Issue: Group III Written Notice with termination (internet abuse, excessive telephone use, excessive tardiness, disruptive behavior); Hearing Date: 01/23/07; Decision Issued: 01/24/07; Agency: DSS; AHO: David J. Latham, Esq.; Case No. 8490; Outcome: Employee granted partial relief. Addendum addressing attorney's fees issued 02/15/07.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8490

Hearing Date: January 23, 2007
Decision Issued: January 24, 2007

APPEARANCES

Grievant
Attorney for Grievant
Three witnesses for Grievant
Director of Public Affairs
Advocate for Agency
One witness for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group III Written Notice issued for utilizing state-owned computer equipment to access Internet websites with sexually explicit content, for accessing the Internet for excessive amounts of

time, for excessive personal telephone calls, excessive tardiness, and for disruptive and intimidating behavior in the workplace.[1] As part of the disciplinary action, grievant was removed from state employment. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2] The Virginia Department of Social Services (Hereinafter referred to as "agency") has employed grievant for four years as a public relations practitioner.[3] Grievant has a total of eight years of state employment.

Grievant's primary responsibility (50 percent of her time) has been editor of the agency's monthly employee newsletter since 2002.[4] She also prepared news releases for distribution to the media, edited Web content, and served as back-up media liaison. Grievant's prior supervisor rated her Contributor overall and an Extraordinary Contributor with regard to her primary job of editing the newsletter.[5]

In February 2006, a new supervisor was hired. For the past ten years, the new supervisor worked in county government; she had not previously had any supervisory experience in state government. From the beginning, grievant and her new supervisor had difficulty communicating and working together. At the same time, grievant began to experience two significant personal problems that may have affected her work.[6] Grievant met with her supervisor in February and explained both of these personal problems. Grievant's supervisor was critical of what she perceived as grievant's inadequate editing skills, tardiness, and excessive time spent on the telephone and Internet. The supervisor verbally counseled grievant but these discussions frequently resulted in grievant being overly emotional and tearful.

The supervisor had noticed that when grievant was asked to help work on team projects, grievant claimed she had too much of her own work to do. The supervisor also noticed that grievant seemed to be spending too much time in personal use of the Internet. In May, the supervisor spoke with grievant about spending too much time on the Internet and mentioned the state policy that prohibits excessive Internet usage.[7] Grievant asserted that she was unaware of

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[1] Agency Exhibit 1. Group III Written Notice, issued July 12, 2006.
[2] Agency Exhibit 2. Grievance Form A, filed August 11, 2006.
[3] Agency Exhibit 5. Employee Work Profile *Work Description*, January 2004.
[4] Agency Exhibit 5. *Id*.
[5] Grievant Exhibit 3. Employee Work Profile *Performance Evaluation*, October 14, 2005.
[6] In February 2006, grievant's husband began working out of town, returning home only on weekends. Grievant had to deal not only with the separation from her spouse but also had full responsibility for raising two teenage sons who were also affected by the absence of their father. In addition, grievant had begun to experience menopausal symptoms.
[7] Agency Exhibit 4. Department of Human Resource Management (DHRM) Policy 1.75, *Use of Internet and Electronic Communication Systems*, August 1, 2001, permits incidental and personal use of the Internet if it does not interfere with the user's productivity or work performance. The policy also prohibits accessing "sexually explicit content" as prohibited by Va. Code § 2.2-2827. Sexually explicit content is defined by the statute to mean "(i) any description of or (ii) any picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting

the policy and that no one had ever counseled her about excessive Internet use. Following this discussion, the supervisor requested the agency's information security administrator to generate a report for the month of May that would show how much time grievant spent on the Internet.

