

Issues: Group II – failure to perform assigned work, Group II – failure to follow policy (1.75), Group II – failure to follow policy (1.60), Group II – abuse of State time and property, Termination, Retaliation (other), Discrimination (disability); Hearing Date: 01/12/09; Decision Issued: 01/19/09; Agency: VCCS; AHO: Lorin A. Costanzo, Esq.; Case No. 8958; Outcome: No Relief – Agency Upheld in Full.

**COMMONWEALTH OF VIRGINIA  
VIRGINIA COMMUNITY COLLEGE SYSTEM**

**DECISION OF HEARING OFFICER**

**In the matter of: Case No: 8958**

Hearing Date: January 12, 2009  
Decision Issued: January 19, 2009

**PROCEDURAL HISTORY**

On July 8, 2008, Grievant was issued four Group II Written Notices of disciplinary action with termination. Grievant timely filed a Grievance to challenge the action of Agency on August 6, 2008. Upon the parties not being able to reach an agreeable resolution of matters Grievant, on August 25, 2008, requested a hearing and this matter was qualified for hearing by agency head on September 4, 2008.

This matter was initially assigned a hearing officer (other than the undersigned) who had set the matter for hearing but had to continue the hearing date upon matters which arose. On December 15, 2008 the undersigned was appointed as hearing officer in this cause. A pre-hearing telephone conference was held December 18, 2008 and the Grievance Hearing was held on January 12, 2009.

**Four Written Notices:** Grievant was given four Written Notices which were each issued on July 8, 2008 with the disciplinary action of Termination effective July 11, 2008 at 5:00 p.m. The four Written Notices provided as follows:

**Written Notice #1:**

(Group II with Termination - Offense date(s): "Various 2008")

"Failure to perform assigned work due to inappropriate management of time and resources during normal working hours on a ongoing basis as evidenced by missed deadlines for projects, lack of productivity in college web site migration and failure to complete assignments, requiring others to receive her assignments and projects. Supervisors have addressed missed deadlines on projects and lack of progress on assigned projects critical to the college. This violation has occurred over the calendar year for which the employee has been counseled. Evidence of computer usage shows days of non-job related Internet surfing, which has interfered with work activities, project completion and complying with established deadlines. Trust and confidence in the employee to fulfill job expectations have been severely impacted."

**Written Notice #2:**

(Group II with Termination - Offense date(s): "5/14, 15, 16, 22, & 23 2008")

"Failure to comply with written policy (DHRM 1.75, "Use of Internet and Electronic Communications Systems") VCCS and VWCC computer usage policies due to substantial and inappropriate use of the Internet during normal work hours on an ongoing basis as evidenced by documentation on the use of the college issued computer. Evidence of computer usage for the past two months reflects significant time in non job-related and

personal use of your work computer. Time spent surfing on the non job-related Internet sites has interfered with work productivity and performance and has adversely impacted the operations of the work unit by delaying and impeding progress in assigned work to migrate the college's web site. This violation has occurred over the calendar year, and specifically during the last two months. Evidence of computer usage shows days of non-job related internet surfing, which violates the ethics of a professional IT position and her workplace ethics training."

**Written Notice #3:**

(Group II with Termination - Offense date(s): "Various 2008")

"Failure to comply with written policy (DHRM 1.60, "Standards of Conduct") regarding the minimum expectations of all employees. Specifically, due to significant inappropriate use of the Internet, the employee has failed to meet expectations for performing assigned duties and responsibilities with the highest degree of public trust; devote full effort to job responsibilities during work hours; meeting or exceeding job performance expectations;\ use state equipment, time and resources judiciously and as authorized; make work-related decisions and/or take actions that are in the best interest of the agency; work cooperatively to achieve work unit and agency goals and objectives; and, conduct themselves at all times in a manner that supports the mission of the agency and the performance of duties. Evidence of non-job-related Internet usage over a significant period of time has violated the trust and confidence placed in a professional Web Developer position. Work duties have had to be reassigned to others due to poor work performance attributable to lack of accountability and productivity."

