

Issues: Group III Written Notice (internet abuse) and termination; Hearing Date: 03/01/07; Decision Issued: 03/05/07; Agency: Department of Corrections; AHO: David J. Latham, Esq.; Case No. 8520; Outcome: Group III – Full relief, written notice rescinded; Termination – Full relief, employee reinstated; **Administrative Review: AHO Reconsideration Request received 03/20/07; Reconsideration Decision 8520-R issued 03/28/07; Outcome: Decision modified: Group III – Partial relief, reduced to Group II with suspension; Termination – Full relief, employee reinstated. Administrative Review: EDR Ruling Request received 03/20/07; Outcome: request withdrawn; Administrative Review: DHRM Ruling Request received 03/20/07; Outcome: request withdrawn. Fees Addendum issued 04/26/07; Compliance Ruling requested by Agency on 05/03/07; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8520

Hearing Date: March 1, 2007
Decision Issued: March 5, 2007

PROCEDURAL ISSUES

Four weeks prior to the hearing, grievant requested certain documents and evidence from the agency.¹ The agency agreed to produce documentation by February 14, 2006 but failed to do so by that date. The agency subsequently produced some but not all of the requested documentation. On February 26, 2007, the agency asserted that it was having difficulty obtaining some of the information and requested a postponement of the hearing to allow more time for production of the documentation sought by grievant. Grievant vigorously objected to the proposed postponement, insisting that the hearing be held as scheduled notwithstanding the absence of some requested documentation.

Grievant requested as part of his relief that he be transferred to another institution. A hearing officer does not have authority to transfer employees.² Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

¹ In fact, grievant had been requesting documentation from the agency for at least two months prior to the hearing appointment but the agency was unresponsive to his requests.

² § 5.9(b)3. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

APPEARANCES

Grievant
Attorney for Grievant
Warden
Advocate for Agency
Two witnesses for Agency

ISSUES

Did grievant's conduct 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 for using a state computer to access pornographic material.³ As part of the disciplinary action, grievant was removed from state employment. The grievance proceeded through the resolution steps; when the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.⁴ The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for 22 years. At the time discipline was issued, grievant was a sergeant.⁵ Grievant has one active prior disciplinary action – a Group III Written Notice for physical abuse of an inmate.⁶

Agency policy provides that employees who access pornographic web sites are subject to corrective action under the Standards of Conduct.⁷ The same policy requires that all computer workstations must be locked and password-protected when unattended even for short periods.⁸ On multiple occasions, grievant received security awareness training⁹ which included the prohibitions in the Information Technology Security policy.

³ Agency Exhibit 1. Group III Written Notice, issued October 20, 2006.

⁴ Agency Exhibit 1. Grievance Form A, filed November 17, 2006.

⁵ Agency Exhibit 7. Grievant's Employee Work Profile Work Description, October 2004-2005.

⁶ Agency Exhibit 8. Group III Written Notice, issued July 22, 2005.

⁷ Agency Exhibit 5. Section X.D.2, Operating Procedure 310.2, *Information Technology Security*, September 1, 2004.

⁸ Section IX.A. *Id.*

⁹ Agency Exhibit 6. E-mail summarizing grievant's security awareness training, February 15, 2007.

On October 10, 2006, the computer located in the sergeant's office used by grievant developed a problem requiring repair. The computer was taken to the facility's computer technician who diagnosed the problem and repaired the computer. As a routine part of his work, the technician checked the computer to assure that all required updates were in the computer and performed a random scan to determine whether any inappropriate material was on the computer. The scan found that there were pornographic images on the computer logged in under grievant's computer profile.¹⁰ The technician alerted the assistant warden who told him to send the computer's hard drive to central office for forensic analysis. The technical security lead for information security found 1300 pictures on the computer's hard drive. While most of the pictures are innocuous, there are a significant number of photographs of people performing various sex acts.¹¹ The pornographic images were obtained from the Internet on the night of September 4/5, 2006 from 10:22 p.m. to 10:29 p.m. and, from 3:37 a.m. to 3:54 a.m. Grievant was the night shift sergeant during the night shift,¹² was assigned to work in the office where the computer was located, and was signed on to the computer during the aforementioned times. Grievant acknowledged that he signed onto his computer that night but states that he was out of his office at various times performing other duties. He denies any knowledge of the photographs or how they came to be on his computer profile.