As part of the report extraction process, the security administrator routinely used a program that includes "alerts" for certain words that might be indicative of inappropriate Internet usage (For example: gambling, casino, XXX, nude, sex). On seven dates, the report "alerted" on the word "sex" which appeared in the web address of several websites accessed on grievant's computer.[8]

In February 2005, grievant's previous supervisor discussed her concerns with grievant about spending too much time on personal calls, surfing the Web, selling at work, leaving her workstation for extended periods, and hostility to coworkers.[9] At the hearing, the previous supervisor averred that spending too much time on personal calls and surfing the web were "agency cultural problems" and that a large number of employees engage in the same practices. Grievant's attendance and punctuality were satisfactory prior to the spring of 2006. Under the previous supervisor, grievant willingly worked nights and weekends when necessary to accomplish agency objectives. In June 2006, grievant's new supervisor counseled her in writing about too much personal time on the telephone and on the Internet, citing the earlier verbal caution she had given grievant in May.[10] Later in June, the supervisor counseled grievant in writing about tardiness, citing a previous verbal counseling on this subject.[11]

After consulting with the Human Resource Department, the supervisor decided to issue a Group III Written Notice and terminate grievant's employment.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in

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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."

[8] Agency Exhibit 3. Information Security Administrator's report.

[9] Agency Exhibit 6. Memorandum signed by previous supervisor, February 22, 2005.

[10] Agency Exhibit 6. E-mail from supervisor to grievant, June 9, 2006.

[11] Agency Exhibit 6. Memorandum from supervisor to grievant, June 26, 2006.

and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[12]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated *Standards of Conduct* Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Policy No. 1.60 provides that Group III offenses include acts and behavior that are of such a serious nature that a first occurrence normally should warrant removal from employment.[13] The appropriate level of disciplinary action for violation of Policy 1.75 is determined on a case-by-case basis with sanctions depending on the severity of the offense, consistent with Policy 1.60.

While violation of the Internet policy *can* be disciplined by terminating an employee's employment, Policy 1.75 makes abundantly clear that the level of discipline must be consistent with Policy 1.60. The discipline imposed must be determined based upon the severity of the offense. Cases involving an employee who accesses pornographic websites designed to appeal to the prurient interest generally warrant termination of employment. However, in this case, the evidence demonstrates that grievant did not access such sites.

Four of the web images proffered by the agency show only a listing of web pages generated by a search engine. All of the pages produced as evidence by

[12] § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.
[13] Agency Exhibit 7. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

the agency were printed more than half a year after grievant had accessed the sites. There is no evidence that the images produced in December 2006 were the same images that were on the web pages in May 2006. In fact, grievant's expert witness demonstrated that some of the pages have changed again since December 2006. Nonetheless, grievant admitted accessing the sites shown in the report. She has provided a credible and unrebutted explanation for accessing the web sites at issue. Because of the difficulty grievant was experiencing in her marital relationship, she was seeking information to improve the relationship. As part of her search, she explored whether her sexual relationship could be improved, which led her to sites that promote sexual paraphernalia (so-called marital aids). She also sought information on relationship issues and health issues. Grievant acknowledged that some sites included unsolicited "pop-up" advertisements for sex toys. Grievant's husband had suggested to her that she look at some of the relationship and ideal mate sites.

Grievant argues that she was unaware of Policy 1.75 prohibiting the accessing of web sites with sexually explicit content. Ignorance of the policy is not an excuse because grievant had access to the policy through the Internet and is accountable for abiding by the policy. The first issue to be resolved is whether grievant actually did access sexually explicit conduct. The statutory definition of sexually explicit conduct is quite broad and includes any description of sexual conduct. A few of the web site images generated by the agency in December 2006 include such descriptions. However, the agency has failed to show that these images were the images that grievant viewed in May 2006. One of the images generated by the agency can be viewed only if one scrolls down the page; grievant denied scrolling down that page and the agency was unable to rebut the denial. Because the agency did not produce the images that grievant viewed, its documentary evidence is not entirely probative.

The agency alleged that grievant viewed hundreds of pages of inappropriate material. As an example, it cited screen print # 1 which accessed the site "sex.toys.co.uk." The computer report contains 12 lines which the agency alleges represent access of 12 different pages or screens on the sex toys web site. However, grievant's expert witness offered persuasive testimony that the 12 lines represent only the 12 graphic components of the single screen print.[14] Accordingly, grievant's access of such sites was far less voluminous than the agency represented.