**Written Notice #4:**

Group II { due to cumulative effect } (Offense date(s): "5/14, 15, 16, 22, &23 2008")

"Abuse of State time and state property due to significant inappropriate use of the Internet during scheduled work hours. Evidence of non-job-related Internet usage over a significant period of time included days of non-performance of duties. This is totally unacceptable for an employee in a professional Web Developer position. Work duties have had to be reassigned to others due to poor work performance attributable to inappropriate and substantial Internet surfing. These instances have occurred over numerous days and times that have created a minimum of five (5) separate "abuse of state time" violations, specifically on May 14, 15, 16, 22, and 23, 2008. These numerous instances, while considered a Group I offense, are cumulative in effect as documented in the evidence and each in and of itself constitute separate violations exceeding four offense, which would normally lead to termination of employment."

**APPEARANCES**

Grievant (who was also a witness)

Grievant's Counsel

Agency Advocate/Presenter

Agency Party Designee

Witnesses: HR Manager

Director

Systems Administer

Manager

## ISSUES

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

**Additional matters raised by Grievant:**

- a. Timeliness of the written notices.
- b. Misapplication of/failure to follow policy.
- c. Retaliation.
- d. Discrimination.

## BURDEN OF PROOF

In disciplinary actions 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. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.<sup>1</sup>

## FINDINGS OF FACT

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

Grievant has been employed by Agency since 4/10/07 as an IT Specialist II/Web Developer.<sup>2</sup> Her duties included being leader of a three person team handling web design. Prior to employment with Agency she had been employed with the Commonwealth of Virginia in various capacities, both full and part time, since 1999.

Agency provided Grievant a state owned computer for use in her job. Grievant received training in the Standards of Conduct. Grievant participated in ethics in the workplace training which includes Standard of Conduct training. Grievant was aware of DHRM Policy Number 1.75 and Agency Policy on computer use.

On January 29, 2008 Agency's HR Department received from Grievant an information/request form concerning FMLA. This form was signed by a Health Care Provider on 1/15/08 and signed by Grievant on 1/28/08. Grievant presented information concerning a certain physical condition.<sup>3</sup>

On February 14, 2008 Grievant received a "Notice of Improvement Needed/Substandard Performance" concerning her duties as to web posting of notices of inclement weather/college

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<sup>1</sup> Department of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 5.8 and 9.

<sup>2</sup> A Ex. 4.

<sup>3</sup> G. Ex. 6 pg 1-4.

closings and delayed openings. The performance deficiencies noted were failure to check for, post, and update such notices during inclement weather situations. The notice indicated four (4) different occurrences in a three week period. Grievant met with Agency on at least two different occasions that specifically addressed her duties and her being the primary person to update the web site for closings or delays.<sup>4</sup>

On April 11, 2008, Grievant received a second "Notice of Improvement Needed/Substandard Performance" concerning lack of communication with the project team and the immediate supervisor. The lack of communication was indicated to have lead to poor planning, lack of organization, and poor time management that resulted in the failure to meet the web migration project objective and 3/31 deadline.<sup>5</sup>

Grievant utilized her Agency furnished computer to access internet web sites for non business purposes on multiple occasions while at work.<sup>6</sup>

Agency Human Resources reviewed the four Written Notices prior to their issuance to Grievant. Four Group II Written Notices with termination were issued to Grievant on July 8, 2008.<sup>7</sup>

On August 11, 2008 Human Resources received a Disability Certificate form (a pre-printed form that combines lines to fill in information and boxes to be checked at the appropriate statement). This form was filled in, signed by a physician, and dated 4/29/08. The form indicated, "This is to certify that {*Grievant name written in*} has been under my professional care and was totally incapacitated from 4/28 to 5/1. As of this date he/she is sufficiently recovered to resume a normal workload 5/2."<sup>8</sup>

On October 2, 2008, a letter from a physician indicated Grievant was under that physician's care for treatment of Major Affective Disorder-Depression and she has been prescribed medications in order to assist with this condition.<sup>9</sup>

Grievant had not told Agency she was seeking any accommodation due to a mental condition.

