

Issue: Group III Written Notice with Termination (Internet abuse); Hearing Date: 06/17/10; Decision Issued: 06/21/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9330; Outcome: No Relief – Agency Upheld; **Administrative Review:** AHO Reconsideration Request received 06/25/10; **Reconsideration Decision** issued 07/09/10; **Outcome:** Original decision affirmed; **Administrative Review:** DHRM Ruling Request received 06/25/10; **Outcome** pending; **Judicial Review:** Appealed to Circuit Court in Augusta County on 07/26/10; **Outcome** pending.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9330**

Hearing Date: June 17, 2010

Decision Issued: June 21, 2010

**PROCEDURAL HISTORY**

On February 9, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

A recent investigation by CTSU resulted in a report which included documents of approximately 100 pages and revealed that beginning on October 19, 2009, and continuing through November 24, 2009, [Grievant] improperly use the computer in his office to attempt to gain access to pornographic websites. [Grievant] spent many hours accessing these sites which is a direct violation of Operating Procedure #310.2. This offense is subject to disciplinary action under the Standards of Conduct 135.1.X.B.1. - failure to follow established written policy. In addition, the amount of time spent using the computer was a compromise to the security of the institution. The Department of Corrections has zero tolerance for those employees found to be engaging in this type of behavior, and as a result, [Grievant] is terminated from employment. He has the right to grieve this action.

On February 19, 2010, 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 he requested a hearing. On May 11, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. Upon the motion of a party, the Hearing Officer found just cause to extend the time frame for issuing this decision. On June 17, 2010, a hearing was held at the Agency's regional office.

## **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
Witnesses

## **ISSUES**

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?

## **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 Department of Corrections employed Grievant as a Corrections Lieutenant at one of its Facilities. The purpose of this position was to, "provide first line supervision of correctional officers."<sup>1</sup> He had been employed by the Agency for approximately 23 years. No evidence of prior active disciplinary action was introduced during the hearing.

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<sup>1</sup> Agency Exhibit 5.

The Agency provided Grievant with a personal computer with access to the Internet. He had a unique login identifier and a password that he selected. Each time Grievant would log on to his computer he would receive a message stating, in part:

Notice and Warning: This computer system is the property of the Commonwealth of Virginia and is intended for authorized users only. By accessing and using this system, you are consenting to system monitoring for law enforcement and other purposes. Unauthorized use of this computer system may subject you to State or Federal criminal prosecution and penalties.

By continuing to use your computer, you acknowledge and that you are subject to the provisions of DHRM Policy 1.75, COV Procedure 310.2, COV IT Information Security Standard SEC501-01), § 18.2-152.1 Virginia Computer Crimes Act, and the Employee Standards of Conduct.

Summaries of the policies are as follows:

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Certain activities are prohibited including but not limited to accessing ... sexually explicit information ...<sup>2</sup>

In October 2009, Grievant logged in to the Agency's computer system and opened the Internet browser software on his computer. He accessed a search engine associated with that browser. The search engine permitted users to filter results. If the user set the filter to the "strict" or "moderate" setting, search results would exclude sexually explicit content. If the user set the filter to the "off" setting, the search results would not be filtered by the search engine. The dialog box for the filter contains a message that, "Turning off SafeSearch may result in the display of mature or sexually explicit content that is considered unsuitable for younger users." Grievant used the search engine to search images on the Internet with the search filter in the "off" position. He made image searches containing the following words<sup>3</sup>:

asian brunett pictures  
bare brunett pictures  
bedroom brunett pictures  
big brunett pictures  
blonde fox pictures  
brunett nurse pictures  
bust brunett pictures  
busted brunett pictures

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<sup>2</sup> Hearing Officer Exhibit 1.