Notwithstanding that grievant's access was very limited, and that she accessed the sites with the sole intent of improving her marital relationship, the fact remains that grievant did access these sites. Even though the images produced by the agency may not have been what grievant viewed in May 2006, it may reasonably be concluded that the images that she did view were very similar

[14] This is demonstrable by carefully reviewing the line descriptions with the individual components on the screen print, and by noting that the line descriptions have suffixes such as .gif, .js, and .css – shorthand for different types of graphic image files (gif).

and contained similar pictures and text. To the extent that the images did contain descriptions of sexual conduct, they would fit within the broad statutory definition of sexually explicit content. Accordingly, it is concluded that grievant violated Policy 1.75 by accessing such web sites.

The remaining issue is assessing the appropriate level of discipline for this offense. For the reasons previously discussed, it must be concluded that grievant's offense is not as severe as the employee who accesses pornographic sites that feature photographs and videos of nude people and people engaged in sexual activity. This is not to say that grievant's access of the sites featuring sexual paraphernalia and descriptions of sexual conduct was permissible – it was not. Grievant could, and should, have accessed these sites from her home computer. However, given the totality of the circumstances, grievant's offense is most appropriately categorized as one which, if repeated would warrant removal from employment – the definition of a Group II offense.

Grievant asserts, and the evidence corroborates, that grievant accessed most of the web sites at issue either during her lunch period or during a break. The agency did not rebut grievant's assertion with any credible evidence. The agency has failed to show either through the computer report or through any credible testimony that grievant accessed the Internet for excessive amounts of time. There is more to proving such abuse than merely making an allegation. The agency has not shown what amount of time it deems to constitute excessive use. Without such a standard, there is no objective basis in this case to conclude that grievant's usage was excessive. Moreover, the agency failed to show that the Internet usage of other employees has been evaluated, whether others have been considered excessive, and whether others have also been disciplined for such use.[15]

Grievant's supervisor alleged that grievant threw a telephone at someone. Grievant denied the allegation. She acknowledged that one night when she believed she was working alone in the office at about 8:00 p.m., she had an upsetting telephone conversation with her husband and slammed the phone down when she hung up. The agency failed to offer a witness to corroborate its hearsay allegation. Grievant's denial outweighs the hearsay testimony offered by the agency.

Grievant's supervisor faulted grievant for being off work for four consecutive Fridays. However, grievant offered unrebutted testimony that she had asked for and received permission to take time off on all but one of the Fridays. Grievant's supervisor charged that grievant called someone an unflattering name; grievant denied the allegation, stating that she did not call anyone a name but apologized in order to keep peace. The agency did not offer

[15] The agency may wish to review case numbers 5625, 5645 and 7960 in which another large state agency promulgated a policy with specific parameters for Internet usage, and then performed computer analyses on all employees to determine who had violated the parameters.

a witness to corroborate the hearsay allegation. Grievant's sworn denial outweighs the hearsay allegation.

Mitigation

The normal disciplinary action for a Group II offense is a Written Notice, or a Written Notice and up to ten days suspension. The *Standards of Conduct* policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has long state service (eight years total). Her recent performance evaluations have been satisfactory overall. She has no prior disciplinary actions.

However, counterbalancing these mitigating circumstances, there are aggravating circumstances. Even grievant's previous supervisor, who testified on grievant's behalf and praised her newsletter work, had counseled grievant about some of the same issues raised by grievant's current supervisor. While the current supervisor has relied too heavily on unsubstantiated hearsay regarding the alleged phone-throwing incident and the name-calling incident, she has counseled grievant on issues such as excessive personal calls, and hostility to coworkers – issues corroborated by the previous supervisor. Although grievant may have bona fide and understandable personal problems outside the workplace, it is up to her to assure that such problems do not intrude upon or adversely affect her work or her relationships with coworkers. After carefully reviewing the circumstances of this case, it is concluded that there is no basis to further reduce the discipline below that which is imposed below.

