Issue: Group II Written Notice (misuse of State property); Hearing Date: 12/17/07; Decision Issued: 12/21/07; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8720; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8720

Hearing Date: December 17, 2007
Decision Issued: December 21, 2007

PROCEDURAL HISTORY

On May 7, 2007, Grievant was issued a Group II Written Notice of disciplinary action for misuse of State property. On June 6, 2007, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On October 12, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 17, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

5. Whether the Agency retaliated against Grievant?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Transportation employs Grievant as a Superintendent of Operations at one of its Facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On November 21, 2005, Grievant received a Counseling Memorandum from her Supervisor at the time. The memorandum stated:

> On or about November 3, 2005 you received an e-mail from a coworker entitled "How to recognize the male worm" and another e-mail on November 14, 2005 entitled "What am I?? Can you guess". Both of these e-mails contain material inappropriate for the workplace. Furthermore you forwarded the first email to fellow co-worker/subordinates. As a manager, you are not [only] expected to lead by example but also to curtail inappropriate actions and advise management of these types of incidents for corrective measure to be taken.
>
> Your actions could be considered misuse of state property as both e-mails were not work related but of a personal nature. The importance of a positive and professional approach to these types of situations is paramount.

Any continuation or condoning of this behavior in the future will result in corrective action up to and/or including termination.

On February 6, 2007, Grievant sent an email entitled "The Miracle of Digital Editing" to eight people. Four of those people were VDOT employees. The first seven pictures are "Before" and "After" pictures of an attractive young woman wearing a bikini. For example, the first two pictures are close ups of the top of the woman's right-hand. The "Before" picture shows wrinkles and veins on her hand. The "After" picture shows those wrinkles and veins removed for a more youthful appearance. The next two pictures show changes to the woman's belly. The fifth picture shows only the "After" Picture of the woman's face. The "Before" picture is missing. The sixth and seventh pictures show changes to the woman's body from the top of her head to the middle of her thighs.

The seventh and eighth pictures show a close-up of a woman's right eye. The seventh picture shows wrinkles around the eye. The eighth picture shows those wrinkles removed.

The 10th through 12th pictures show a woman's face before and after wrinkles have been removed.

The 13th picture shows the head of a donkey and is entitled "Before". The 14th picture is a portrayed of a Presidential candidate and is entitled "After".[1]

The 15th picture shows two baby monkeys laughing along with the text:

It's easy to laugh!
Have a great day!
Send this to your friends
We are all entitled to a smile

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."[2] 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

[1] The Hearing Officer construes this email to express an opinion that the candidate is an "ass". In other words, the email reflects a political opinion.

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

VDOT Department Policy Memoranda Manual 1-20 sets forth the Agency's policy "regarding the use, accessibility, and retention requirements of electronic mail …." This policy states:

> Inappropriate uses of VDOT e-mail services are specifically prohibited. They include, but are not limited to, the following:
>
> - any use that:
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> - violates federal, state, or local laws, or VDOT policies and rules;
> - is for a commercial purpose outside VDOT auspices;
> - is for personal gain not otherwise permitted by applicable policy;
> - communicates in a manner to suggest the communication is from another party;
> - involves unauthorized access to another's files or communications;
> - disseminates sexually-oriented messages or **chain letters**; or
> - disseminates jokes or material that disparages any group or individual on the basis of race, sex, religion, or ethnicity; or otherwise violates VDOT's Equal Opportunity/Affirmative Action Policy (effective 3/1/00); or
> - intimidates or coerces others for any purpose. (Emphasis added).

The Agency policy also provides:

> Violations of this policy shall be considered violations of written procedures under the Department of Human Resource Management's Standards of Conduct Policy 1.60 (effective 9/16/93), and may be considered improper use of state equipment and time, or criminal violations.

The Agency provided Grievant with training regarding usage of the Agency's email system. As part of this training, Grievant was informed that, "Inappropriate e-mails may include: … Chain letters, hoaxes, etc. [and] potentially other e-mail or electronic message usage."[3]

The Agency presents three reasons why the disciplinary action should be upheld. First, the Agency contends the Grievant's email is inappropriate because it depicts a woman in a bikini.[4] The Agency has not presented sufficient evidence to show the Grievant knew or should have known that sending an email depicting a woman in a bikini would violate Agency policy.[5] The written counseling Grievant received in

[3] Agency Exhibit 11.

[4] The picture of a woman in a bikini is not sufficient to establish that it is sexually-oriented. The woman's demeanor is not enticing or lascivious.

[5] Neither the DHRM policy, nor the Agency policy addresses images of women wearing bikinis. The Agency's training does not appear to have addressed the issue as well.

November 2005 does not have the two objectionable emails attached. It is not possible for the Hearing Officer to determine the nature and scope of the counseling that was given to Grievant in 2005 would address emails containing pictures of a woman in a bikini.

Second, the Agency contends Grievant's email is inappropriate because it demeans a candidate for political office. This argument fails. The email reflects a political opinion similar to what one might see when reading a political cartoon in a newspaper. The Agency has not placed Grievant on notice that she may not send emails reflecting political opinions.

Third, the Agency contends Grievant's email is a chain letter. Whether Grievant's email is a chain letter depends on its definition.[6] *Webster's New Universal Unabridged Dictionary* defines "chain letter" as:

> a letter sent to a number of people, each of whom is asked to make and mail copies to other people who are to do likewise, often used as a means of spreading a message or raising money.

Webster's II New Riverside Dictionary defines "chain letter" as:

> a letter directing the recipient to send out multiple copies so that its circulation increases in a geometric progression.

The email Grievant sent states:

> Send this to your friends
> We are all entitled to a smile

This email is a "chain letter". It directs the recipient to send out multiple copies so that its circulation increases in a geometric progression. The record supports that the email was effective in becoming a chain letter. For example, Grievant sent the email to eight people. At least one of those individuals sent the email to another VDOT employee. That VDOT employee sent the email to several other VDOT employees. One of the recipients, unknown to Grievant, was offended by the email and complained to Agency Human Resource Officers. In short, the email made its way through VDOT staff located in different parts of the State in the manner consistent with a chain letter.

The Agency has presented sufficient evidence to show that Grievant sent a chain letter to several VDOT employees thereby acting contrary to VDOT Department Policy Memoranda Manual 1-20. The Agency's policy defines this offense as the "improper use of state equipment." The Agency's level of discipline is consistent with DHRM Policy 1.60, Standards of Conduct, which makes failure to follow written policy a Group

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[6] Black's Law Dictionary does not define "chain letter".

II offense. Accordingly, the Agency's issuance to Grievant of a Group II Written Notice must be upheld.

Grievant argues that the November 2005 counseling memorandum expired and, thus, there is no basis to take disciplinary action against her. Contrary to Grievant's assertion, counseling memoranda do not have an expiration date. In addition, issuing a written counseling memorandum is not a condition precedent to taking disciplinary action in the form of a Written Notice.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[7] Under the *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.

Grievant contends the disciplinary action should be mitigated because the Agency inconsistently disciplined employees. For example, Grievant contends that some employees were given written counseling for sending the email while others were not. In order to show the inconsistent application of discipline, Grievant must show similarly situated employees were treated differently from how she was treated. Whether some employees receive counseling memorandums and others did not for "first offenses" is not relevant. The Agency's practice was to issue written counseling memoranda to employees sending inappropriate email for the first time. Employees sending a second inappropriate email were given Group II Written Notices. Grievant has not presented evidence of any employees who received written counseling memorandum for a first incident but were not given written notices for a second incident. Grievant has not established that the Agency inconsistently disciplined employees.

Grievant contends her immediate supervisor condoned her email. Grievant sent a copy of the email to the Supervisor at his home. The Supervisor did not instruct Grievant to stop sending such emails. Although it might have been a preferred practice for the Supervisor to have informed Grievant to stop sending emails that might be inappropriate, the Supervisor did not encourage or cause Grievant to send the February 6, 2007 email. The Supervisor's inaction is insufficient to mitigate the discipline issued to Grievant.

[7] *Va. Code § 2.2-3005.*

Grievant contends the Agency did not timely issue the Written Notice to her. Approximately three months passed from the time the Agency learned of Grievant's email to the date it issued a Written Notice. Grievant's argument fails. Because of the number of employees involved in receiving and forwarding the February 6, 2007 email and other emails, the Agency required approximately three months to take disciplinary action. This delay was reasonable.

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[8] (2) suffered a materially adverse action[9]; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.[10]

Grievant presented evidence that she complained about the Agency's hiring practices.[11] Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established a causal link between the adverse action and the protected activity. The Agency disciplined Grievant because she sent an email that the Agency deemed inappropriate. Agency managers only learned of Grievant's email from a complaint from another employee who received the email. Grievant was one of many employees against whom the Agency took corrective measure.

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[8] *See* Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[9] On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

[10] This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

[11] The Hearing Officer will assume for the sake of argument that Grievant's complaint constituted engaging in a protected activity.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

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

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

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

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction

in which the grievance arose within **30 days** of the date when the decision becomes final.[12]

[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

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