

Issue: Group II Written Notice (internet abuse); Hearing Date: 08/29/13; Decision Issued: 09/16/13; Agency: VDOT; AHO: Lorin A. Costanzo, Esq.; Case No. 10158; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER
In the matter of: Grievance Case No. 10158**

**Hearing Date: August 29, 2013
Decision Issued: September 16, 2013**

PROCEDURAL HISTORY

Agency issued Grievant a Group II Written Notice (Offense Dates: "approx. 5/31/12 through 9/21/12") on October 4, 2012 for Computer/Internet misuse, Failure to follow instructions and/or policy, Abuse of state time.

Due to circumstances, including Grievant being on Short Term Disability, an exception was granted to filing the grievance within the normal 30 calendar day time period from offense date(s).¹ The grievance was filed on 4/30/13 and considered timely filed. After matters were not resolved to the satisfaction of Grievant, the grievance was qualified for hearing. Hearing Officer was appointed by the Department of Human Resources Management effective August 20, 2013 and a pre-hearing telephone conference was held on August 21, 2013. Grievance Hearing was held on August 29, 2013 at Facility. By agreement of the parties, all the exhibits exchanged were admitted into evidence *en masse*.

APPEARANCES

Agency Presenter	
Agency Party Designee (who was also a witness)	
Witnesses:	Engineer
	Director
	IT Resource Manager
Grievant	(who was also a witness)
Witness:	Location Design Engineer

ISSUES

Whether the issuance of a Group II Written Notice was warranted and appropriate under the circumstances?

BURDEN OF PROOF

As this is a disciplinary action, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against 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 more convincing than the opposing evidence.²

¹ Grievant's Exhibits, Memorandum of 10/11/12.

² *Grievance Procedure Manual*, Office of Employment Dispute Resolution, Dept. of Human

The employee has the burden of *raising* and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.³

FINDINGS OF FACT

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

Grievant is an Engineering Technician III employed by Agency at Facility. Grievant has been employed by agency since 1999.⁴ Agency provides Grievant with an Agency computer and internet access at work. Grievant was issued a Group II Written Notice on October 4, 2012 for computer/internet misuse, failure to follow instructions and/or policy, and abuse of state time (Offence Codes/Categories "52", "13", and "35"). The Written Notice indicated offense date(s) of "approx. 5/31/12 through 9/21/12" and provided under *Nature of Offense and Evidence*:

Research of e-mail and Internet activity indicates that (Grievant] has engaged in excessive personal e-mail and internet usage abusing the privilege of "incidental and occasional personal use of [Agency's] IT resources". This failure to comply with Policy 1.75 USE OF ELECTRONIC COMMUNICATIONS AND SOCIAL MEDIA is documented in 54 pages of print-outs of personal e-mail and personal Internet usage at work. The orange highlight indicates emails "outside of [Agency]" and the green highlight indicates "inside of [Agency]" personal e-mails. Time spent on Internet activities is so excessive that access fell into a discernible pattern between 9am-11am and 2pm-4pm, which are clearly during her routine work hours. There were 416 pages of internet-related usage provided to you yesterday. Also included are 55 pages of additional Blue Coat and 24 pages of bar chart reports. During supervisor-led group discussion, of which {Grievant] was a part, specific instructions were given to limit the personal use of agency equipment/Internet access as this is a distraction to completing the volume of work at hand. There are 15 pages attached supporting said discussion at the I&D Staff Meeting, including redistribution of the written policy. {Grievant] is also required to acknowledge the policy each time she logs onto her computer and also has completed annual training (MOAT) which requires her acknowledgement of this policy. This constitutes breach of Codes of Conduct, Policy 1.60. in that this behavior is 'failure to follow supervisors instructions'; 'unauthorized use or misuse of state property', i.e. computer: and 'abusive state time', including, use of state time for personal business. {Grievant's] failure to comply with these policies has detracted from her ability to execute business responsibilities more timely and from her ability to proactively support other members or business activities of the I&D team.