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice issued on July 12, 2006 is hereby REDUCED to a Group II Notice with 10-day suspension. The termination of grievant's employment is hereby RESCINDED. Grievant is reinstated to her former position or, if occupied, to an objectively similar position.[16] Grievant is awarded back pay from the date on which the 10-day suspension ends, and benefits and seniority are restored from the date on which suspension ends. The award of back pay must be offset by any interim earnings, and by any unemployment compensation received.

[16] Given the obvious unsatisfactory relationship between grievant and supervisor, both should be encouraged to participate in mediation. If requested, EDR will assist in facilitating mediation. Alternatively, team building or some other equivalent relationship-mending process deemed appropriate by the agency's human resource director might be an option.

The grievance statute provides that for those issues qualified for a hearing, the hearing officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the hearing officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.[17] For an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.[18]

Therefore, grievant is entitled to recover a reasonable attorney's fee, which cost shall be borne by the agency.[19] Grievant's attorney is herewith informed of his obligation to timely submit a fee petition to the Hearing Officer for review.[20]

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

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[17] Va. Code § 2.2-3005.1.A.

[18] § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. Section VI(D) EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004.

[19] Va. Code § 2.2-3005.1.A & B.

[20] *See* Section VI.D, *Rules for Conducting Grievance Hearings*, effective August 30, 2004. Counsel for the grievant shall ensure that the hearing officer *receives*, within 15 calendar days of the issuance of the hearing decision, counsel's petition for reasonable attorneys' fees.

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.[21] 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.[22] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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/David J. Latham

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David J. Latham, Esq.
Hearing Officer

[21] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[22] 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

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 8490

Hearing Date: January 23, 2007
Decision Issued: January 24, 2007
Addendum Issued: February 15, 2007

APPLICABLE LAW AND PROCEDURE

The grievance statute provides that for those issues qualified for a hearing, the hearing officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the hearing officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.[23] For an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.[24]

DISCUSSION

Following issuance of the hearing officer's decision which resulted in the grievant substantially prevailing on the merits of the grievance, grievant timely submitted a petition for attorney's fees. Grievant's petition includes attorneys' fees for services rendered by his attorney prior to the qualification of the grievance for hearing. Not all grievances proceed to a hearing; only grievances that challenge certain actions qualify for a hearing.[25] The hearing officer may award relief only for those issues that qualify for hearing. Further, the statute provides that an agency is required to bear only the expense for the hearing officer and other associated *hearing* expenses including grievant's attorneys' fees.[26] Attorney fees incurred prior to filing of a grievance or during

[23] Va. Code § 2.2-3005.1.A.
[24] § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. Section VI(D) EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004.
[25] Va. Code § 2.2-3004.A. *See also* §4, Qualification for a Hearing, *Grievance Procedure Manual*, August 30, 2004.
[26] Va. Code § 2.2-3005.1.B.

the grievance procedure's Management Resolution Steps are not expenses arising from the hearing. Accordingly, a hearing officer may award only those attorney fees incurred subsequent to qualification of the grievance for hearing and as a direct result of the hearing process.

The petition also includes a fee for attorney travel time. Time spent traveling to and from a hearing does not involve legal work, counsel, or attorney work product and, therefore, is not compensable. Accordingly, travel time is not included in the award. Therefore, grievant's attorney fees for services performed prior to qualification and for travel are not included in the award.

AWARD

The petition for fees for travel and for services rendered prior to qualification is denied. The grievant is awarded attorney fees incurred from December 14, 2006 through January 26, 2007 in the amount of $2,832.10 (22.3 hours x $127.00 per hour).[27]

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

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David J. Latham, Esq.
Hearing Officer

[27] Section VI.D. EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004, limits attorney fee reimbursement. Effective for grievances initiated on or after August 1, 2006, the EDR Director determined that the reasonable limit for attorney fees is $127 per hour.