to shoot weapons and explode bombs in order to attain a favorable score.

[3] Grievant wrote "SWEET!" in response to an email from a co-worker expressing excitement that 19 days remained until they could play "CLINK!!!".

[4] Grievant wrote "Come on ladies, can't we all just get along???" and "Ladies I am waiting!" to male co-workers as banter regarding winning and losing the game.

[5] Grievant wrote "Your house, you died 11 times ….."

[6] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

DHRM Policy 1.75, *Use of Internet and Electronic Communication Systems*, permits personal use of the Commonwealth's Internet access or electronic communication systems if such use is incidental and occasional but does not violate "any provision of … supplemental policy adopted by the agency supplying the Internet or electronic communications systems, or any other policy …." DHRM Policy 1.75 prohibits "installing or downloading computer software, programs, executable files contrary to policy."

VITA Policy, *Acceptable Internet, E-mail, and Other Electronic Communications Usage Policy*, governs employee usage of the Internet, e-mail, and other electronic communications. This policy sets forth unacceptable uses of the Internet to include: "Downloading or installing without the authorization of Customer Support Services Desktop & End user Support (CSS DEUS): … Games …."

VITA Policy, *Personal Computer and Local Area Network Policy*, states that employees using the Agency's personal computers should "not download or install without the authorization of Customer Support Services Desktop & End User Support (CSS DEUS): … Games …."

Grievant used a portable hard drive to transfer data into an Agency owned computer and into the Agency's computer network.[7] By doing so, he downloaded and installed an executable file. He then participated in the discussion of the game with co-workers using the Agency's electronic communication system.[8] Grievant's actions were contrary to VITA policy and therefore did not constitute incidental and occasional personal use under DHRM Policy 1.75.

"Failure to … comply with established written policy" is a Group II offense.[9] The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice.

The Agency contends the disciplinary level should be a Group III Written Notice because Grievant (1) installed and participated in gaming activities using computer equipment and electronic communications networks of the Agency, (2) used the Internet and Agency email inappropriately, and (3) abused State time and resources from at least January 7, 2004 to April 13, 2005. When these three factors are considered separately each rises no higher than a Group II offense for violation of policy. An

[7] Grievant argued that attaching a USB hard drive to the Agency's computer did not result in the installation of any software. The Hearing Officer finds that Grievant's argument is untenable. The software on the USB hard drive downloaded into the Agency's computer system and executed while Grievant and the other workers played the game.

[8] Grievant argues that because he sent emails outside of his normal work hours and on his personal time, he should not be disciplined. This argument fails because VITA policy does not distinguish between use of its equipment during work hours or after work hours.

[9] DHRM § 1.60(V)(B)(2)(a).

Agency may not take separate actions otherwise constituting Group II offenses and combine them into a single Group III offense. An agency may not do so for two reasons.

First, DHRM Policy 1.60 does not authorize this practice. DHRM Policy 1.60 authorizes discipline based on the accumulation of separate active written notices. However, it does not authorize accumulation of separate behavior into a single written notice with a higher level of discipline then would otherwise be permitted by policy.

Second, aggregating behavior in order to elevate the level of offense causes an extension of the active life of the disciplinary action. For example, if an employee were to receive two Group II Written Notices on a particular day, those notices would expire after three years. If the employee received a Group I Written Notice in the fourth year, the employee could not be removed based on the accumulation of active disciplinary action. On the other hand, if an agency aggregated two Group II Written Notices into a single Group III Written Notice[10], and the employee received a Group I Written Notice in the fourth year, the employee could be removed from employment based on the accumulation of disciplinary action. In short, an employee receiving two or more Group II Written Notices is not in the same position as an employee receiving one Group III Written Notice.

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…."[11] 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.[12] 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.[13]

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[10] This illustration assumes the agency chose not to terminate the employee because of receiving two Group II Written Notices or receiving one Group III Written Notice.

[11] *Va. Code § 2.2-3005.*

[12] Grievant argued that because his immediate supervisor participated in the gaming, his behavior was sanctioned by his supervisor. Grievant did not present any evidence suggesting that the supervisor unduly influenced him to participate in the game playing. There is no reason to believe Grievant's actions would have been different had his supervisor not been one of the players.