Grievant was advised by telephone on October 14, 2006 that he would have a disciplinary hearing on October 20, 2006. At the disciplinary hearing, grievant requested that he be shown the evidence against him and be provided with dates and times the images were recorded. This evidence was not given to grievant. The agency had available Rapid Eye videotape which would have shown who was at the computer at the time the images were recorded. The agency did not produce this evidence and destroyed it prior to this hearing.

The Written Notice issued to grievant lists the date of offense as October 10, 2006, however, the actual date the pornographic images were recorded was September 4/5, 2006. The Written Notice cites "Policy 310, Section 4, D-1;" however, no such policy was produced as evidence. The agency submitted a Directive 310 but it does not contain a Section 4, D-1. The agency also submitted Operating Procedures 310.1 and 310.2 but neither contains a Section 4, D-1. Section IV of the Written Notice is blank indicating that the agency failed to consider any mitigating or supporting circumstances in this case.

APPLICABLE LAW AND OPINION

¹⁰ Each user of a computer is assigned a specific user name and password. When a user signs on to the computer, all activity is logged under that user's profile.

¹¹ Agency Exhibit 2. Examples of images. See also Agency Exhibit 11, CD containing all pictures found on the computer under grievant's profile.

¹² Agency Exhibit 3. *Daily Duty Roster*, September 04/05, 2006.

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 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 his evidence first and must prove his claim by a preponderance of the evidence.¹³

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 (DHRM) 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. Section V.B of Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.¹⁴ The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section XII of the DOC *Standards of Conduct* addresses Group III offenses, which are defined identically to the DHRM *Standards of Conduct*.¹⁵

¹³ § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

¹⁴ Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁵ Agency Exhibit 9. Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005.

Grievant stipulated, and the evidence corroborates, that the images at issue: 1) are pornographic and, 2) were found on grievant's computer user profile. It is undisputed that grievant worked on the night the images were placed on the computer and that he was logged onto the computer at the times the images were recorded. However, the agency has failed to demonstrate that grievant accessed or recorded the images. Because grievant acknowledged that he was away from his computer at various times and had left it logged on under his password, other employee(s) could have used grievant's computer during his absence. The agency had available to it Rapid Eye videotape which would have conclusively proven who used the computer at the time the images were accessed. The agency failed to produce that evidence. When a party has evidence that would have resolved a factual issue and fails to produce the evidence, the trier of fact must conclude that the evidence would not have been favorable to the party who failed to produce the evidence. Accordingly, it is concluded that the videotape would not corroborate the agency's assertion that grievant accessed the inappropriate images. Therefore, the agency has not borne the burden of proof to show that grievant accessed or recorded the pornographic images.

Grievant argues that, although the agency has a "zero tolerance" policy for pornographic images, enforcement has been selective and inequitable. Grievant argues that his discipline was disproportionately harsh compared with that of other employees. One employee was found to be "surfing" the ESPN sports site excessively and was counseled. Two employees were found to have on their profiles pictures of women in bathing suits; both were given Group I Written Notices. One employee had accessed pictures of women with full frontal nudity; that employee received a Group II Written Notice. The agency explains that although it does not tolerate such images, the disciplinary action taken in each case is based upon individual circumstances.