Prior to the offense dates Grievant signed a document acknowledging being given a copy of Department of Human Resource Management Policy 1.75 "Use of Internet and Electronic Communication Systems" and acknowledging responsibility to read and abide by this policy.⁵ Also, Grievant's computer screen displayed at log-on, among other matters, "Incidental and occasional non-job-related use is permitted as defined by Department of Human Resource Management Policy No. 1.75, "Use of Internet and Electronic Education Systems". Furthermore, the screen displayed, "Authorized users are permitted access to the Internet and [Agency's] electronic communication systems to assist in the performance of their jobs." and "Authorize users are subject to having all activities monitored and recorded without notice, and without user knowledge or permission."⁶

Grievant utilized Agency computer for e-mail and internet usage of a personal and non-business nature on multiple dates and at multiple times while at work. Grievant's e-mail activity data was

Resources Management, §5.8 and §9.

³ *Grievance Procedure Manual*, Office of Employment Dispute Resolution, Dept. of Human Resources Management, §5.8.

⁴ Agency Tabs 1 and 21 and Grievant's Exhibits.

⁵ Agency Tab 7.

⁶ Agency Tab 6.

documented by Agency. Agency also documented her personal/non-business internet usage data for multiple dates including 8 separate workdays for which sites visited, certain site content, and time information was compiled. Grievant's personal/non-business internet usage for these 8 days indicates:⁷

<u>date</u>	<u>approximate personal or non-business internet usage</u>
September 21, 2012	29 minutes
September 12, 2012	2 hours 15 minutes
September 06, 2012	2 hours 35 minutes
August 29, 2012	1 hour 50 minutes
August 28, 2012	1 hour 51 minutes
August 23, 2012	2 hours 29 minutes
August 20, 2012	2 hours 22 minutes
August 17, 2012	1 hour 49 minutes

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code §2.2-2900 *et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §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 §2.2-3001.

Policy Number 1.60 -Standards of Conduct

To establish procedures on Standards of Conduct and Performance for Employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated *Standards of Conduct* (Policy No. 1.60).

The *Standards of Conduct* provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The *Standards 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.

DHRM Policy 1.60 - *Standards of Conduct* organizes offenses into three groups according to the severity of the behavior. 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 law.⁸

⁷ Agency Tab 15.

⁸ Agency Tab 10.

Policy 1.60 also provides, "Examples of offense, by group, are presented in Attachment A. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, 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 provisions of this section". Failure to follow supervisor's instructions or comply with written policy and unauthorized use or misuse of state property is listed in Attachment A to Policy 1.60 as examples of Group II Offenses.

Policy:1.75- *Use of Electronic Communications and Social Media*

DHRM Policy 1.75 - *Use of Electronic Communications and Social Media* is applicable to all state employees, including employees of agencies exempt from coverage of the Virginia Personnel Act. The purpose of this policy is to ensure the appropriate, responsible, and safe use of electronic communication and social media by employees. This policy establishes minimum standards for all state employees.

Policy 1.75 provides, in pertinent part, as follows.

Business use

Agency provided electronic communications tools are the property of the Commonwealth and are provided to facilitate the effective and efficient conduct of State business. Users are permitted access to the Internet and electronic communications tools to assist in the performance of their jobs. Some users may also be permitted to access and use social media to conduct agency business. Each agency or institution of the Commonwealth may adopt its own policy setting forth with this with specificity the work- related purposes for which such equipment and access are provided.

Personal Use

Personal use means use that is not job-related. In general, incidental and occasional personal use of the Commonwealth's electronic communications tools including the Internet is permitted as long as the personal use does not interfere with the user's productivity or work performance, does not interfere with any other employee's productivity or work performance, and does not adversely affect the efficient operation of the Commonwealth's systems and networks....

AGENCY RESPONSIBILITIES AND REQUIREMENTS

Agencies have the following responsibilities and requirements related to Policy 1.75.

Monitor Usage

No user shall have any expectation of privacy in any message, file, image or data created, sent, retrieved, received, or posted in the use of the Commonwealth's equipment and/or access. Agencies have the right to monitor any and all aspects of electronic communications and social media usage. Such monitoring may occur at any time, without notice, and without the user's permission.

