

Issue: Group III Written Notice with termination (accessing and downloading sexually explicit material); Hearing Date: 03/20/06; Decision Issued: 03/31/06; Agency: Va. Department of Health; AHO: Carl Wilson Schmidt, Esq.; Case No. 8286; Outcome: Agency upheld in full; **Administrative Review: HO Reconsideration Request received 04/04/06; Reconsideration Decision issued 04/17/06; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 04/04/06; EDR Ruling No. 2006-1330 issued 06/21/06; Outcome: HO's decision affirmed; Administrative Review: DHRM Ruling Request received 04/04/06; DHRM form letter issued 04/18/06; Outcome: No basis to interfere; Original decision affirmed.**



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8286**

Hearing Date: March 20, 2006  
Decision Issued: March 31, 2006

**PROCEDURAL HISTORY**

On December 20, 2005, Grievant was issued a Group III Written Notice of disciplinary action with removal for having inappropriate images on his computer. On December 28, 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 February 8, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was originally scheduled for March 10, 2006 but had to be continued for just cause at Grievant's request. On March 20, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
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 Department of Health employed Grievant as an Information Technology Specialist until his removal effective December 20, 2005. He had been employed by the Agency for approximately seven years. His duties included building databases, web pages, and generating reports. No evidence of prior active disciplinary action against Grievant was presented during the hearing.

Grievant worked in a building with restricted access. To gain access to the building, he and other employees used their State-issued security cards. Employees could leave the building without using their security cards.

Grievant had four personal computers assigned to him. He had one computer monitor and would use a switch box to access data stored on each computer. One of the computers was a Gateway Pentium III desktop. Another computer was an IBM NetVista personal computer. The two remaining computers are not of significance in this grievance. Grievant had access to the Agency's computer network and to the Internet using the personal computers assigned to him. Grievant was assigned a unique identification and password to enable him to log onto the personal computers and Agency network.

On October 10, 2002, the hard drive in the Gateway computer was reformatted<sup>1</sup> and a new hard drive was installed. Grievant determined what files on the computer were to be retained and reinstalled following the upgrade.

On September 1, 2005, Grievant started working in a new position within the Agency. He received a new computer and relinquished his old computer. While Agency employees were preparing Grievant's old computers to be reused, they noticed offensive pictures stored on the computer. The matter was reported and the Agency began an investigation.

The Agency's Information System Security Officer (ISSO) and Information System Specialist I performed a forensic examination of Grievant's personal computers. They made an identical copy of the information on Grievant's computers and examined the copy. They discovered at least 200 pictures showing women in provocative poses, partially clothed, or nude.

### **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).<sup>2</sup> 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);
- downloading or transmitting fraudulent, threatening, obscene, intimidating, defamatory, harassing, discriminatory, or otherwise unlawful messages or images; \*\*\*
- any other activities designated as prohibited by the agency.

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<sup>1</sup> Reformatting a hard drive has the effect of erasing any data existing on the drive.

<sup>2</sup> 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 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:

- interferes with the user's productivity or work performance, or with any other employee's productivity or work performance;
- adversely affects the efficient operation of the computer system;
- 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:

(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* 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*.

The screen show on the Gateway computer contains several pictures constituting lewd exhibition of nudity. One picture shows a close-up picture of a woman’s bottom and genitals. The woman is bent forward in order to draw the viewer’s attention to her bottom and genitals. Another picture shows a close-up and front view of a woman’s

genitals. The woman is using her fingers to expose her genitals. The screen show contained additional pictures, but these two are sufficient for the Agency to show that DHRM Policy 1.75 was violated because of a lewd display of nudity found on Grievant's Gateway computer.

The matter in dispute is whether Grievant placed the offensive images on his computer. The Agency has presented sufficient evidence to support its conclusion that Grievant placed the offensive images on his computer. First, Grievant had a unique log on identification name and password. Only a person who knew Grievant's log on name and password could access the Gateway computer using Grievant's identity. Grievant alleged that others may have accessed his computer, but he did not present sufficient evidence for the Hearing Officer to conclude that this actually happened.<sup>3</sup> Grievant did not have to share his computer with another employee. Second, the images were stored on Grievant's personal computer hard drive under the path: C:\Documents and Settings\[Grievant's name and name of computer]\Desktop\My Documents\personal\personal\My Pictures\screenshow. Grievant had to use a software program in order to create folders of this complexity. Third, Grievant admits to placing numerous pictures on his computer and creating a collage. The pictures were of young attractive woman in various poses.<sup>4</sup> Grievant's admission demonstrates his ability and propensity<sup>5</sup> to download pictures and assemble them into a presentation format.

