

Issue: Group II Written Notice with termination (due to accumulation) (internet abuse);
Hearing Date: 10/18/06; Decision Issued: 10/25/06; Agency: VDOT; AHO: Carl
Wilson Schmidt, Esq.; Case No. 8437; Outcome: Agency upheld in full;

Administrative Review: HO Reconsideration Request received 11/09/06;

Reconsideration Decision issued 11/17/06; Outcome: Original decision affirmed;

**Administrative Review: EDR Ruling Request received 11/09/06; EDR Ruling No.
2007-1481 issued 01/25/07; Outcome: Remanded to Hearing Officer; Second
Reconsideration Decision issued 02/05/07; Outcome: Original decision affirmed;**

**Administrative Review: DHRM Ruling Request received 11/09/06; DHRM Ruling
issued 03/29/07; Outcome: HO's decision affirmed; Judicial Review: Appealed
to the Circuit Court, City of Bristol, April 27, 2007; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8437

Hearing Date: October 18, 2006
Decision Issued: October 25, 2006

PROCEDURAL HISTORY

On February 6, 2006, Grievant was issued a Group II Written Notice of disciplinary action with removal for violating Department of Human Resource Management Policy 1.75 governing *Use of Internet and Electronic Communications Systems*. On June 29, 2006, 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 September 21, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 18, 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 Virginia Department of Transportation employed Grievant as a Right of Way Agent Specialist at one of its Facilities. He held that position for approximately 13 years prior to his removal effective June 29, 2006. Grievant worked eight hours per day, five days per week.

Grievant had prior active disciplinary action consisting of a Group II Written Notice issued on February 6, 2004 for violation of DHRM Policy 1.75 and a Group I Written Notice issued on September 14, 2005 for conviction of traffic violation while operating a State vehicle.¹

Grievant had a unique log in identification so that he could log into the Agency's computer system and gain access to the Internet. When Grievant first logged in, a screen appeared saying, in part:

Incidental and occasional non-job related use is permitted as defined by Department of Human Resource Management Policy No. 1.75 "Use of Internet and Electronic Communications Systems." Non-job related use is

¹ Agency Exhibit 7.

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 or any other policy, regulation, law or guideline as set forth by local, State or Federal law.²

The Agency monitored its employees' internet usage for the week of May 1 through May 5, 2006. Agency managers learned that Grievant had a high rate of internet access during that week. Grievant's internet usage was the highest among employees in his district. Agency managers sought a detailed report of the websites Grievant visited during the week. Grievant's internet usage was lower on May 2, 2006 than it was for the remaining four days of the week. The Human Resource Manager presented the detailed report to Grievant's Supervisor and asked the Supervisor to identify which websites were likely work-related. The Human Resource manager excluded from consideration work-related websites and a lunch break from 11:55 a.m. until 12:55 p.m. as part of her review of the detailed report. She testified Grievant spent approximately 3:30 hours viewing websites not related to VDOT work.

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).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 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;

² Agency Exhibit 3.

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

- 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.)

Grievant devoted several hours of his day on May 2, 2006 to viewing non-work related websites. He did not perform his work duties during that time. Grievant's personal internet usage exceeded incidental and occasional personal use.

"Failure to ... comply with established written policy" is a Group II offense.⁴ Grievant failed to comply with DHRM Policy 1.75 because his personal use of the internet was excessive. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice.

Accumulation of a second active Group II Written Notice "normally should result in discharge."⁵ Grievant had a prior active Group II Written Notice and Group I Written Notice. Based on the accumulation of disciplinary action, Grievant's removal from employment must be upheld.

Grievant contends the Agency did not correctly calculate the amount of time he devoted to viewing personal websites. He cites to several examples where time gaps appeared between the time he visited one site and the time he visited another site. He contends he could have been attending to work related matters not involving his computer and then returned to internet browsing. Several of the time gaps can be explained by the sites Grievant was visiting. One of the websites Grievant often viewed contained videos about sports. While he watched the video, the Agency's monitoring software did not record Grievant visiting another website. This explains the several minute time gaps between Grievant's personal internet usages.