Address Violations

Violations of this policy must be addressed under Policy 1.60, Standards of Conduct, 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.⁹

Screen Display upon log-on: Upon log-on to the Agency computer system at work the computer screen used by Grievant displays the following information, in pertinent part:

This system is for the use of authorized users only. Authorized users are permitted access to the Internet and [Agency's] electronic communication systems to assist in the performance of their jobs.

Authorized users are subject to having all activities monitored and recorded without notice, and without user knowledge or permission. Anyone using this system expressly consents to such monitoring. In addition, electronic records may be subject to the Freedom of Information Act and, therefore, available for public disclosure.

Certain activities are prohibited as defined by the Department of Human Resource Management Policy No. 1.75 "Use of Internet and Electronic Communication Systems" which has been adopted by [Agency]...

Incidental and occasional non-job-related use is permitted as defined by Department of Human Resource Management Policy No. 1.75 "Use of Internet and Electronic Education Systems". Non-job related use is prohibitive if it interferes with the user's productivity or work performance, or with any other employee productivity or work performance; adversely affects the efficient operation of the computer system; violates any provision of this policy or any other policy, regulation, law or guideline as set forth by local, state or federal law.

Continued use of this equipment implies knowledge and understanding of this policy.

Violation of this policy may result in disciplinary action up to and including termination.¹⁰

Additionally this screen requires Grievant to, "Press Enter or click OK to continue use of this system and to indicate that you are aware you activity and use may be monitored at any time".

Grievant's Activity: Agency provides Grievant with use of an Agency computer and internet access at work. Agency presented evidence of Grievant's e-mail and internet usage for personal/non-business purposes while at work. Numerous documents (including logs) were admitted concerning Grievant's personal/non-business internet activity at work within 24 workdays from August 17, 2012 to September 21, 2012. Testimony was also received concerning Grievant's personal/non-business internet activity at work.

Agency provided analysis of an 8 work day sample of the personal/non-business internet activity of Grievant. The evidence presented for each of the below 8 dates indicated the start and end time for each such internet usage event and indicated the internet sites visited together with content for a number of the sites visited. Included in the evidence presented for the 8 work day sample is the following:¹¹

<u>date</u>	<u>total non-business internet usage</u>	<u>number of internet usage events and internet usage events start and finish times for the date</u>
September 21, 2012	29 minutes	(2 events - 7:42 to 8:02 and 9:03 to 9:12)

⁹ Agency Tab 5.

¹⁰ Agency Tab 6.

¹¹ Agency Tab 15.

September 12, 2012	2 hours 15 minutes	(11 events beginning at 7:54 with the last event ending at 15:19)
September 06, 2012	2 hours 35 minutes	(12 events beginning at 7:29 with the last event ending at 17:15)
August 29, 2012	1 hour 50 minutes	(11 events beginning at 7:48 with the last event ending at 16:42)
August 28, 2012	1 hour 51 minutes	(11 events beginning at 7:35 with the last event ending at 16:44)
August 23, 2012	2 hours 29 minutes	(13 events beginning at 8:20 with the last event ending at 17:26)
August 20, 2012	2 hours 22 minutes	(15 events beginning at 7:27 with the last event ending at 16:38)
August 17, 2012	1 hour 49 minutes	(11 events beginning at 7:48 with the last event ending at 12:48)

On **September 21, 2012** Grievant had a total of 2 non-business internet usage events and spent a total of 29 minutes for non-business internet activities at work this date. She spent:

- 20 MINUTES ... BEGINNING AT 7:42A.M. VISITING ROANOKE.COM, WDBJ7 (STATE POLICE INVESTIGATE OFFICER) & FACEBOOK
- 9 MINUTES... BEGINNING AT 9:03A.M. VISITING FACEBOOK.