Grievant argues that a either adware or spyware was responsible for downloading the pictures and assembling them into a presentation. Grievant regularly accessed the Internet as part of his job duties and as part of his personal use of the Agency's computer system.<sup>6</sup> On several occasions, Grievant contacted the Agency's information technology support division because his computer speed had slowed. Support staff examined Grievant's computer and concluded it was infected with adware or spyware. Grievant contends that because his computer was infected with adware or spyware, it automatically downloaded pictures of nude women onto his computer's hard drive and then assembled them into a presentation.

The Agency presented testimony of an expert in information technology, the Information Systems Security Officer (ISSO). He holds the highest level of certification among information systems security personnel. He described himself as holding the "gold standard" in information security standards. The ISSO performed a forensic

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<sup>3</sup> Grievant presented evidence that at some point in time, Mr. MH, a former employee, concluded the personal computers of certain employees were being accessed by another person not authorized to use the computers. Because of his concerns, he had the computers upgraded to Windows 2000 and ordered cables and locks locked in all PCs, monitors and printer/scanners in order to secure technology in the network integrity. There is no reason to believe unauthorized access continued after the upgrade.

<sup>4</sup> The pictures Grievant admitted to downloading and putting into a collage did not show nude women.

<sup>5</sup> Grievant also admitted to placing pictures of himself, friends, and family members onto the hard drive and his computer.

<sup>6</sup> Incidental and occasional personally use is permitted by DHRM Policy 1.75.

examination of the data on Grievant's computer.<sup>7</sup> He could not find a virus that would have created the screenshow collage. He reviewed the most recent literature available in the industry. He was unable to find any adware or spyware that would download pictures of nude women and assemble those pictures in a screenshow as the screenshow appeared on Grievant's computer.<sup>8</sup>

Grievant argued that the offensive pictures were placed on his computer by someone else or by computer software when he was away from his desk. To support his argument he presented the properties of pictures on his computer showing that they had been created or modified at times in the evening after normal work hours or in the early morning before normal work hours began. The ISSO testified that the times created or modified were not accurately reported because of a "bug" in the Microsoft operating system. He added that the "timestamp" on an image may represent the time it was created or downloaded from the Internet based on Greenwich Mean Time.<sup>9</sup> Accordingly, the Hearing Officer finds that the time images were downloaded cannot be determined from the properties associated with those image files.

It is not necessary for the Agency to show beyond any doubt that Grievant downloaded the images onto his computer. It is only necessary for the Agency to prove that is more likely than not that Grievant downloaded the images. The Agency has met this burden.

*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..."<sup>10</sup> 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.

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<sup>7</sup> The ISSO created an exact copy of the data on Grievant's computer and performed several tests and reviews.

<sup>8</sup> Grievant argues that the collage could have been created by a software program called Screenpaver. To use Screenpaver, a computer user must download the software and pay a fee. No evidence was presented showing that the software was downloaded onto Grievant's Gateway computer by adware or spyware.

<sup>9</sup> Greenwich Mean Time is between four and five hours different from Eastern Standard Time.

<sup>10</sup> *Va. Code § 2.2-3005.*



## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal 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:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>11</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>11</sup> 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: 8286-R**

Reconsideration Decision Issued: April 17, 2006

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant presented evidence regarding the time cookies were placed on his computer. He contends they could not have been placed on the computer and recorded under Greenwich Mean Time. If the Hearing Officer assumes for the sake of argument that Grievant’s assertion is true, the outcome of this case does not change.

Grievant argues others used his computer when he was out of the office. Incidental use by other employees is not sufficient to alter the outcome of this case.

Grievant argues a collage could have been created by software of a certain type. Grievant’s argument fails because no evidence was presented suggesting any software was on his computer hard drive that was of the type described by Grievant.

Grievant admitted to downloading pictures at his home and creating a collage. He brought the collage into his workplace and placed it on his computer. The fact remains that Grievant had the knowledge of how to create a collage. Grievant’s practice of creating collages is another factor suggesting he created the collage of offensive pictures found on his computer.

Grievant’s request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant’s request for reconsideration is **denied**.

## 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

April 18, 2006

(grievant)

**RE: Grievant v. Virginia Department of Health  
Case No. 8286**

Dear xxx:

The Agency head, Ms. Sara Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, in accordance with the state employee grievance procedure, within 15 calendar days from the date the decision is issued an employee may request that the Director of the Department of Human Resource Management conduct an administrative review if the employee believes the hearing decision is inconsistent with state policy or agency policy. The employee must state the specific policy and explain why he believes the decision is inconsistent with that policy.

In the instant case, you failed to identify any policy, either state or agency, with which the hearing decision is inconsistent. Rather, it appears that you are disagreeing with the assessment of the evidence by the hearing officer and the outcome of the hearing. This Agency has no basis to review the decision and therefore will not interfere with its application.

If you have any questions regarding this correspondence, please contact me at (804) 225-2136 or 1 (800) 533-1414.

Sincerely,

Ernest G. Spratley, Manager  
Employment Equity Services

c: Sara R. Wilson, Director, DHRM  
Ms. Grace DiLiberto, VDH