Issues: Two Group II Written Notices and one Group III Written Notice (offensive behavior/failure to follow policy); Hearing Date: 01/20/06; Decision Issued: 01/26/06; Agency: VITA; AHO: Carl Wilson Schmidt, Esq.; Case No. 8234,8236,8241; Outcome: Employees granted partial relief; **Administrative Review: EDR Ruling Request received 02/09/06; EDR Ruling No. 2006-1274, 1275, 1276, 1277 issued 05/08/06; Outcome: Remanded to HO; Reconsideration Decision issued 06/08/06; Outcome: Original decision affirmed; EDR Ruling Request on Reconsideration Decision received 06/15/06; EDR Ruling No. 2006-1380 issued 07/19/06; Outcome: No basis to review – HO's decision affirmed. Administrative Review: DHRM Ruling Request received 02/09/06; 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: 8234 / 8236 / 8241

Hearing Date: January 20, 2006
Decision Issued: January 26, 2006

PROCEDURAL HISTORY

On December 14, 2005, the Director of the Department of Employment Dispute Resolution issued Ruling Numbers 2006-1207, 2006-1208, and 2006-1209 consolidating three grievances involving the Virginia Information Technologies Agency. On December 15, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 20, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant H
Grievant K
Grievant F
Grievants' Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether VITA has jurisdiction to take disciplinary action against VITA employees who may have engaged in offensive behavior while employed by DOC?

2. Whether the Grievants engaged in the behavior described in the Written Notices?

3. Whether the behavior constituted misconduct?

4. 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)?

5. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary actions, 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 Grievants 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:

Grievant K is employed by the Virginia Information Technologies Agency as an Information Technology Specialist III. She worked for the Department of Corrections prior to beginning employment with the VITA in September 2004 upon the creation of VITA.

Grievant K sent an email on August 29, 2002 while she was employed by DOC. The email contained a series of pictures which VITA considered inappropriate and warranting disciplinary action.

On June 14, 2005, Grievant K sent an email to several co-workers stating:

MAKE SURE YOU SCROLL ALL THE WAY DOWN

(If this doesn't put a smile on your face, nothing will!)

Guess what cup size?

Okay, what did you guess?

Oh come on, GUESS!

The truth revealed ….. Scroll down

Are you ready??

This kid's gonna hate Mom for this some day!

The first image presented to the email reader appears to be a close up picture of a bra covering a woman's chest. The picture shows what appears to be a woman's cleavage. Red lipstick appears on the left side of the cleavage slightly above the edge of the bra. The lipstick appears in a pattern as if a woman had placed and held a kiss right above the edge of the bra. The second image is the same as the first except that it is taken as if the photographer stepped back a foot or two from the original pose. The second picture shows a small male child laying on his stomach.[1] The top of the child's head borders the right side of the image. The lower edge of the bra borders the left side of the image. The child is wearing a shirt that is pulled up an inch or two above his waistline. His pants are either pulled down or removed. The bra is on top of the child's bottom.

Grievant H is employed by the Virginia Information Technologies Agency as an Information Technology Specialist III. She worked for the Department of Corrections prior to beginning employment with the VITA in September 2004 upon the creation of VITA.

Grievant H sent emails dated March 1, 2004, March 26, 2004 and May 6, 2004 while she was employed by DOC. The email contained several comments which VITA considered inappropriate and warranting disciplinary action.

Grievant F is employed by the Virginia Information Technologies Agency as an Information Technology Specialist III. He worked for the Department of Corrections prior to beginning employment with VITA in September 2004 upon the creation of VITA.

An email was sent on February 25, 2002 from Grievant's email account to several co-workers.[2] The email contained several images that VITA considered inappropriate and warranting disciplinary action.

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[1] The camera angle is as if the photographer was standing above the child but to the child's right side and then looking down towards the child.

[2] Grievant disputed sending the email. He asserted that other employees "spoofed" him by sending the offensive email under his name. He presented evidence that this practice occurred among employees in his work unit. It is unnecessary for the Hearing Officer to resolve the issue of whether Grievant sent the email.