On **September 12, 2012** Grievant had a total of 11 non-business internet usage events spending a total of 2 hours 15 minutes for non-business internet activities at work this date. Within this total time expended were, among other time expenditures, the following:

- 15 MINUTES ... BEGINNING AT 7:54A .M. VISITING ROANOKE.COM, WEATHER.COM, MAPS.GOOGLE, WWW .RADFORD.VA.US, VISITRADFORD.COM, MAPS.GOOGLE, SOAPCENTRAL (YOUNG & RESTLESS, BOLD & BEAUTIFUL)
- 13 MINUTES ... BEGINNING 8:13A.M. VISITING AAMIDATLANTIC.COM, FACEBOOK
- 22 MINUTES ... BEGINNING AT 9:30A.M. VISITING LOOKWHOGOTBUSTED, FACEBOOK, CRAIGSLIST, GOOGLE (SIMPLE HOMEMADE CONCORD GRAPE WINE RECIPE) EASY-WINE.NET, HOMEBREWIT.COM
- 15 MINUTES ... BEGINNING AT 10:01A.M. VISITING GOOGLE.COM, PIPSTEMRESORT.COM, CASSRAILROAD.COM, GOOGLE (MORGANTOWN WV BIKE RALLY), CYCLEFISH.COM, MOTORCYCLEMONSTER.COM, RIDERSINFO.NET, CHEROKEETHUNDERRALLY.COM.
- 7 MINUTES ... BEGINNING AT 10:50 A.M. VISITING GOOGLE (PIGEON FORGE CAR SHOW), RESERVEPIGEONFORGE.COM, PIGEONFORGE.COM, INSIDEPIGEONFORGE.COM
- 31MINUTES ... BEGINNING AT 12:01A.M VISITING GOOGLE (LECONE VIEW MOTEL GATLINBURG TN) LECONTEVIEW .COM, BRBO.COM-VACATION RENTALS TENNESSEE, VRBO.COM-VACATION RENTALS EAST GATLINBURG, TRAVELOOGA.COM, GOOGLE MAPS(WESTAGATE SMOKEY MOUNTAIN RESORT),,
- 8 MINUTES ... BEGINNING AT 2:51P.M. VISITING RADFORD.EDU, GOOGLE, COPELAND.COM, GOOGLE (_LANDSCAPE)
- 14 MINUTES ... BEGINNING AT 3:05P.M. VISITING RADFORD.EDU, LOOKWHOGOTBUSTED, CRAIGSLIST, FACE BOOK, EBAY (HARLEY DAVISON LEATHER WOMEN'S JACKET)

On **September 6, 2012** Grievant had a total of 12 non-business internet usage events spending a total of 2 hours 35 minutes for non-business internet activities at work this date. Within this total time expended were, among other time expenditures, the following:

- 42 MINUTES... BEGINNING AT 7:57A .M. VISITING WDBJ7, ___FUNERALHOME, FACEBOOK, EBAY, TIMESDISPATCH (TRAFFIC ALERT) WRIC.COM (SINKHOLE), EMAIL, CHEVYMALL.COM, EBAY, FACEBOOK, MYTICKETSTOBUY.COM. WDBJ7 (LOCAL SCHOOL MAY HAVE TO PAY)...
- 22 MINUTES ... BEGINNING AT 9:26A.M. VISITING FACEBOOK, LOOKWHOGOTBUSTED, __FUNERAL SERVICES.COM, ___FUNERALHOME, ___FUNERALHOMNE, CRAIGSLIST, VAWC.VIRGINIA.GOV (JOBS)
- 15 MINUTES ... BEGINNING AT 10:16 A.M. VISITING MONTVA.COM (REAL ESTATE), GOOGLE (SEARCHES FOR, ADDRESSES), GOOGLE MAP (FOR SAME ADDRESS), GOOGLE, PEEKYOU.COM, COLONIAL WEBB.COM, BIRDDOGJOBS.COM
- 8 MINUTES ... BEGINNING AT 1 :09 P.M. VISITING WDBJ7 (SUPREME COURT RULING MAY FREE CHILD MOLESTER FROM LIFE IN PRISON), FACEBOOK
- 29 MINUTES ... BEGINNING AT 3:14P.M. VISITING TOPIX.COM, FACEBOOK, WDBJ7 (GAY RADFORD UNIV . STUDENT WHO WAS BULLIED), CRAIGSLIST (HARLEY DAVIDSON JACKET...)
- 29 MINUTES ... BEGINNING AT 4:36P.M. VISITING ONLINEGIS.NET/VABEDFORD, OLMULHOTDOG.COM, MAPS.GOOGLE, GOOGLE (HARLEY COTTON WOMEN JACKET..) THE HOUSE OF HARLEY .COM, WWW.EPINIONS.COM (HARLEY) ...