The Hearing Officer reviewed the detailed report of Grievant's internet usage. If only Grievant's internet usage where he visited sites with no longer than a two minute gap are considered, Grievant's personal usage amounted to approximately 84 minutes.⁶ Spending 84 minutes viewing personal websites amounted to approximately 17 percent of Grievant's work day. Even using a calculation more favorable to Grievant reveals that Grievant's internet usage on May 2, 2006 was excessive and contrary to policy.

⁴ DHRM § 1.60(V)(B)(2)(a).

⁵ DHRM § 1.60(VII)(D)(2)(b).

⁶ This calculation disregards the time Grievant may have watched sports videos on websites.

Mitigation

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....”⁷ 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.”

Grievant contends the disciplinary action should be mitigated because of his medical condition and the stress he was experiencing as part of his personal life. Grievant presented a timeline describing some of the difficulties he experienced outside of his work. For example, Grievant was treated for depression and anxiety by a Licensed Clinical Social Worker including six sessions from December 8, 2004 to April 13, 2005.⁸ His divorce was final on August 4, 2005 but without a property settlement. A final property settlement was entered by the Court on April 18, 2006 which required Grievant to pay within 30 days. This created significant stress for Grievant. Grievant testified he had a form of obsessive and compulsive disorder causing him to use the internet excessively.⁹

Grievant’s personal concerns may help explain his behavior on May 2, 2006 but they do not excuse his behavior. Grievant received a Written Notice on February 6, 2004 for improper internet usage. The Agency clearly placed him on notice that he could not use the internet excessively for personal reasons. Grievant’s medical and financial problems are not of the type considered as mitigating circumstances under the *EDR Rules for Governing Grievance Hearings*. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁷ Va. Code § 2.2-3005.

⁸ Grievant presented evidence that he had required psychotherapy services as the result of receiving the Group II Written Notice and his removal. That evidence would not form a basis to reverse disciplinary action that was issued prior to the psychotherapy services.

⁹ If the Hearing Officer assumes Grievant was compelled to use the internet, he offered no explanation as to why his use focused on visiting personal websites rather than work-related websites.

DECISION

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

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 all of your appeals to the other party and to the EDR Director. 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.¹⁰

[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

¹⁰ 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: 8437-R

Reconsideration Decision Issued: December 27, 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.

DHRM Policy 2.05 “[p]rovides that all aspects of human resource management be conducted without regard to race, color, religion, gender, age, national origin, *disability*, or political affiliation” Under Policy 2.05, “‘disability’ is defined in accordance with the Americans with Disabilities Act,” the relevant law governing disability accommodations.¹¹ Like Policy 2.05, the Americans with Disabilities Act (ADA) prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual’s disability. A qualified individual is defined as a person with a disability, who, with or without “reasonable accommodation,” can perform the essential functions of the job.¹² An individual is “disabled” if he “(A) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) [has] a record of such an impairment; or (C) [has been] regarded as having such an impairment.”¹³ The “essential functions” are the “fundamental job duties of the employment position the individual with a disability holds or desires.”¹⁴

¹¹ 42 U.S.C. § 12101 *et seq.*

¹² 42 U.S.C. § 12111(8).

¹³ 42 U.S.C. § 12102(2).

¹⁴ 29 C.F.R. § 1630.2(n).

To establish a *prima facie* claim of wrongful discharge under the ADA, the grievant must show that: (1) he is within the ADA's protected class (i.e., a "qualified individual with a disability"); (2) he was discharged; (3) his job performance met his employer's expectation when he was discharged; and (4) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination.¹⁵

Grievant was discharged from his position. If the Hearing Officer assumes for the sake of argument that Grievant is a qualified individual with a disability,¹⁶ his job performance met the employer's expectations, Grievant has not presented sufficient evidence to show a connection between his disability and his excessive use of the internet.

Grievant's Licensed Clinical Social Worker wrote that Grievant has "Major Depressive Disorder, Recurrent, Severe and Generalized Anxiety Disorder with panic attacks." Grievant presented documents showing the symptoms of his mental health concerns. He has not presented any evidence (other than his assertion) that his mental health concerns caused him to spend an excessive amount of time on the Agency's internet visiting non-work related websites. Grievant contends he was unable to control his excessive usage because of his disability. His assertion is not credible. When Grievant used the internet, he clearly controlled what websites he visited. He predominantly visited the sites for which he had some personal interest such as sport sites. Grievant established a pattern of internet usage showing that he visited work related sites or sports sites. To the extent Grievant's usage was obsessive and compulsive as he claims, Grievant could have chosen only work related web sites to view.