## CONCLUSIONS OF POLICY

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a

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<sup>4</sup> A. Ex. 15; G. Ex. 4 pg. 4-6.

<sup>5</sup> A. Ex. 16; G. Ex. 4 pg. 1-3.

<sup>6</sup> Testimony of Grievant.

<sup>7</sup> Testimony of HR Manager.

<sup>8</sup> A. Ex. 21.

<sup>9</sup> G Ex. 3.

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 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 Section 2.2-3000(A) sets forth the Virginia grievance procedure and provides, in 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 employee disputes which may arise between state agencies and those employees who have access to the procedure under Section 2.2-3001."

To establish procedures on standards of conduct and performance for employees of the Commonwealth of Virginia and pursuant to Section 2.2-1201 of the Code of Virginia, the Department of Human Resources Management promulgated the *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 of Conduct* 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.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Suspension of up to 10 workdays for the first Group II Offense is provided. A second active Group II Notice should result in termination.<sup>10</sup>

DHRM Policy Number 1.75 establishes a policy for the use of the internet and the state's electronic communication systems for state agencies and their employees. This policy provides, "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....".

"No user should have any expectation of privacy in any message, file, image or data created, sent, retrieved or receive by use of the Commonwealth's equipment and/or access. Agencies have a right to monitor any and all aspects of their computer systems...."<sup>11</sup>

Grievant completed Agency's Ethics in the Workplace Online Training on 10/15/07. This training included *DHMR Policy 1.75, Use of the Internet and Electronic Communication Systems*, and set forth the general guidelines for use of these systems. The training noted that, in general, the equipment and systems should be used for business purposes. Personal use should

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<sup>10</sup> *Standards of Conduct* DHRM Policy: 1:60 effective April 16, 2008 and *Standards of Conduct* DHRM Policy: 1:60 effective: 9/16/93.

<sup>11</sup> A. Ex. 6.

be limited to minor, sporadic or infrequent occasions." <sup>12</sup>

Agency has an *Employee Acceptable Use Agreement* policy which was addressed in the Agency Security Awareness Training Grievant received. <sup>13</sup> Grievant received training in Information Security Awareness and completed the annual MOAT Certification Requirements on May 23, 2008.<sup>14</sup>

The *Standards of Conduct* were explained to Grievant during her orientation session on 4/11/07 with Agency. On 7/11/07 Grievant acknowledged in writing that Standards of Conduct, Performance Policy and FMLA leave, among other matters, were explained to her. She has received the Employee Handbook which also provided information concerning FMLA, Policy 1.60, Standards of Conduct, Electronic Mail, Computer, and Telephone Use - Policy 1.75. <sup>15</sup>

**Web Development Project:** Grievant's duties included responsibilities as to the Agency Web Development Project. This was a major and extremely important project with a high priority for Agency. The redesign and launching of a new Agency web site was seen as a major need and as an important marketing tool of Agency. Agency wanted the project to progress quickly. However, issues developed as to lack of progress and performance.

Early in 2008 HR Manager received questions as to how to address Grievant's performance related issues by Director and by Manager. HR was alerted there were concerns as to Grievant's performance. Director was very frustrated as to lack of productivity and in the latter part of May/ first part of June approached HR Director again. HR Manager indicated they needed to investigate matters to see what was going on.

Director was concerned with communication problems. Grievant was to send updates each week on status of matters. Many times these updates were not send. Director considered the Web Development to be a major project and he was concerned that the project was delayed. Delays went from October to the end of year, from the end of year to March, and then that was further delayed. Grievant was counseled on her work. Concern was expressed that details and planning were lacking. Appropriate use of resources was a concern also. To get the project moving people were brought in and other people were assigned to do Grievant's duties. <sup>16</sup>

Grievant's position involved web development and heavy use of the computer on a daily basis. HR Manager suggested looking at her computer usage to see what work was being performed. A significant amount of non-Agency activity was shown on her computer. HR Manager testified in his 27 years with Agency it was probably the most serious and flagrant violation of computer policy, use of computers, and ethics that he has seen.