Grievant asserts that he was not given due process prior to the issuance of discipline.¹⁶ Grievant's assertion has merit. Prior to being discharged, grievant was not shown the images he was charged with accessing, was not given the dates and times such images were accessed, and was not shown the Rapid Eye videotape. Although the agency did not provide grievant with **full** documentation or thereafter give him a reasonable opportunity to respond, the lack of pre-termination due process has been cured by this hearing. Grievant has received the information explaining the charge and has had an opportunity (while represented by an attorney) to respond to and rebut the charge.

¹⁶ Agency Exhibit 9. Section VII.C, Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005, requires that "the appointing authority and personnel officer shall gather **full** documentation supporting [removal] action and shall notify the employee, verbally or in writing, of the reasons for such removal, giving the employee a **reasonable** opportunity to respond to the charges." (Emphasis added)

Grievant has acknowledged that he left his computer unattended for periods of time without logging off. However, the agency did not charge grievant with this offense. Moreover, grievant did not have an opportunity to prepare a defense to this charge. When the agency raised this charge during the hearing, grievant contended that it is common practice for employees not to log off their computers when leaving them unattended for brief periods of time. Since this charge was not part of the Written Notice, grievant did not know it would be raised at hearing and did not have an opportunity to call witnesses to corroborate his contention. Moreover, the agency did not rebut grievant's contention by bringing its own witnesses to overcome grievant's defense.

Accordingly, the agency has not borne the burden of proof to show that grievant used a state computer to access pornographic material. Moreover, it has not shown that grievant was even aware that such material was on his computer.

DECISION

The decision of the agency is reversed.

The Group III Written Notice and removal from state employment effective October 20, 2006 are hereby RESCINDED. Grievant is reinstated to his former position or, if occupied, to an objectively similar position. Grievant is awarded full back pay, and benefits and seniority are restored. The award of back pay must be offset by any interim earnings, and by any unemployment compensation received.

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

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.

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 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. 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:

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.

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.

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

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

REVISED DECISION OF HEARING OFFICER

In re:

Case No: 8520-R

Hearing Date:	March 1, 2007
Decision Issued:	March 5, 2007
Reconsideration Request Received:	March 20, 2007
Response to Reconsideration:	March 29, 2007

**This reconsideration decision incorporates a revised decision.
All previous copies of the decision issued on March 5, 2007
should be destroyed.**

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.²³

OPINION

The agency requests reconsideration of the decision for three points of contention. This response addresses each issue in the order presented in the agency's request.

²³ § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

(1) The agency takes issue with the finding of fact that the agency had available to it Rapid Eye video recording which would have conclusively proved who used the computer at the time the images were accessed, and that the agency failed to produce this evidence. The agency has correctly noted that the 30-day retrieval window for Rapid Eye video recording had already passed when the computer technician took grievant's computer for repair on October 10, 2006. The decision is revised accordingly.

(2) The agency also correctly notes that it was grievant who raised as a defense the fact that he left his computer unattended for periods of time without logging off. The decision is revised accordingly.

(3) The agency argues that grievant's assertion that it was common practice to not log off computers when leaving them unattended for brief periods is a new "issue." Grievant's assertion is not a new "issue" because that term means the issue(s) being grieved in the grievance. In the instant case, the "issue" is the disciplinary action and termination of grievant's employment. Grievant's argument about the common practice of other employees is merely one of the defenses he raised. The grievance procedure does not require a grievant to include every possible defense in the written grievance. Therefore, grievant has the right to raise this argument in his own defense.

Each party to a hearing is obligated to anticipate possible defenses that the opposing party may raise, and then be prepared to offer additional witnesses or documents to rebut the opposing party's claim.²⁴ The agency had the opportunity to anticipate this defense and could have called rebuttal witnesses if it believed grievant's claim was bogus. When the opposing party does not rebut claims made by a party, the adjudicator must conclude that the agency has no evidence to the contrary. In such a circumstance, grievant's testimony is unrebutted and therefore, taken as fact.