[13] Grievant is correct that VITA may not discipline him for behavior he engaged in while employed by DOC. The Agency relied on the length of time Grievant played the game as a basis to elevate the

DECISION

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

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. 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 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.

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disciplinary action to a Group III offense. Once the disciplinary action is reduced to and considered as a Group II offense, the Hearing Officer finds not reason to mitigate the Group II Written Notice.

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.[14]

[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/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

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

The Virginia Information Technologies Agency (VITA) has requested an administrative review of the hearing officer's decision in Case No. 8233. The grievant was issued a Group III Written Notice but was not terminated. He filed a grievance to have the disciplinary action reversed. In his decision, the hearing officer reduced the disciplinary action from a Group III Written Notice to a Group II Written Notice. The agency officials presented several arguments to support its claim that the hearing officer's decision is inconsistent with state personnel policies. 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 III. On September 15, 2005, he was issued a Group III Written Notice for violating 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;" DHRM's Standards of Conduct; VITA's Employee Standards of Conduct Special Provisions, Employee Code of Ethics, and Information Security Access Agreement.

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." By all accounts, he performed his duties in a satisfactory manner and had received no prior disciplinary action.

The grievant and at least five other employees played a game called Half-Life for entertainment on their state-owned computers. The game was purchased by the grievant for his personal use. He installed the game on a USB drive and took the USB drive to work. He attached the USB drive to his computer in order to play the game at work. His agency learned that they were playing the game based on the e-mails he and the other five employees generated related to playing he game. He sent at least two game-related e-mails while he was an employee of the Department of Corrections. He sent at least two other game-related e-mails after he became an employee of VITA.

The relevant policy, 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. This policy also 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 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 clearly pointed out that VITA Policy, Acceptable Internet, E-mail, and Other Electronic Communications usage Policy, governs employee usage of the Internet, e-mail and other electronic communications. He further indicated that this policy sets forth unacceptable uses of the Internet to include "Downloading or installing without the authorization of Customer Support Services Desktop & End User Support (CSS DEUS)…Games…." Similarly, VITA Policy, Personal Computer and Local Area network Policy, states that employees using the agency's personal computers should "not download or install without the authorization of Customer Support Services Desktop & End User Support (CSS DEUS):...Games…" Finally, the hearing officer concluded that the employee's actions were contrary to VITA policy and therefore did not constitute incidental and occasional personal use under DHRM Policy 1.75. Summarily, the hearing officer opined that the agency provided evidence to support that the grievant violated the relevant policies because he (1) installed and participated in gaming activities using computer equipment and electronic communications networks of the agency, (2) used the Internet and agency e-mail inappropriately, and (3) abused State time and resources from at least January 7, 2004 to April 13, 2005. The hearing officer pointed out that the agency contends that these violations taken collectively should be a Group III Written Notice. The hearing officer continued, however, that an agency may not take separate actions otherwise constituting Group II offenses and aggregate them to be a single Group III offense. He also pointed out that, in accordance with the relevant policies, each of the above violations, taken separately, will support only a Group II level offense. More specifically, each violation itself is sufficient to support only a Group II level offense and it was improper to aggregate them in order to support a Group III level offense. The hearing officer also noted that the active life of a Group III

Written Notice is four years whereas the active life of a Group II Written Notice is three years. Thus, an employee unfairly will be under threat of termination for a longer period of time for a violation that is equivalent to a Group II level offense.

Concerning whether DHRM Policy No. 1.60 permits aggregating lesser level offenses to become a single higher-level offense, this Agency concurs with the interpretation of the hearing officer. Policy No. 1.60 permits for an accumulation of written notices that may result in disciplinary actions such as transfer, demotion, suspension, etc., but offers no support for combining violations in order to issue a higher level of discipline.

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.

Finally, the DHRM has consistently ruled that violations of rules and policies by an employee must be addressed while the employee is a still an employee of that agency. While a record of the violations and any disciplinary actions that were taken at the previous agency should be forwarded to the new agency, the new agency cannot taken disciplinary action for those violations that occurred at the previous agency.

This Agency concurs with the interpretation and application of the relevant policy by the hearing officer and therefore has no basis to interfere with the execution of the decision.

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Ernest G. Spratley
Manager, Employment Equity Services