CONCLUSIONS OF POLICY

A State agency may take disciplinary action against its employees only for behavior over which the Agency has jurisdiction. Most of the emails sent by the three grievants were while they were employed by DOC and not by VITA. Grievances challenging VITA's actions with respect to behavior arising under the proper jurisdiction of DOC must be resolved against VITA.

Although DOC and VITA are agencies of the Commonwealth of Virginia, they are separately established legal entities.[3] Each agency has its own agency head, unique mission, unique policies, and separately owned facilities. The DOC agency head reports to the Secretary of Public Safety. The VITA head reports to the Secretary of Technology. No evidence[4] was presented by the Agency showing it retained jurisdiction to address employee misbehavior while the employee was working for DOC.

DOC and VITA employees are subject to DHRM Policy 1.60, Standards of Conduct. This does not, however, authorize VITA to enforce DHRM Policy 1.60 on behalf of DOC. If DOC had taken disciplinary action prior to September 2004, the individuals deciding what level of disciplinary action to take would have been part of DOC and familiar with the DOC culture and able to determine how disruptive the messages were to DOC operations. In addition, the first, second, and third steps of the grievance process would have been with DOC managers, not VITA managers. It is possible (maybe likely) that the disciplinary action taken by DOC managers would have been different than the action taken by VITA managers.

With respect to this disciplinary action, all of Grievant H's emails were sent while she was employed by the Department of Corrections. Because VITA lacks jurisdiction to discipline her for those emails, the Group II Written Notice issued to her must be rescinded. Grievant F's email was also sent while he was employed by the Department of Corrections. Accordingly, the Group III Written Notice issued to him must be rescinded.

VITA's concern about the message sent by the three grievants while they were employed by DOC is understandable. The emails raise serious questions about the employees' use of email. Had DOC discovered the emails, it is likely that DOC managers would have found it necessary to address the need for taking disciplinary action. How DOC managers may have resolved any concerns is not known.

Grievant K sent one email on August 29, 2002 while she was employed by the Department of Corrections. The Hearing Officer will disregard this email. The issue is

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[3] The DOC was created under Va. Code § 53.1-8. VITA was created under Va. Code § 2.2-2005.

[4] Evidence of this nature might have included memoranda of understanding or legislative documents regarding the transition.

narrowed to whether the email she sent on June 14, 2005 while employed by VITA warrants disciplinary action.

VITA policy, *Acceptable Internet, E-mail, and Other Electronic Communications Usage Policy,* provides:

> Any outbound e-mail sent using a VITA agency e-mail account is to be considered as equivalent to a message sent on agency letterhead, therefore: ***
>
> - Any untrue, prejudicial, misleading, obscene, racist, sexist, or other unprofessional remarks may make the organization liable for legal action and will be considered a breach of DHRM's Standards of Conduct Policy 1.60.

When Grievant K's email dated June 14, 2005 is considered as equivalent to a message sent on agency letterhead, it is possibly obscene and sexist, but is clearly unprofessional.[5] When the email text and two images are read as a whole, the email objectifies a small child in a sexual manner. The email is sufficiently unprofessional so as to confirm the Agency's assertion that Grievant sent the email contrary to its policies. "Failure to … comply with established written policy" is a Group II offense.[6] Grievant failed to comply with VITA policy thereby justifying the issuance of a Group II Written Notice.

Grievant argues that the pictures are simply "bare butt baby pictures" that most mothers have been showing as a common practice. She contends the Agency is over-reacting to harmless baby pictures. The Agency contends the pictures may not be child pornography but they use a small child to display a sexual message. The Hearing Officer is persuaded by the Agency's arguments and concludes that the pictures are, at a minimum, unprofessional in the workplace.