It is agreed that employees are responsible for their accounts and should not leave their computers logged on when they leave the area. To the extent that grievant failed to comply with this written instruction, he violated Section IX.A of Operating Procedure 310.2. The decision is revised to reflect this offense.

PROCEDURAL ISSUES

Four weeks prior to the hearing, grievant requested certain documents and evidence from the agency.²⁵ The agency agreed to produce documentation by February 14, 2006 but failed to do so by that date. The agency subsequently produced some but not all of the requested documentation. On February 26, 2007, the agency asserted that it was having difficulty obtaining some of the information and requested a postponement of the hearing to allow more time for production of the documentation sought by grievant. Grievant vigorously objected to the proposed postponement, insisting that the hearing be held as scheduled notwithstanding the absence of some requested documentation.

²⁴ See www.edr.virginia.gov. The Grievance Hearing, Section VII, *Basic Skills for Presenting Your Case at Hearing*,

²⁵ In fact, grievant had been requesting documentation from the agency for at least two months prior to the hearing appointment but the agency was unresponsive to his requests.

Grievant requested as part of his relief that he be transferred to another institution. A hearing officer does not have authority to transfer employees.²⁶ Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, “Management reserves the exclusive right to manage the affairs and operations of state government.”

APPEARANCES

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ISSUES

Did grievant’s conduct 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 for using a state computer to access pornographic material.²⁷ As part of the disciplinary action, grievant was removed from state employment. The grievance proceeded through the resolution steps; when the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.²⁸ The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for 22 years. At the time discipline was issued, grievant was a sergeant.²⁹ Grievant has one active prior disciplinary action – a Group III Written Notice for physical abuse of an inmate.³⁰

Agency policy provides that employees who access pornographic web sites are subject to corrective action under the Standards of Conduct.³¹ The policy also provides that all workstations, when unattended even for short periods must be locked and password protected.³² On multiple occasions, grievant received security awareness training³³ which included the prohibitions in the Information Technology Security policy.

²⁶ § 5.9(b)3. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

²⁷ Agency Exhibit 1. Group III Written Notice, issued October 20, 2006.

²⁸ Agency Exhibit 1. Grievance Form A, filed November 17, 2006.

²⁹ Agency Exhibit 7. Grievant’s Employee Work Profile Work Description, October 2004-2005.

³⁰ Agency Exhibit 8. Group III Written Notice, issued July 22, 2005.

³¹ Agency Exhibit 5. Section X.D.2, Operating Procedure 310.2, *Information Technology Security*, September 1, 2004.

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³³ Agency Exhibit 6. E-mail summarizing grievant’s security awareness training, February 15, 2007.

On October 10, 2006, the computer located in the sergeant's office used by grievant developed a problem requiring repair. The computer was taken to the facility's computer technician who diagnosed the problem and repaired the computer. As a routine part of his work, the technician checked the computer to assure that all required updates were in the computer and performed a random scan to determine whether any inappropriate material was on the computer. The scan found that there were pornographic images on the computer logged in under grievant's computer profile.³⁴ The technician alerted the assistant warden who told him to send the computer's hard drive to central office for forensic analysis. The technical security lead for information security found 1300 pictures on the computer's hard drive. While most of the pictures are innocuous, there are a significant number of photographs of people performing various sex acts.³⁵ The pornographic images were obtained from the Internet on the night of September 4/5, 2006 from 10:22 p.m. to 10:29 p.m. and, from 3:37 a.m. to 3:54 a.m. Grievant was the night shift sergeant during the night shift,³⁶ was assigned to work in the office where the computer was located, and was signed on to the computer during the aforementioned times. Grievant acknowledged that he signed onto his computer that night but states that he was out of his office at various times performing other duties. He denies any knowledge of the photographs or how they came to be on his computer profile.