<sup>3</sup> Grievant spelled the word "brunette" as "brunett".

creamy brunett pictures  
drip pictures  
fingers brunett  
fishnet brunett  
hard pictures  
hot brunett pictures  
hot Latino women pictures  
latino squirt pictures  
leg brunett pictures  
next door brunett pictures  
short skirt pictures  
squirt pictures  
tight hole pictures  
tight pictures  
wet brunett pictures  
wet finger pictures  
wet Latino pictures  
wet split pictures  
spy cam pictures  
low cut brunett pictures  
nighty brunett pictures  
victoria secret pictures

Grievant made word searches as follows:

anal pictures  
brunett bang pictures  
licking brunett pictures  
panty pictures  
peeping brunett pictures  
teen bust pictures  
teen fox pictures  
tight hold pictures  
german girle WebCam pictures  
german teen pictures

When Grievant conducted the searches they often resulted in the production of sexually explicit images. For example, the search “blonde fox pictures” would result in some pictures of nude couples engaged in sexual intercourse and oral sex. The search result images were collected by the search engine from various websites including websites containing pornography. If Grievant clicked on an image, his view would change from the search results to the website that contained the original image. The Agency maintained firewall software. If the firewall software was working properly and was up-to-date, it would block any attempt by Grievant to access the website containing pornography. On October 19, 2009, Grievant clicked on several of the images returned by the search engine in response to the search “blonde fox pictures”. The firewall

software denied Grievant access to those websites. He received a notification from the software that his access to the websites was denied. Although Grievant was obligated by policy to notify his supervisor that he attempted to access a website and was denied access, Grievant failed to do so.

The Agency reviews Internet usage by its employees on a periodic basis. The Information Security Officer identified Grievant as an individual who attempted to access prohibited websites. She reviewed the Agency's firewall software which recorded the websites visited by Grievant as well as the words Grievant used to conduct Internet searches. She presented her findings to Agency managers which resulted in disciplinary action against Grievant and his removal effective February 9, 2010. Sometime in April 2010, after Grievant was no longer with the Agency, the Information Security Officer sought and obtained the hard drive of Grievant's computer. The Hearing Officer will exclude from consideration the contents contained on that hard drive in Grievant's temporary folder because they were not used as part of Grievant's removal. Those contents were presented as the second part of Agency Exhibit 3.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."<sup>4</sup> Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."<sup>5</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>6</sup>

The search engine Grievant used was a website affiliated with Grievant's Internet browser. The Agency's firewall software did not block Grievant's use of that search engine because when appropriately used the search engine website was not pornographic. It appears that the Agency's firewall software blocked Grievant from visiting pornographic websites. It did not block Grievant from using the search engine without a filter and using sexually suggestive terms to retrieve images from pornographic websites as the result of Internet searches. By using the search engine to retrieve sexually explicit images, the search engine became, for all practical purposes, a pornographic website containing sexually explicit images. Grievant viewed these sexually explicit images.

DHRM Policy 1.75, Use of the Internet and Electronic Communication Systems, prohibits State employees from:

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<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

- 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);

DHRM Policy 1.75 also states:

Violations of this policy must be addressed under [Policy 1.60, Standards of Conduct Policy](#), or appropriate disciplinary policy or procedures for employees not covered by the Virginia Personnel Act. The appropriate level of disciplinary action will be determined on a case-by-case basis by the agency head or designee, with sanctions up to or including termination depending on the severity of the offense, consistent with [Policy 1.60](#) or the appropriate applicable policy.

DOC Operating Procedure 310.2 (VI) (H) (1) prohibits, “[a]ccessing downloading, printing or storing information with sexually explicit content as prohibited by law (see COV § 2.2-2827).

*Code of Virginia* Section 2.2-2827 states:

Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content. Agency approvals shall be given in writing by agency heads, and any such approvals shall be available to the public under the provisions of the Virginia Freedom of Information Act (§ [2.2-3700](#)).

"Sexually explicit content" means (i) any description of or (ii) any picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § [18.2-390](#), sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § [18.2-390](#), coprophilia, urophilia, or fetishism.

Grievant utilize the search engine on the Agency’s computer to access the Internet and obtain sexually explicit images. Several images depicted people engaged in sexual conduct such as oral sex and sexual intercourse. Grievant’s actions were contrary to the *Code of Virginia*, DHRM and DOC policies.