On **August 29, 2012** Grievant had a total of 11 non-business internet usage events spending a total of 1 hour 50 minutes for non-business internet activities at work this date. Within this total time expended were, among other time expenditures, the following:

- 24 MINUTES... BEGINNING AT 8:31A.M. VISITING SOAPCENTRAL;(YOUNG & RESTLESS,BOLD&BEAUTIFUL) FACEBOOK,WDBJ7 (CARROL CO DEPUTIES SEARCH FOR MAN) _FUNERALHOME,_____FUNERALSERVICES.COM, LOOKWHOGOTBUSTED...
- 16 MINUTES ... BEGINNING AT 9:21A.M. VISITING WEATHER.COM,FACEBOOK, _FUNERALHOME.COM
- 12 MINUTES... BEGINNING AT 12:07A.M. VISITING **BANK**_, WDBJ7, ROANOKE .COM,FACEBOOK,POF.COM
- 23 MINUTES ... BEGINNING AT 2:56P.M. VISITING CRAIGSLIST,DESIOWNERS.COM,GOOGLE (SPINAL STENOSIS SURGERY) WEBMD.COM.WSJ.COM
- 12 MINUTES ... BEGINNING AT 3:49A.M.- VISITING VAWC.VIRGINIA.GOV (JOB SEARCH)

On August 28, 2012 Grievant had a total of 11 non-business internet usage events spending a total of 1 hour 51 minutes for non-business internet activities at work this date. Within this total time expended were, among other time expenditures, the following:

- 29 MINUTES ... BEGINNING AT 7:35A.M. VISITING ROANOKE.COM, LCAOETHENEW.COM,THELIFEOUTDOORS, WALKERCREEKCABINS FACEBOOK,GOOGLE (SEARCH FOR MOOSE CABIN NEW RIVER....) NEW RIVER.COM,
- 13 MINUTES ... BEGINNING AT 8:43A.M. VISITING SOAPCENTRAL, WDBJ7(SNAP BENEFIT CHANGES COULD MAKE SHOPPING EASIER FOR EVERYONE),ROANOKE.COM (SEX OFFENDER CHARGED..)
- 12 MINUTES ... BEGINNING AT 9:11A.M. VISITING GOOGLE.COM (SEARCH CABOOSE CABIN VA) ROANOKEOUTSIDE.COM, VAPARKWAY.COM,LITTLESYCAMORE.NET
- 18 MINUTES ... BEGINNING AT 11:02 A.M. VISITING _____FUNERALHOME,_____FUNERALSERVICES... LOOKWHOGOTBUSTED,FACEBOOK,CRAIGSLIST
- 12 MINUTES... BEGINNING AT 11:58 A.M. VISITING WDBJ7 (FORMER TOPLESS BAR AND PAPA JOES SLATED FOR DEMOLITION, THE STREET.COM (WORST CARS OF ALL TIME) ROANOKE.COM (OBITUARIES, CHRISTIANBURG MAN GETS 15 YEAR PRISON SENTENCE... FACEBOOK
- 8 MINUTES... BEGINNING AT 2:10P.M. VISITING GOOGLE (SEARCH FOR CABOOSE RENTAL CABIN...), GOOGLE (SEARCH FOR GALAX ROOSTER CABIN RENTAL) MOUNTAINLODGING.COM....
- 8 MINUTES... BEGINNING AT 3:13P.M. FACEBOOK AND CRAIGSLIST