Grievant was advised by telephone on October 14, 2006 that he would have a disciplinary hearing on October 20, 2006. At the disciplinary hearing, grievant requested that he be shown the evidence against him and be provided with dates and times the images were recorded. This evidence was not given to grievant. The agency had Rapid Eye videotape which would have shown who was at the computer at the time the images were recorded but these recordings are routinely held for 30 days and thereafter recycled or destroyed. Because the computer technician first discovered the images more than 30 days after the date on which they were recorded, the recording was no longer available when the offense was discovered.

The Written Notice issued to grievant lists the date of offense as October 10, 2006, however, the actual date the pornographic images were recorded was September 4/5, 2006. The Written Notice cites "Policy 310, Section 4, D-1;" however, no such policy was produced as evidence. The agency submitted a Directive 310 but it does not contain a Section 4, D-1. The agency also submitted Operating Procedures 310.1 and 310.2 but neither contains a Section 4, D-1. Section IV of the Written Notice is blank indicating that the agency failed to consider any mitigating or supporting circumstances in this case.

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

³⁴ Each user of a computer is assigned a specific user name and password. When a user signs on to the computer, all activity is logged under that user's profile.

³⁵ Agency Exhibit 2. Examples of images. See also Agency Exhibit 11, CD containing all pictures found on the computer under grievant's profile.

³⁶ Agency Exhibit 3. *Daily Duty Roster*, September 04/05, 2006.

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 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 his evidence first and must prove his claim by a preponderance of the evidence.³⁷

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 (DHRM) 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. Section V.B of Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.³⁸ The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section XII of the DOC *Standards of Conduct* addresses Group III offenses, which are defined identically to the DHRM *Standards of Conduct*.³⁹

Grievant stipulated, and the evidence corroborates, that the images at issue: 1) are pornographic and, 2) were found on grievant's computer user profile. It is undisputed that grievant worked on the night the images were placed on the computer and that he was logged onto the computer at the times the images were recorded. However, the agency has failed to demonstrate that grievant accessed or recorded the images. Because grievant acknowledged that he was away from his computer at various times and had left it logged on under his password, other employee(s) *could* have used grievant's computer during his absence. The pornographic images were all accessed on a single night. There is no evidence that such images were accessed on any other dates. The fact that this was a one-time occurrence supports grievant's contention that an unauthorized person may have used his computer. Although the

³⁷ § 5.8, *EDR Grievance Procedure Manual*, effective August 30, 2004.

³⁸ Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

³⁹ Agency Exhibit 9. Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005.

images were on grievant's account, the agency has not borne the burden of proof to show that he accessed or recorded the images.

Grievant argues that, although the agency has a "zero tolerance" policy for pornographic images, enforcement has been selective and inequitable. Grievant argues that his discipline was disproportionately harsh compared with that of other employees. One employee was found to be "surfing" the ESPN sports site excessively and was counseled. Two employees were found to have on their profiles pictures of women in bathing suits; both were given Group I Written Notices. One employee had accessed pictures of women with full frontal nudity; that employee received a Group II Written Notice. The agency explains that although it does not tolerate such images, the disciplinary action taken in each case is based upon individual circumstances.

Grievant asserts that he was not given due process prior to the issuance of discipline.⁴⁰ Grievant's assertion has merit. Prior to being discharged, grievant was not given the dates and times such images were accessed. Although the agency did not provide grievant with full documentation or thereafter give him a reasonable opportunity to respond, the lack of pre-termination due process has been cured by this hearing. Grievant has received the information explaining the charge and has had an opportunity (while represented by an attorney) to respond to and rebut the charge.

Grievant has acknowledged that he left his computer unattended for periods of time without logging off. Grievant contended that it is common practice for employees not to log off their computers when leaving them unattended for brief periods of time. The agency did not contest grievant's assertion by offering any witnesses to rebut grievant's defense. However, even if grievant is correct that others do not log off unattended computers, that does not excuse his violation of the policy. The agency can only discipline those violators who are reported. Therefore, grievant's failure to log off or lock his computer was a violation of policy, e.g., Section IX.A of Operating Procedures 310.2. Failure to comply with established written policy is a Group II offense.