Grievant contends the disciplinary action against him was an unlawful discriminatory practice and gender discrimination. No credible evidence was presented to show that the Agency disciplined Grievant for any reason other than his behavior.

Grievant contends he was not given adequate oral or written notification of the offense. To the extent Grievant questions the Agency's actions prior to the hearing, his concerns are moot. Grievant could have brought his concerns to the EDR Director for a ruling. With respect to notice of the offense after qualification of the Hearing Officer and prior to the hearing, Grievant had adequate notice of the offense alleged against him. The Written Notice issued to Grievant informed him that he violated DHRM Policy 1.75

¹⁵ Rohan v. Networks Presentations, LLC, 2003 U.S. Dist. LEXIS 26687, at n.5 (D. Md. Apr. 17, 2003), *aff'd*, 375 F.3d 266 (4th Cir. 2004). Once an employee establishes a *prima facie* case, an agency may nevertheless prevail if it can establish one of the defenses enumerated in 29 C.F.R. § 1630.15. See generally Peter A. Susser, *Disability Discrimination and the Workplace* 1014-26 (BNA Books 2005).

¹⁶ Grievant presented a letter from a Licensed Clinical Social Worker saying Grievant "is unable to maintain gainful employment at this time as his level of functioning is greatly impaired in all areas." This letter suggests Grievant is not someone who can perform the essential functions of his position with reasonable accommodation. Thus, Grievant would not be a qualified individual with a disability.

because his use of the internet exceeded occasional and incidental personal use. The Agency's evidence was consistent with that charge. Grievant had an adequate opportunity to present evidence at the hearing to support his position.

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

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8437-R2

Reconsideration Decision Issued: February 5, 2007

RECONSIDERATION DECISION

In EDR Ruling 2007-1481, the EDR Director remanded the case “for further consideration and analysis ... under the mitigation standard enunciated in the Rules” and asked the Hearing Officer to “clarify that consideration and analysis, and explain the basis of that conclusion in his reconsidered decision.”

In the original hearing decision, the Hearing Officer addressed mitigation by saying:

Mitigation

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....”¹⁷ 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.”

¹⁷ *Va. Code § 2.2-3005.*

Grievant contends the disciplinary action should be mitigated because of his medical condition and the stress he was experiencing as part of his personal life. Grievant presented a timeline describing some of the difficulties he experienced outside of his work. For example, Grievant was treated for depression and anxiety by a Licensed Clinical Social Worker including six sessions from December 8, 2004 to April 13, 2005.¹⁸ His divorce was final on August 4, 2005 but without a property settlement. A final property settlement was entered by the Court on April 18, 2006 which required Grievant to pay within 30 days. This created significant stress for Grievant. Grievant testified he had a form of obsessive and compulsive disorder causing him to use the internet excessively.¹⁹

Grievant's personal concerns may help explain his behavior on May 2, 2006 but they do not excuse his behavior. Grievant received a Written Notice on February 6, 2004 for improper internet usage. The Agency clearly placed him on notice that he could not use the internet excessively for personal reasons. Grievant's medical and financial problems are not of the type considered as mitigating circumstances under the *EDR Rules for Governing Grievance Hearings*. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Upon consideration of the EDR Ruling 2007-1481, the Hearing Officer finds that Grievant's medical and financial problems did not cause him to engage in excessive personal use of the internet. Grievant viewed an excessive number of sports websites because of his personal interest and preference to view such sites. If Grievant's medical and financial problems had caused him to use the internet excessively, there is no reason to believe he would have accessed primarily sports sites. For example, if his medical and financial problems were a cause for him to act, he could have used the internet excessively by viewing work related sites. He accessed sports and other personal websites because of his personal preference. Because Grievant had been previously disciplined for excessive personal use of the internet, Grievant knew that his actions of visiting sports sites placed him at risk of being disciplined. The disciplinary action taken against Grievant was in accordance with the Standards of Conduct and did not exceed the bounds of reasonableness. Grievant has not presented sufficient evidence to show a basis to mitigate the disciplinary action against him.