On August 23, 2012 Grievant had a total of 13 non-business internet usage events spending a total of 2 hours 29 minutes for non-business internet activities at work this date. Within this total time expended were, among other time expenditures, the following:

- 21MINUTES... BEGINNING AT 8:20A.M. VISITING EMAIL,ROANOKE .COM (GAMES, MEDIA SHARING) WDBJ7 (_NAKED,_ CAVORTS VEGAS PARTY PHOTOS), FACEBOOK,LOOKWHOGOTBUSTED.COM
- 5 MINUTES... BEGINNING AT 8:52A.M. VISITING FACEBOOK,SOAPCENTRAL (YOUNG & RESTLESS, BOLD & BEAUTIFUL)
- 15 MINUTES ... BEGINNING AT 9:07A.M. VISITING DCR.VIRGINIA.GOV, MAPS.GOOGLE (NATURAL TUNNEL STATE PARK, OCCONEECHEE STATE PARK)
- 26 MINUTES... BEGINNING AT 9:34A.M. VISITING _____FUNERAL HOME, _EFUNERALSERVICES,... FACEBOOK, CARAIGSLIST (PUB TABLE AND CHAIRS)
- 24 MINUTES... BEGINNING AT 11:16 A.M. VISITING GOOGLE (PIPESTEM PARK,PIPESTEM RESORT.COM
- 39 MINUTES ... BEGINNING AT 3:00P.M. VISITING WDBJ7(BLUE RIDGE ANTIQUE MALL EVACUATED AFTER TRACTOR TRAILER CRASHES...) FACEBOOK,CRAIGSLIST,LOOKWHOGOT BUSTED.COM, MONTVA.COM, BANK_____.COM,CAPITALONE.COM

On August 20, 2012 Grievant had a total of 15 non-business internet usage events spending a total of 2 hours 22 minutes for non-business internet activities at work this date. Within this total time expended were, among other time expenditures, the following:

- 3 MINUTES... BEGINNING AT 7:53A.M. VISITING SOAPCENTRAL
- 11 MINUTES ... BEGINNING AT 8:20A.M. VISITING MONTVA.COM,LOOKWHOGOTBUSTED.COM, WDBJ7 (3 KILLED) AND THREE FUNERAL HOME SITES
- 26 MINUTES... BEGINNING AT 9:37A.M. VISITING FACEBOOK,WDBJ7 (1PERSON DEAD AFTER WRECK) CRAIGSLIST
- 48 MINUTES ... BEGINNING AT 12:21P.M. VISITING WDBJ7,FACEBOOK, CRAIGSUST,AND POF.COM

- 27 MINUTES ... BEGINNING AT 3:02P.M. VISITING FACEBOOK, LOOKWHOGOTBUSTED WDBJ7 (2 BOYS MISSING), ROANOKE.COM (OBITUARIES), CRAIGSLIST
- 12 MIN... BEGINNING AT 4:02P.M. VISITING FACEBOOK, BLACKBOARDCONNECTED, COUNTRYCUPBOARDTOO.COM, MAPQUEST

On August 17, 2012 Grievant had a total of 11 non-business internet usage events spending a total of 1 hour 49 minutes for non-business internet activities at work this date. Within this total time expended were, among other time expenditures, the following:

- 4 MINUTES ... BEGINNING AT 7:48A.M. VISITING SOAPCENTRAL, WDBJ7 (2 BOYS MISSING IN TACOMA)
- 17 MINUTES ... BEGINNING AT 7:58A.M. VISITING FACEBOOK, ROANOKE.COM, PUBMED HEALTH, LOOKWHOGOTBUSTED.COM
- 5 MINUTES... BEGINNING AT 8:25A.M. VISITING ROANOKE.COM (OBITS), FACEBOOK(____FUNERAL HOME), GOOGLE.COM (_FUNERAL HOME)
- 38 MINUTES ... BEGINNING AT 9:23A.M. VISITING FUNERAL HOME, CRAIGSLIST (BOX SPRING, FUELBOX), FLICKER PHOTO SHARING, CONSTANT CONTACT COMMUNITY, SOAPCENTRAL
- 16 MINUTES... BEGINNING AT 11:13 A.M. VISITING ... SOAPCENTRAL, BEDFORD BULLETIN, WSET MONETA GROCERY TO CLOSE, FACEBOOK

In addition to evidence of internet activity Agency admitted evidence of Grievant's e-mail activity. Agency evidence indicates personal/non-business e-mail activity at work as summarized below:

date	INBOX (To Grievant) A. Tab 17	SENT (From Grievant) A. Tab 18	DELETED A. Tab 19	PURGED A. Tab 20
9/21	5	5	1	0
9/20	9	12	3	0
9/19	9	12	1	0
9/18	2	14	13	0
9/17	7	17	13	0
9/16	0	0	1	0
9/15	0	0	1	0
9/14	0	4	4	0
9/13	0	2	13	0
9/12	14	9	21	0
9/11	11	18	1	25
9/10	3	6	0	9
9/7	0	7	0	17
9/6	6	17	2	14
9/5	1	0	0	1
9/4	1	9	0	10
9/2	0	0	0	1
9/1	0	0	0	1
8/31	2	11	0	20
8/30	3	10	0	11
8/29	2	5	0	20
8/28	0	4	0	26
8/27	1	4	0	24
8/26	1	0	0	0
8/24	1	3	0	3
8/23	0	8	0	11
8/22	0	8	0	5
8/21	0	10	0	11
8/16	0	0	0	1
8/15	0	1	0	0
8/14	2	0	0	4
8/9	0	1	0	0
8/8	2	1	0	0
8/7	3	2	0	0
7/31	1	3	0	0
7/30	0	1	0	0

7/26	2	6	0	1
7/25	3	3	0	0
7/24	4	0	0	0
7/23	1	1	0	0
7/20	1	0	0	0
7/19	3	9	0	2
7/18	0	2	0	0
7/17	0	1	0	0
7/16	1	0	0	0
7/13	1	0	0	0
7/12	0	1	0	0
7/11	2	5	0	0
7/10	2	2	0	0
7/9	1	3	0	0
7/3	0	1	0	0
7/2	0	5	0	0
6/28	1	0	0	0
6/27	0	4	0	1
6/26	0	1	0	0
6/20	1	0	0	0
6/19	0	4	0	0
6/18	2	6	0	1
6/15	1	1	0	0
6/14	0	3	0	0
6/12	3	0	0	0
6/11	5	5	0	0
6/4	2	0	0	0
6/1	0	1	0	0
5/31	0	3	0	0
5/23	0	0	0	1

Breaks: Grievant argues personal/non-business usage while on breaks and lunch period should not be taken into consideration. Policy 1.75 clearly states incidental and occasional personal use is permitted if it does not interfere with productivity or work performance. This Policy does not provide all personal/non-business usage is permitted if it does not affect productivity or work performance. The only authorized personal use permitted by Policy 1.75 is the "incidental and occasional" use provided for in the Policy 1.75 and usage is not expanded over and above "incidental and occasional" during breaks or lunch.

Policy 1.75 and Right to monitor: Grievant was clearly informed and knew or should have known Agency has a right to monitor computer use at any time, without notice, and without the user's permission. Policy 1.75 specifically provides no user shall have any expectation of privacy in the use of the Commonwealth's equipment and/or access. When Grievant logs-on to her VDOT Computer the screen display specifically addresses Policy 1.75 and its expectations as to incidental and occasional non-job-related use. The screen indicates "Continued use of this equipment implies knowledge and understanding of this policy" and "Violation of this policy may result in disciplinary action up to and including termination."¹²

Policy 1.75 was addressed in annual MOAT Security Training Grievant attended. Management had given Grievant and other staff attending a staff meeting instructions as to Policy 1.75 and the limitation of time spent on personal business in the work place.¹³ Management addressed in its e-mail of 3/22/12 a reminder that VDOT e-mail is for business purposes.¹⁴ Prior to the dates at issue in this cause, Grievant signed a *Certificate of Receipt* indicating she had been given a copy of DHRM Policy 1.75 and acknowledged

¹² Agency Tab 6.