The agency has not borne the burden of proof to show that grievant accessed or stored pornographic material. Moreover, it has not shown that grievant was even aware that such material was on his computer. However, the agency has demonstrated that grievant failed to comply with established written policy by leave his logged-on computer unattended for a period of time.

DECISION

The decision of the agency is modified.

The Group III Written Notice is hereby REDUCED to a Group II Written Notice with 10 days suspension.

⁴⁰ Agency Exhibit 9. Section VII.C, Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005, requires that "the appointing authority and personnel officer shall gather **full** documentation supporting [removal] action and shall notify the employee, verbally or in writing, of the reasons for such removal, giving the employee a **reasonable** opportunity to respond to the charges." (Emphasis added)

Grievant's removal from state employment effective October 20, 2006 is hereby RESCINDED. Grievant is reinstated to his former position or, if occupied, to an objectively similar position. Grievant is awarded back pay from the point at which his suspension ends (10 workdays from the date of termination). Benefits and seniority are restored from the date at which suspension ends. The award of back pay must be offset by any interim earnings, and by any unemployment compensation received.

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.⁴¹ 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.⁴²

Therefore, grievant is entitled to recover a reasonable attorney's fee, which cost shall be borne by the agency.⁴³ Grievant's attorney is herewith informed of his obligation to timely submit a fee petition to the Hearing Officer for review.⁴⁴

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. Address your request to:

Director

⁴¹ Va. Code § 2.2-3005.1.A.

⁴² § 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.

⁴³ Va. Code § 2.2-3005.1.A & B.

⁴⁴ 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.

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:

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.⁴⁵ 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.⁴⁶ 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]

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 HRM, the hearing officer has issued a revised decision.

⁴⁵ 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).

⁴⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

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.⁴⁷

S/ David J. Latham

David J. Latham, Esq.
Hearing Officer

⁴⁷ 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).



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 8520

Hearing Date:	March 1, 2007
Decision Issued:	March 5, 2007
Reconsideration Request:	March 20, 2007
Reconsideration Response:	March 29, 2007
Addendum Issued:	April 26, 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.⁴⁸ 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.⁴⁹

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 13.6 hours of 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

⁴⁸ Va. Code § 2.2-3005.1.A.

⁴⁹ § 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.

qualify for a hearing.⁵⁰ 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.⁵¹ Attorney fees incurred during the grievance procedure's Management Resolution Step stage 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. In this case, the agency head qualified this case for hearing on December 11, 2006. Attorney fees prior to that date are not reimbursable.

The petition also charges a fee that includes apparent attorney travel time. Time spent traveling to and from a hearing does not involve legal work, counsel, or attorney work product and is, therefore, not compensable. Accordingly, time billed in excess of 5.0 hours on the day of hearing is not included in the award. Therefore, grievant's attorney fees for services performed prior to qualification and for travel time on the day of hearing are not included in the award.

AWARD

The petition for fees for travel and for services rendered prior to qualification of the grievance is denied. The grievant is awarded attorney fees incurred from December 13, 2006 through December 27, 2006 in the amount of \$387.50 (3.1 hours at the billed rate of \$125.00 per hour) and, from January 18, 2007 through April 19, 2007 in the amount of \$5,461.00 (43.0 hours at the maximum allowable rate of \$127.00 per hour).⁵² The total amount awarded is \$5,848.50.

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.

David J. Latham, Esq.
Hearing Officer

⁵⁰ Va. Code § 2.2-3004.A. See also §4, Qualification for a Hearing, *Grievance Procedure Manual*, August 30, 2004.

⁵¹ Va. Code § 2.2-3005.1.B.

⁵² Section VI.D. *EDR Rules for Conducting Grievance Hearings*, effective August 1, 2006, limits attorney fee reimbursement to \$127.00 per hour.