**Internet usage:** Grievant was aware of policies and standards regarding internet usage

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<sup>12</sup> A. Ex. 11.

<sup>13</sup> A. Ex. 6.

<sup>14</sup> A Ex. 6.

<sup>15</sup> A. Ex. 4.

<sup>16</sup> Testimony of Director.

and had received training on same. The computer login agreement displayed on Grievant's computer each log in. This gave notice that the computer is the property of the Commonwealth of Virginia and proceeding past this point implies consent to comply with and abide by applicable laws and policies governing its use.

The Agency expressed strong concern over the extent of the internet surfing that was not related to Agency business. Dates of Grievant's activities were documented in Agency Exhibit 18 which indicated Grievant's internet history file for certain dates showing URL ("Uniform Resource Locator"), Title, Hits, Modified Date, Expiration Date, and User Name. Grievant's non business activities were as follows:

- On 5/14/08 approximately 200 line item non agency business sites were viewed by Grievant.
- On 5/15/08 approximately 94 line item non agency business sites were viewed by Grievant.
- On 5/16/08 approximately 130 line item non agency business sites were viewed by Grievant.
- On 5/20/08 approximately 51 line item non agency business sites were viewed by Grievant.
- On 5/21/08 approximately 52 line item non agency business sites were viewed by Grievant (within a ½ day period).
- On 5/22/08 approximately 120 line item non agency business sites were viewed by Grievant.
- On 5/23/08 approximately 30 line item non agency business sites were viewed by Grievant.
- On 5/27/08 approximately 66 line item non agency business sites were viewed by Grievant.
- On 5/28/08 approximately 73 line item non agency business sites were viewed by Grievant (within a 1/2 day period)
- On 5/29/08 approximately 45 line item non agency business sites were viewed by Grievant.
- On 6/3/08 approximately 30 line item non agency business sites were viewed by Grievant.

Director determined Grievant's internet usage as to certain dates in May of 2008 including the below dates. Grievant utilized the internet for non-business reasons on the below May dates:

- 5/14 7:55 to 8:36 and 9:28 to 3:45.
- 5/15 8:56 to 4:23.
- 5/16 7:41 to 9:29 and 12:04 to 4:09.
- 5/19 12:14 to 2:47
- 5/20 8:24 to 9:16 and 10:32 to 5:22.
- 5/21 8:15 to 12:24.
- 5/22 8:06 to 9:28 and 11:57 to 4:56.
- 5/23 8:11 to 8:38 and 11:58 to 2:37.
- 5/27 7:32 to 239.
- 5/28 7:34 to 11:30.
- 5/29 9:12 to 9:50, 12:01 to 12:57, and 4:32 to 4:59.<sup>17</sup>

Agency additionally presented a printout of Grievant Temporary Internet Files showing thumb nail pictures of the images which were located on her computer. There were 256 pages of images admitted at hearing with approximately 26 images per page (256 pages x 26 images per page = approximately 6656 images. It is noted that a few pages had less than 26 images on the page). Agency expressed concern as to the extreme number of images that were on Grievant's computer that were not business related. A very small number of the temporary internet files were what appeared to be related to the agency business. Grievant had received her Agency computer upon coming to work clear of all internet downloads and the computer was

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<sup>17</sup> A. Ex. 17, and testimony.

under her personal password.

Agency specifically indicated 12 photographs/images in Grievant's temporary internet files as being of particular concern to Agency due the nature of their content. These photographs/images show infant children, adults, and objects in a concerning manner. They include depictions/photographs of body parts and representations/pictures/images of genitals or suggestive of genitals. Grievant indicates she did not download inappropriate images and she did not go to inappropriate sites.

The overwhelming number of images in Grievant's Internet Files on her Agency computer do not relate to Agency business. These include numerous images/pictures of celebrities, individuals, cats, dogs, other animals, babies, homes, cards, posters, slogans, cartoons, military scenes, and objects.

Grievant testified that off and on primarily in March, April, and May internet surfing was a problem and there were some days there was non-work related internet surfing but not every day. She further indicated she could not estimate the time spent. She denied going to web sites in which there were inappropriate images that were down loaded. She testified her internet activities did not contribute to being removed as team leader but the cause was that the project was too big to be done as scheduled. She testified that there were multiple occasions the weekly reports were not filed.