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, “[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency

may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.” In the judgment of the Agency, Grievant’s behavior rises to the level of a Group III offense. The Agency’s judgment is supported by the evidence. Grievant viewed sexually explicit images contrary to the *Code of Virginia* as well as State policy. Every time Grievant logged on to the Agency’s computer system, he received a notice that the terms of DHRM Policy 1.75 governed his usage of the computer system. DHRM Policy 1.75 authorizes the Agency to remove Grievant from employment. The Agency’s decision must be upheld.

Grievant denied that he attempted to access pornographic websites using the Agency’s computer system. Grievant denied that he had actually viewed pornographic images using the Agency’s computer system. Grievant’s denial was not credible.

Grievant argued that other employees might have used his login identity to access sexually explicit content. At his supervisor’s direction, Grievant left his password on a piece of paper in the desk drawer of his desk. The Supervisor testified with credibility that he may have accessed Grievant’s computer two or three times using Grievant’s logon information in order to gain access to backup files on the hard drive of Grievant’s computer. The Supervisor testified that he did not use Grievant’s computer to access the Internet. The Hearing Officer does not believe that anyone other than Grievant used Grievant’s logon identification to access the Internet.

Grievant presented evidence of an email sent on January 26, 2010 by the Superintendent to the Regional Director in which the Superintendent stated, “[a]lthough we were originally led to believe that [Grievant] was actually able to view pornographic material during the site visits, it has now been determined that in fact he was not.”<sup>7</sup> It is unclear what steps the Superintendent used to reach this conclusion. The Superintendent’s conclusion may reflect confusion between viewing the sexually explicit search results from the search engine and viewing the pornographic websites containing the original sexually explicit image. If the Superintendent was unable to access the pornographic website because of the firewall, it would not mean that he could not view those same images by conducting an unfiltered search using sexually oriented terms.

Grievant argued that the Agency disciplined him merely for attempting to access pornography rather than actually viewing pornography. Grievant argued that attempting to access pornography does not rise to the level of a Group III offense. Grievant’s argument is untenable. Grievant may not have been able to access and view pornographic websites. This distinction is not significant because Grievant was able to use the search engine to obtain the images from the pornographic websites and view them as search results. In other words, Grievant was able to view as part of the search engine results the same sexually explicit image that he would have viewed had he been able to connect to the pornographic website.

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<sup>7</sup> Grievant Exhibit 1.



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>8</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. In light of this standard, 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 of a Group III Written Notice of disciplinary action with removal 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 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

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<sup>8</sup> Va. Code § 2.2-3005.

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  
600 East Main St. STE 301  
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>9</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>9</sup> 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**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 9330-R**

Reconsideration Decision Issued: July 9, 2010

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material; and
- (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

The burden of proof with respect to proving the inconsistent application of disciplinary action is on Grievant. Grievant did not present any evidence to show that employees similarly situated to Grievant had accessed pornography but were not removed from employment. The Hearing Officer has no reason to believe that the Agency inconsistently applied disciplinary action and singled out Grievant for disciplinary action.

Grievant seeks reconsideration to reopen the hearing based on a document discussed but not offered as an exhibit by the Agency during the hearing. The

document is not newly discovered evidence for several reasons. The document existed at the time of the hearing and before the hearing. Grievant could have asked the Hearing Officer to issue an order compelling the Agency to produce information that would have resulted in a response that included the document in question. Grievant did not do so. Grievant did not exercise due diligence in attempting to obtain the document or the information contained in the document. It is not clear that the information contained in the document is material. Based on the Hearing Officer's recollection, the Agency referred to the document to establish the point that Grievant was spending a lot of his time on the Internet instead of doing his work. The Hearing Officer upheld Grievant's removal based on the fact that Grievant accessed pornography and not on how much time Grievant spent accessing the Internet. A document showing that Grievant wasted a lot of time as compared to other employees would not affect the outcome of this case.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

### **APPEAL RIGHTS**

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.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer