

Issue: Group II Written Notice (violation of Internet/Computer policy); Hearing Date: 05/08/07; Decision Issued: 06/15/07; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8548, 8549, 8566; Outcome: Partial Relief.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8548 / 8549 / 8566**

Hearing Date: May 8, 2007  
Decision Issued: June 15, 2007

**PROCEDURAL HISTORY**

On November 17, 2006, Grievant L was issued a Group II Written Notice of disciplinary action for violation of the DHRM Policy 1.75, Use of Internet and Electronic Communication Systems. On November 17, 2006, Grievant H was issued a Group II Written Notice of disciplinary action for violation of DHRM Policy 1.75, Use of Internet and Electronic Communication Systems. On November 28, 2006, Grievant C was issued a Group II Written Notice of disciplinary action for a violation of DHRM policy 1.75, Use of Internet and Electronic Communication Systems.

The Grievants timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievants and they requested hearings. The EDR Director consolidated the three grievances for one hearing.<sup>1</sup> On April 9, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 8, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

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<sup>1</sup> See EDR Director's Ruling Number 2007-1572, 2007-1573, and 2007-1574.

Grievant L  
Grievant H  
Grievant C  
Agency Party Designee  
Agency Representative  
Witnesses

### **ISSUE**

1. Whether Grievants engaged in the behavior described in the Written Notices?
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 actions, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievants were 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 employs Grievant H as a Transportation Operation Manager II, Grievant C as an Equipment Repair Supervisor, and Grievant L as an Administrative Office Specialist III. Each employee works in District C.<sup>2</sup> No evidence of prior active disciplinary action against the Grievants was introduced during the hearing.

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<sup>2</sup> Grievant L has been employed by the Agency for approximately 18 years. Grievant H has been employed by the Agency for approximately 7 years. Grievant C has been employed by the Agency for approximately 27 years.

The Latest Japanese Swimsuits email consists of seven pictures showing young women wearing string bathing suits. Two pictures show women whose bathing suits that do not cover their pubic hair. Another picture shows a woman whose left breast is exposed.

Grievant C received the Latest Japanese Swimsuit email on September 6, 2006 and forwarded it to other employees using the Agency's computer system. Grievant L received the email on September 15, 2006 but did not forward the email. Grievant H did not receive the email.

The Three Stages of a Man's Life email consists of three pictures of a male and a female lion. The first picture is entitled "Before Marriage" and shows a male lion roaring while he mates with a female lion. The second picture is entitled "After Marriage" and shows a male lion in a corner of a cage with a female lion roaring at the male lion and intimidating the male lion. The third picture is entitled "After the Divorce" and shows a male lion skin rug.

On July 18, 2006, Grievant L sent the Three Stages of a Man's Life email to Grievant H and two other employees. Grievant H read the email and on July 19, 2006 forwarded the email. Grievant C received the email on July 18, 2006, but did not forward the email.

VDOT employees working in districts other than District C received and forwarded the two emails. They were given oral or written counseling. Unlike the three Grievants in this case, none of the other employees receiving and sending the two emails received disciplinary Written Notices.

## **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).<sup>3</sup> Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

DHRM Policy 1.75 governs State employee use of the internet. This policy provides:

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

Certain activities are prohibited when using the Internet or electronic communications. These include, but are not limited to:

- accessing, downloading, printing or storing information with sexually explicit content as prohibited by law (see Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001);
- downloading or transmitting fraudulent, threatening, obscene, intimidating, defamatory, harassing, discriminatory, or otherwise unlawful messages or images;
- installing or downloading computer software, programs, or executable files contrary to policy;
- uploading or downloading copyrighted materials or proprietary agency information contrary to policy;
- uploading or downloading access-restricted agency information contrary to policy or in violation of agency policy;
- sending e-mail using another's identity, an assumed name, or anonymously;
- permitting a non-user to use for purposes of communicating the message of some third party individual or organization;
- any other activities designated as prohibited by the agency.

DHRM Policy 1.75 permits State employees to use the internet for personal use within certain parameters as follows:

Personal use means use that is not job-related. In general, incidental and occasional personal use of the Commonwealth's Internet access or electronic communication systems is permitted; however, personal use is prohibited if it:

- interferes with the user's productivity or work performance, or with any other employee's productivity or work performance;
- adversely affects the efficient operation of the computer system;
- violates any provision of this policy, any supplemental policy adopted by the agency supplying the Internet or electronic communication systems, or any other policy, regulation, law or guideline as set forth by local, State or Federal law. (See Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001.)

The Agency's Internal Auditor reviewed the Latest Japanese Swimsuits email and concluded that the email contained nudity but that the images did not meet the criteria for sexually explicit material as is defined in Code of Virginia § 2.2 - 2827 and prohibited by DHRM Policy 1.75. At the hearing, the Agency asserted that the two emails were contrary to DHRM Policy 1.75 but not because they were sexually explicit. It is not necessary for the Hearing Officer to address whether the emails contained sexually explicit content because the Agency did not disciplined the employees for sending sexually explicit content.

The Agency contends the employees sent emails that were sexually oriented and inappropriate in nature and that sending such the emails was contrary to DHRM Policy 1.75. The Agency's argument fails. DHRM Policy 1.75 prohibits sexually explicit content, but it does not prohibit sexually oriented content that is not also sexually explicit.

The two emails did not violate DHRM Policy 1.75 because they do not relate to:

- downloading or transmitting fraudulent, threatening, obscene, intimidating, defamatory, harassing, discriminatory, or otherwise unlawful messages or images;
- installing or downloading computer software, programs, or executable files contrary to policy;
- uploading or downloading copyrighted materials or proprietary agency information contrary to policy;
- uploading or downloading access-restricted agency information contrary to policy or in violation of agency policy;
- sending e-mail using another's identity, an assumed name, or anonymously;
- permitting a non-user to use for purposes of communicating the message of some third party individual or organization;
- any other activities designated as prohibited by the agency.

The Agency contends the emails represent an "[u]nauthorized use or misuse of state property or records". The Agency's argument is untenable. The three employees were authorized to use the Agency's computer systems for personal use such as sending emails unrelated the Agency's business. The employees did not misuse state property because the intended use of the Agency's computer system was to send emails. The employees did not divert the Agency's computer system for private commercial use or to gain some personal benefit.

“Inadequate or unsatisfactory work performance” is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that the Grievants were responsible for performing certain duties and that the Grievants failed to perform those duties. This is not a difficult standard to meet.

Agency employees are expected to communicate in a professional manner without upsetting or offending other employees. Grievant C knew or should have known that the Latest Japanese Swimsuits email could be offensive to other employees because it depicted nudity. Grievant H and Grievant L knew or should have known that the Three Stages of a Man's Life could be offensive to other employees because it depicted copulation, conflict, and harm between Lions and then drew an analogy to humans. Both emails were sent to Mr. C. who was offended. Upon receiving the emails he replied, "Don't send me stuff like this again".<sup>4</sup> The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. By sending one of the two emails, each Grievant engaged in behavior justify the issuance of disciplinary action.<sup>5</sup>

Grievants argued that the Agency failed to comply with the deadlines in the Grievance Procedure Manual. To the extent the Agency failed to comply with the GPM during the step process, the Grievants should have brought their concerns to the EDR Director. To the extent the Grievants may have been denied procedural due process, the formal grievance hearing cured those defects.

### 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...”<sup>6</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

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<sup>4</sup> Agency Exhibit 7.

<sup>5</sup> The Agency argued that merely receiving an offensive email without reporting it would justify disciplinary action. The Agency has not presented sufficient evidence to show that the three employees were aware of their obligation to report receipt of offensive emails and to whom they would report such information.

<sup>6</sup> *Va. Code § 2.2-3005.*

Grievants contend that the disciplinary action should be mitigated because the Agency has inconsistently disciplined similarly situated employees. The two emails were sent to VDOT employees working in other districts. The employees working in those districts received oral or written counseling but not Written Notices. Grievants argued they should only receive counseling rather than Written Notices.

Although the three Grievants and the employees who were not disciplined work for the same Agency, they are not similarly situated. Each district has a separate chain of command. Each district has a separate human resource office. Each district has an opportunity to set policies specific to its district. Although managers in District C consulted with the Agency's central office human resource staff, the decision to discipline the three employees was made by managers in District C. All of the employees working in District C who sent either of the two emails were disciplined. The Grievants were treated consistently with other employees and their district.<sup>7</sup> In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

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

## 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:

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<sup>7</sup> The Grievants also argued that their long tenure and satisfactory work performance would justify mitigation. Although agencies may consider length of employment and satisfactory work performance, those factors alone are not a basis to mitigate disciplinary action under the *Rules*.



Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of 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.<sup>8</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>8</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.