**6/26:** On June 26, 2008 HR Manager received computer records indicating information on Grievant's computer usage prior to meeting with Grievant. Grievant indicated at the meeting, among other matters, that she was doing the job 110% and that she had concerns over her supervisors being hostile. She initially indicated she was not surfing the internet for significant time during work hours. HR Manager indicated that, when evidence was shown Grievant as to her computer usage, he then asked Grievant if she wanted to change what she had said. HR Manager indicated she then said it had occurred and she had done those things.

At the meeting of 6/26/08 Grievant told HR Manager she was seeing a counselor, experiencing depression, had an eating disorder, and also mentioned internet surfing compulsion. HR Manager asked if she was requesting an accommodation and she replied no. Grievant did not request accommodation on account of a mental condition.

No written documentation of a mental condition was received by Agency from Grievant or a Health Care Professional previously to this date or at this meeting. The only evidence admitted of written documentation as to a mental condition is the Disability Certificate received by HR on August 11, 2008 and the letter of October 2, 2008 (discussed previously).

**Written Notices:** Agency was concerned Grievant was not performing assigned duties and projects were not being completed in a timely manner. Upon investigation it was determined that non-business internet use during work hours was extensive and significant. The time Grievant expended on internet surfing was a significant contributing factor to her poor work performance.

Grievant had received two "Notice of Improvement Needed/Substandard Performance" and she had also receiving counseling. Her performance led to her being removed from team leader status and her work had to be assigned to others and performed by other employees. Grievant was directed to provide weekly reports as to progress on the web migration project she was assigned to do. Not only was the web migration project not progressing satisfactorily but the reporting directed to be done on the status of the project was not done as directed.

Agency made the determination to issue 4 Group II Written Notices and Termination to address matters concerning Grievant. The four Written Notices that were given Grievant set forth Agency concerns and considerations and provided an opportunity to seek a response to each individual concern from Grievant. Written Notices were given for:

- Written Notice #1. Failure to perform assigned work.
- Written Notice #2. Failure to comply with written policy (DHRM Policy 1.75, "Use of Internet and Electronic Communications Systems")
- Written Notice #3. Failure to comply with written policy (DHRM Policy 1.60, "Standards of Conduct") regarding the minimum expectations of all employees.
- Written Notice #4. Abuse of State time and state property.

Group II Offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. Examples of Group II offenses include failure to follow supervisor's instructions or comply with written policy and unauthorized use or misuse of state property. The examples indicated are not all-inclusive but intended as examples. The Standards of Conduct also provides,

"... any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provision of this section.

"Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeds agency norms...."<sup>18</sup>

**Written Notice #1 - Failure to perform assigned work:** Grievant's duties with Agency included prime responsibility for maintaining information on the Agency Web Site as to closings and late starts due to inclement weather or other reasons. She received a *Notice of Improvement Needed* (dated 2/14/08) addressing her failing to perform these duties and was directed to contact Chief to provide a personal telephone number to be contacted at concerning closings. She did not do so timely. Additionally, there were problems with her timely removal of the web notices.

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<sup>18</sup> DHRM Policy 1.60, *Standards of Conduct*, (B.)(2.)

Grievant's was team leader on web migration and web development matters for Agency. She was required to file reports as to the status of matters. She did not file reports as directed and her lack of progress on web migration and web development matters became greater problem over time. As matters progressed, Grievant was given counseling on these matters by her supervisor.

Grievant did not perform her assigned work and Management was concerned over how Grievant was utilizing her working hours and an investigation was initiated. Investigation into her usage of her computer indicated significant work time being utilized for non-agency activities. This was acted to undermine the effectiveness of Agency's activities. The Agency action of giving a Group II Written Notice was consistent with provisions Policy 1.60.