Grievant's argument that the pictures are harmless baby pictures is untenable for several reasons. First, the child displayed is not a relative of Grievant K. She does not know who the child's parents are and whether the parents approved of the taking of the picture. Second, the first image of the child is intended to create a prurient interest in what appears to be a woman's breasts, but is actually a child's buttocks.[7] This is confirmed by text in the email asking about what cup size the viewer was seeing. Third, lipstick prints appear on the child's bottom. It is unknown who placed the lipstick prints

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[5] The VITA policy states that unprofessional remarks **may** make the organization liable for legal action. The Hearing Officer construes this policy such that it is not necessary for the Agency to show that Grievant K's email must have resulted in legal liability. If the email is unprofessional, the employee has acted contrary to the policy.

[6] DHRM § 1.60(V)(B)(2)(a).

[7] Grievant K estimated the child's age at between 18 and 24 months.

on the child's bottom or whether the child or anyone with authority over the child assented to someone kissing the child's bottom.

Grievant K 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…."[8] 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.

DECISION

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

The Agency's issuance to Grievant F of a Group III Written Notice of disciplinary action is **rescinded.**

The Agency's issuance to Grievant K of a Group II Written Notice of disciplinary action is **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. Please address your request to:

[8] *Va. Code § 2.2-3005.*

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.

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.[9]

[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

[9] 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: 8234 / 8236 / 8241-R

Reconsideration Decision Issued: June 8, 2006

RECONSIDERATION DECISION

In EDR Ruling 2006-1274, 2006-1275, 2006-1277, the EDR Director asked the Hearing Officer to reconsider and clarify the Hearing Decision regarding mitigation. The Ruling states:

> The grievant asserts that the hearing officer has ignored evidence of inconsistent discipline introduced at hearing. Specifically, she alleges that evidence was introduced showing that another employee, Mr. W., sent an e-mail containing the words "fuck," "fucking", "and "liberal pussies," but that this employee was only counseled for his action. She also points to evidence that the supervisor to whom Grievants K, H, and F reported only received a verbal counseling, despite his failure to discipline the grievants, and that the manager issuing the written notices to the grievants himself had used the word "fuck" in the workplace, without receiving any discipline. In addition, the grievant questions the hearing officer's failure to draw an adverse inference against the agency because it purportedly failed to comply with the hearing officer's order to produce the written counseling given to Mr. W. (Footnotes omitted).

In contrast to Mr. W's behavior, Grievant K's behavior consisted of sending an email of a small child whose bottom is partially exposed and partially covered by a woman's bra. Grievant K's behavior objectified in a sexual manner a small child unknown to Grievant K.

To suggest that exploiting a small child is similar behavior to an adult using the work fuck in emails to other adults or in conversation among adults in the workplace is without merit. Based on Grievant K's testimony that the child was between the ages of

18 to 24 months, Grievant K knew or should have known that the child did not consent to having the pictures taken of him. Grievant K knew or should have known that the Agency would not wish to be a part of her role in exploiting a child by sending that child's picture over its computer system. When one adult uses the word fuck when speaking to another adult in the workplace or when one adult sends an email containing the word fuck to another adult in the workplace, that behavior should be discouraged; but it is hardly the same as exploiting an 18 to 24 month old child.[10]

Whether there is a basis to draw an adverse inference against the Agency for failing to produce a document is irrelevant. The facts and discipline upon which Grievant K contends are comparable to her behavior are known. None of those facts can be considered similar to the markedly inappropriate behavior of Grievant.

One of the objectives of disciplinary action is to engage in corrective action so that an employee learns what behavior is unacceptable. Grievant does not believe she engaged in inappropriate behavior. Upholding disciplinary action Grievant in this case without mitigation is especially important because it is unclear whether Grievant would otherwise understand her error. There is no basis to alter the disciplinary action against Grievant K.

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 DHRM, 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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

[10] Grievant's behavior was also materially different from her supervisor who was counseled despite his failure to discipline the grievants.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

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

The agency has requested an administrative review of the hearing officer's decision in Cases Nos. 8234, 8236, and 8241. These cases involve three different employees. The agency has asked for an administrative review on the basis that even though the employees had committed policy and rules infractions at one agency and had subsequently transferred to another agency, the receiving agency had the authority to discipline those employees. 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 grievants as Information Technology Specialist IIIs. In their positions, the grievants 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." On September 15, 2005, the agency issued to each of the three employees a disciplinary action for violating Section 2.2-2827 of the Code of Virginia; 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 grievants and other employees either had been playing computer games on state-owned computer equipment and/or exchanging e-mails that agency officials classified as inappropriate.

The three employees referenced in this administrative review, Grievants F, H and K, were employed previously at the Department of Corrections. They transferred to VITA during September 2004. Two employees, Grievant H and Grievant K, were issued Group II Written Notices. The third employee, Grievant F, was issued a Group III Written Notice. Each grievant challenged the disciplinary action by filing a grievance. All requested and received permission to consolidate their grievances at the hearing step so the same hearing officer could hear them at the same time. In his decision, the hearing officer upheld the disciplinary action taken against Grievant K but directed the agency to rescind the disciplinary actions taken against Grievant F and Grievant H. Grievant K asked for and received an administrative review from the

Department of Employment Dispute Resolution (EDR) and a reconsideration decision from the hearing officer. In his reconsideration decision the hearing officer upheld his original decision.

Based on the evidence, Grievant F was issued a Group III Written Notice for sending images in an e-mail message that VITA considered inappropriate and warranted disciplinary action. He sent this e-mail message on February 25, 2002 while he was employed at the Department of Corrections. Grievant H was issued a Group II Written Notice for sending e-mail messages that VITA officials considered inappropriate and warranted disciplinary action. She sent these emails in 2004 while she was employed at the Department of Corrections. Grievant K was issued a Group II Written Notice II Written Notice for sending two emails whose contents VITA officials considered inappropriate and warranted disciplinary action. One of Grievant F's e-mail messages was sent while she was employed at the Department of Corrections and the other after she became a VITA employee.

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, "A State agency may take disciplinary action against its employees only for behavior over which the Agency has jurisdiction. Most of the emails sent by the three grievants were while they were employed by DOC and not by VITA. Grievances challenging VITA's actions with respect to behavior under the proper jurisdiction of DOC must be resolved against VITA." The ruling continues, in part, "DOC and VITA employees are subject to DHRM Policy 1.60, Standards of Conduct. This does not, however, authorize VITA to enforce DHRM Policy on behalf of DOC. If DOC had taken disciplinary action prior to September 2004, the individuals deciding what level of disciplinary action to take would have been part of DOC and familiar with DOC culture and able to determine how disruptive the messages were to DOC operations. In addition, the first, second, and third steps of the grievance process would have been with DOC managers, not VITA managers. It is possible (maybe likely) that the disciplinary action taken by DOC managers would have been different than the action taken by VITA managers."

Based on the above, the hearing officer rescinded the disciplinary action against Grievant H in its entirety because the e-mail messages she sent were sent while she was employed at DOC. Concerning Grievant F's disciplinary action, the hearing officer rescinded it in its entirety because all the messages he sent were sent while he was employed at DOC. Concerning Grievant K's disciplinary action, the hearing officer upheld the disciplinary action because she sent one message while employed at VITA which VITA officials considered to be inappropriate and warranted disciplinary action.

The singular issue before DHRM is whether a state agency can take disciplinary action against an employee for violating rules and policies while that employee was an employee of another agency. The DHRM has consistently ruled that an employee's present agency has no authority to take disciplinary action against an employee for violating rules and policies while that employee was employed by another agency. Therefore, this Agency concurs with the hearing officer's decision related to this issue. Concerning the level of offense for the violations Grievant K committed, DHRM Policy No. 1.60 and DHRM Policy No. 1.75 provide sufficient guidance. 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." The hearing officer is authorized to weigh the evidence and to make his decision based on his assessment of the evidence.

Therefore, this Agency has determined that there is no basis to interfere with the execution of the hearing decision.

Ernest G. Spratley
Manager, Employment Equity Services