¹⁸ Grievant presented evidence that he had required psychotherapy services as the result of receiving the Group II Written Notice and his removal. That evidence would not form a basis to reverse disciplinary action that was issued prior to the psychotherapy services.

¹⁹ If the Hearing Officer assumes Grievant was compelled to use the internet, he offered no explanation as to why his use focused on visiting personal websites rather than work-related websites.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. 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

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Virginia Department of Transportation

March 29, 2007

The grievant has requested an administrative review of the hearing officer's decision in Case No. 8437. The grievant is challenging the decision because he feels that the decision is inconsistent with state and agency policy. This agency will not interfere with the hearing decision for the reasons stated below. The agency head of the Department of Human Resource Management has requested that I respond to this appeal.

FACTS

Until he was terminated, the Virginia Department of Transportation employed the grievant as a Right of Way Agent Specialist at one of its facilities. On February 6, 2006, the grievant was issued a Group II Written Notice of disciplinary action with removal for violating Department of Human Resource Management Policy No. 1.75, *Use of Internet and Electronic Communications Systems*. His termination was based on an accumulation of active written notices. He filed a grievance but the agency did not grant him any relief. In his decision, the hearing officer upheld the disciplinary action. The grievant requested an administrative review from the Department of Employment Dispute Resolution (EDR) and a reconsideration of the decision by the hearing officer. A ruling by EDR remanded the decision to the hearing officer who issued a second reconsideration decision. The hearing officer did not modify his decision. The grievant contends that his behavior could not be considered as misconduct due to his past and present medical and financial conditions. In addition, he feels that the ruling is in violation of the Virginia Human Rights Act, Virginia Code Chapter 39, 2.2-3901, in that the decision discriminates against him.

The relevant policies include the Department of Human Resource Management's Policy No. 1.60, which states that 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. The examples are not all-inclusive.

Also applicable is DHRM's Policy No. 1.75 that establishes guidelines for the use of the Internet and the state's electronic communication systems for state agencies and their employees. This

policy establishes minimum standards. Agencies may supplement this policy as they need or desire, as long as any such supplement is consistent with DHRM's policy.

In the instant case, the fact that the grievant accessed the Internet for personal use is supported by indisputable evidence. Based on that evidence, the hearing officer upheld all parts of the disciplinary action.

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, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. Any challenge to the hearing decision must cite a particular mandate or provision in policy. The 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 present case, the evidence supported that the grievant accessed the Internet during work hours for personal use. The hearing officer indicated that the grievant failed to comply with DHRM Policy No. 1.75 because his personal use of the internet exceeded the occasional and incidental level. Thus, it was appropriate for the agency to take disciplinary action under DHRM Policy No. 1.60.

The grievant contends that the disciplinary action was improper because of his past and present medical conditions. He further contends that the disciplinary action was in violation of the Virginia Human Rights Act. These arguments are baseless because while it is clear that employers must provide reasonable accommodations to employees with disabilities, there is no evidence that the grievant's medical conditions rose to the level of a disability or that reasonable accommodations were requested by the grievant. In addition, even if reasonable accommodations were provided, employers can hold employees with disabilities to the same standards of work performance and conduct as non-disabled employees.

Finally, the decision was remanded to the hearing officer for further consideration and analyses of certain mitigating factors. In a decision dated February 5, 2007, the hearing officer stated:

Upon consideration of the EDR Ruling 2007-1481, the Hearing Officer finds that Grievant's medical and financial problems did not cause him to engage in excessive personal use of the internet. Grievant viewed an excessive

number of sports websites because of his personal interest and preference to view such sites. If Grievant's medical and financial problems had caused him to use the internet excessively, there is no reason to believe he would have accessed primarily sports sites. For example, if his medical and financial problems were to cause him to act, he could have used the internet excessively by viewing work related sites. He accessed sports and other personal websites because of his personal preferences. Because Grievant had been previously disciplined for excessive personal use of the internet, Grievant knew that his actions of visiting sports sites placed him at risk of being disciplined. The disciplinary action taken against Grievant was in accordance with the Standards of Conduct and did not exceed the bounds of reasonableness. Grievant has not presented sufficient evidence to show a basis to mitigate the disciplinary action taken against him.

In summary, this Agency has determined that the hearing decision is consistent with state and agency policy. Therefore, we have no basis to interfere with the execution of this decision.

Ernest G. Spratley