**Written Notice #2 - Failure to comply with written policy (DHRM 1.75):** Failure to comply with written policy is an example of a Group II Offense. Grievant was familiar with DHRM Policy 1.75 and policy on internet usage. Her Internet Usage was significant and frequent. Grievant engaged in significant and extensive internet use activities for personal and not business purposes at work during business hours on the 5/14, 5/15, 5/16 5/22, and 5/23 of 2008 in violation of policy. Her use of the internet was neither minor, sporadic, or infrequent.

**Written Notice #3 - Failure to comply with written policy (DHRM 1.60):** DHRM Policy 1.60 provides that Employees are employed to fulfill certain duties and expectations that support the mission and values of their agencies and are expected to conduct themselves in a manner deserving of public trust. Included under minimum expectations for acceptable workplace conduct and performance are the following:

- Perform assigned duties and responsibilities with the highest degree of public trust.
- Devote full effort to job responsibilities during work hours.
- Make work-related decisions and/or take actions that are in the best interest of the agency.
- Use state equipment, time, and resources judiciously and as authorized.
- Meet or exceed established job performance expectations.
- Made work-related decisions and/or take actions that are in the best interest of the agency

The evidence indicates that Grievant was not devoting full effort to job responsibilities during work hours and she was expending significant work time in personal activities on a regular basis. She devoted a significant time at work in pursuit of personal matters when she decided to and did engage in internet surfing activities during the business day. This time was not expended in the pursuit of Agency goals nor was it job related. Her actions were not in the best interest of Agency and deprived Agency of services she was hired to provide. The actions were a failure to use state equipment, time, and resources judiciously and as authorized and were a material factor in her not meeting job expectations. Failure to comply with written policy is an example of a Group II Offense.

**Written Notice #4 - Abuse of State time and state property:** Grievant was employed by Agency to perform Agency business needs. The nature of her job as an IT Specialist/Web Developer necessitated computer use and internet access. She was assigned long term projects and the Agency expected her to be working on those projects during the business day. However, she engaged in personal internet surfing on a frequent and significant basis utilizing both the Agency's equipment and her work time for personal/non Agency business purposes. This was a

material factor in Grievant not being able to accomplish her assigned duties. Additional Agency resources were diverted to accomplish her duties when other individuals had to be assigned her duties.

Written Notice # 4 referenced a minimum of five (5) separate "abuse of state time" violations. It was noted that these individually are considered Group I offenses but due to the cumulative effect a Group II was given.

Policy 1.60 provides that for repeated violations of the same offense an agency may issue a Group II Written Notice. It is also noted that the fourth active Group I Written Notice normally results in discharge.

**Timeliness of Action:** One of the basic tenets of the *Standards of Conduct* is the requirement to promptly take action when an offense or unacceptable performance occurs. Management should issue a written notice as soon as reasonably possible after becoming aware of misconduct, unacceptable performance, or an employee's commission of an offense.<sup>19</sup> One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose is to prevent a recurrence of the offense. Unless an extensive, detailed investigation is required, most disciplinary actions are generally issued within a few weeks after learning of an offense.

In June of 2008 Director had discussion with HR Manager over work not being performed by Grievant. HR Director indicated that Grievant's computer usage needed to be looked into. Upon investigation it was determined that a significant amount of time was expended by Grievant on the computer in non work related activities. On or about June 4, 2008 Director first received information from the history file of Grievant's computer. This information was compiled and on 6/26/08 information was shown to HR Manager. It was then determined that there had been a significant amount of time spend by Grievant on her computer with web surfing activities that were non-work related.

On June 26, 2008 Grievant was met and was questioned by HR Manager as to her computer usage. On July 3, 2008, Grievant and management met to discuss proposed disciplinary actions. Grievant was given opportunity (until 7/8/08) to respond to Agency concerns of violations of policy, work profile, and work assignments issued. Written Notices were issued on July 8, 2008.

For the reasons stated above, the evidence did not indicate Agency acted in an untimely manner in this cause.

**Policy not applied consistently/misapplication:** Grievant contends that the regulations regarding use of computers were selectively and inconsistently enforced and/or applied. However, Grievant was not able to identify any individual instances of inconsistent application

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<sup>19</sup> Department of Human Resource Management ("DHRM") Policies and Procedures Manual, Policy 1.60, Effective 9/16/93, Section VII.B.1..and Department of Human Resource Management ("DHRM") Policies and Procedures Manual, Policy 1.60 effective date: April 16, 2008 B. 2.

of policy nor present evidence as to misapplication or non-consistent application.

The Agency has terminated 3 other individuals on internet issues. Testimony indicated 3 other individuals had been terminated for issues involving internet usage and one individual suspended for usage of ebay on a state computer.

**Retaliation and/or Discrimination:** Grievant contends Agency discriminated on the basis of her disability and the Agency retaliated against her as a result of her making a FMLA request.

***Retaliation*** is defined in Section 9 of the Grievance Procedure Manual as: "Adverse employment actions taken by management or condoned by management because an employee exercises a right protected by law or reported a violation of law to a proper authority (e.g. "whistleblowing")."

To establish retaliation, Grievant must show that she: 1.) engaged in a protected activity, 2.) suffered an adverse employment action, and 3.) a casual link exists between the adverse action and the protected activity.

An agency may not retaliate against its employees. If the agency presents a non-retaliatory business reason for the adverse action, retaliation is not established unless the evidence shows, by a preponderance, that the Agency's stated reason was mere pretext or excuse for the retaliation. Evidence establishing a casual connection and inferences drawn there from may be considered on the issue of whether the Agency's explanation was a pretext.<sup>20</sup>

Grievant presented a FMLA request to Agency on 1/29/08.<sup>21</sup> She was granted time off for her needs and work schedule adjustments as were needed to accommodate the known physical illness she provided information for. At this time the matter of a mental condition or depression was not raised.

Grievant expressed that she should be able to leave work when she needed to without having to call someone to report that she was leaving work. The Agency requested she notify her immediate supervisor when she needed to leave or when she would be late.<sup>22</sup>

As above discussed, the Agency has presented reasons for their taking disciplinary actions against Grievant including, but not limited to: lack of progress on assigned tasks, conducting personal business/non-business activities during working hours, and abuse of policy as to computer usage and internet activities. Agency has further expressed their concern as to the effect on Agency and the business of Agency that Grievant's actions caused.

Agency has presented a non-retaliatory business reasons for the disciplinary actions against Grievant. Furthermore, the evidence does not show, by preponderance, that the Agency's

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<sup>20</sup> See, EDR Ruling No. 2007-1530, Page 5, (February 2, 2007) and EDR Ruling No. 2007-1561, Page 5, (June 25, 2007).

<sup>21</sup> G. Ex. 6.

<sup>22</sup> A. Ex. 1.

stated reason was mere pretext or excuse for the retaliation. Retaliation is not established.

***Discrimination*** is defined in Section 9 of the Grievance Procedure Manual as, "Different or hostile treatment based on race, color, religion, political affiliation, age, disability, national origin, or sex."

Grievant contends that she was suffering from depression and that the Agency should have taken her condition into consideration. She did not make the Agency aware of her depression/mental condition and request accommodation prior to the issuance of the Written Notices and termination. The 6/26/08 meeting was the first time she mentioned depression but she specifically indicated she did not desire accommodation and that she was handling matters herself. Furthermore, Grievant did not present to Agency evidence documenting her mental condition.

The only documents (other than the FMLA request) provided to Agency concerning any condition, physical or mental, were:

a. The Disability Certificate dated 4/29/08 which was received by Agency on August 11, 2008 and which did not indicate the incapacitating condition but did indicate she was sufficiently recovered to resume a normal workload 5/2. *and*

b. The letter of October 2, 2008 referencing depression and medication to treat the depression. This letter also noted severely increased depression and need to make medication adjustments as to the periods of 4/14 to 4/18 and 4/28 to 5/1. The letter indicated, "In addition to the two weeks she was on leave there were days in the following weeks when these symptoms were severe and resulted in her inability to perform her job duties, as well as a decreased ability to judge such occasions."<sup>23</sup>

Grievant did not request Agency to provide reasonable accommodations for any mental disability/condition. Grievant told HR Manager at the 6/26/08 meeting she was seeing a counselor, experiencing depression, eating disorder, and mentioned internet surfing compulsion. When Agency asked if Grievant was seeking accommodation, she said no. She said she was taking care of this herself.

Employers may prohibit employees from using the internet to access inappropriate websites and making excessive use of the employer's computers and other equipment for purposes unrelated to work. Even if an employee's disability causes violation of a conduct rule the employer may discipline the employee if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard. Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1086 (10th Cir. 1997)

The ADA generally requires employees with disabilities to request reasonable accommodations rather than employers to have to ask questions about the nature of an employee's impairment. Although the ADA does not require employees to ask for an accommodation at a specific time, the timing of a request for reasonable accommodation is important because an employer does not have to rescind discipline. Hill v. Kansas City Area

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<sup>23</sup> G. Ex. 3.

Transp. Auth., 181 F.3d 819, 894 (8th Cir. 1999).

For the reasons stated above, retaliation or discrimination is not found.

**Mitigation and other considerations:**

In reviewing agency-imposed discipline, the hearing officer must give due consideration to management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations. Testimony indicated that Agency took into consideration a number of matters including:

- a. The priority to the Web Development project.
- b. There were communication issues in that her department required weekly e-mails as to updates of status and concern these not being consistently received.
- c. The Agency web site inclement weather closings or late starting postings not being made or taken off timely together with the timeliness of response to instructions to providing Chief with her contact number.
- d. The two prior *Notices of Improvement Needed* as well as counseling sessions held.
- e. The extent of personal use of the internet during working hours.
- f. Severity of the violations of policy.

Grievant contended that prior to the issuance of the Written Notices HR had not reviewed the Written Notices. HR Manager testified that HR did review the Written Notices before they were issued. He confirmed that Supervisors and Managers at Agency are not to issue formal disciplinary action without HR review and he in fact conducted the review prior to issuance.

Grievant contended that the choice to issue four Written Notices was merely to terminate Grievant. Agency made the determination to issue four Written Notices. HR Manager testified as to considerations in issuing the four Written Notices. He indicated the number of Written Notices issued could have ranged from one, at one extreme, to 12-14 or even double digits, on the other extreme. Agency considerations included the multiple components involved, the breadth and depth of the evidence, how similar situations were addressed in the past, to be clear as to what the violations of policy were, to adequately set forth the violations, and for opportunity for Grievant to address each violation of policy and each violation of expectations.

Testimony indicated that the Agency desired to address the behavior and the problems with the seriousness in which they actually were. Management supported multiple Group II Written Notices (and not a single Group III) to indicate with clarity the various violations and their severity. After giving consideration as to the factors involving Grievant and after the above considerations management felt termination rather than suspension was appropriate.

Upon consideration of the evidence presented and upon consideration of the burden of proof in this cause it is found that the Agency has met its burden. For the reasons stated above, the Agency has proven by a preponderance of the evidence:

- (i.) the employee engaged in the behavior described in the Written Notices;

- (ii.) the behavior constituted misconduct;
- (iii.) the agency's discipline was consistent with law and policy; and
- (iv.) the agency's discipline does not exceed the limits of reasonableness.

Grievant's actions were such as to warrant disciplinary actions under the Standards of Conduct. Issuance of the above Group II Written Notices and Termination is appropriate under the circumstances.

## **DECISION**

For the reasons stated herein, the Agency's issuance to Grievant on July 8, 2008 of the four Group II Written Notices is hereby **UPHELD**.

## **APPEAL RIGHTS**

You may file an Administrative review request within **15 calendar days** from the date the decision was issued.

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

### **Administrative Review:**

This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

**1. A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.

**2. A challenge that the hearing decision is inconsistent with State or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to: Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219.

**3. A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to: Director, Department of Employment Dispute Resolution, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219.

A party may make more than one type of request for review. All requests 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. (Note: the 15-day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

**Judicial Review of Final Hearing Decision:**

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal. You must give a copy of your notice of appeal the Director of the Department of Employment Dispute Resolution.

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Lorin A. Costanzo, Hearing Officer