¹³ Agency Tab 3 and Grievant Exhibits (Letter of 5/30/13).

¹⁴ Grievant Exhibits, (E-mail of 3/22/12)

her responsibility to read this Policy, abide by this Policy, and ask her supervisor or Human Resource Officer for clarification if she had any questions concerning this Policy.¹⁵ Additionally, Grievant was present in a meeting in June of 2012 in which Policy 1.75 was discussed and she received a copy of the Policy.

The evidence indicates that Grievant was aware or should have been aware of the terms and conditions of Policy 1.75 addressing usage of the Commonwealth's electronic communications tools, including the Internet. Furthermore, there is insufficient evidence to find Policy 1.75 was unclear and vague as alleged by Grievant.

Retaliation and/or Discrimination: Grievant's letter of 5/30/13 (attached to Employee Grievance form) raised the issue of Retaliation contending she was singled out for special treatment because she is a woman and raises the question of retaliation due to having an ongoing EEOC claim against Agency for sexual discrimination. Additionally, a document admitted entitled "Complaint of Discrimination Form" dated 1-28-08 addressed a complaint of disability discrimination and asked for relief of "Private Area Minimum Distraction". A Memo dated February 11, 2008 signed by Grievant stated, "The temporary accommodations you are making have satisfied my needs for the time period we are in our temporary location..."¹⁶

Grievant's supervisor testified there were times when going to Grievant's work area he had noticed she would minimize something on her computer screen or she would shut down her computer screen. Grievant's supervisor went on vacation in September 2012 and upon returning his supervisor addressed an incident giving rise to concerns as to Grievant's performance and productivity. While her supervisor was on vacation Grievant made statements about not being interrupted to Grievant's supervisor's supervisor. Grievant's supervisor's supervisor asked IT District Resource Manager to look into matters and determine how much time Grievant was spending on the internet and e-mail at work. HR was consulted as to usage matters and it was concluded Grievant's personal usage was excessive.

Management has the right and duty to manage the business of Agency. Management indicated concerns with performance and maximizing efficiency within Grievant's work group. Grievant contends she did not misuse the computer, e-mails, or the internet according to policy. She contends she did not abuse state time as her time was used wisely, her projects were on time and correct, and there was no loss of productivity. However, testimony indicated management, prior to mid September 2012, had concerns with Grievant's productivity and efficiency. Management was also faced with increased performance requirements imposed on the Facility which led to increased work expectations for employees. Management expressed concern that greater efficiency was needed and Grievant's computer usage affected the ability of her work group to do more work. Management believed Grievant could have performed her job better without the computer activity addressed in the Written Notice. Evidence was admitted that Grievant had issues with her work that were of concern to management and had been late submitting a plan/project.

Facility management had issued four Group II Written Notices since 2010 for excessive internet usage prior to Grievant's Written Notice. The four Group II Written Notices were issued to 4 male employees. One Written Notice involved usage of 3.8 hours in a 5 day period and another involved usage of 10-15 hours in a three week period.

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer

¹⁵ Agency Tab 7.

¹⁶ Grievant Exhibits

to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a)(1).

Retaliation is defined in §9 of the *Grievance Procedure Manual* as "Adverse employment actions taken by management or condoned by management because an employee participated in an activity recognized as protected in §4.1(b). §4.1(b) of the *Grievance Procedure Manual* addresses the following matters:

1. Unfair application or misapplication of state and agency personnel policies, procedures, rules, and regulations;
2. Discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin, or sex;
3. Arbitrary or capricious performance evaluation;
4. Retaliation for participating in the grievance process, complying with any law or reporting a violation of such law to a government authority, seeking to change any law before Congress or General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law;
5. Informal discipline

To establish retaliation Grievant must show (1) she engaged in a protected activity; (2) she suffered a materially adverse action¹⁷; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially 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 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.¹⁸

The evidence indicates Grievant had engaged in a protected activity and she has suffered a material adverse action in that a Group II Written Notice was issued. Grievant has not offered sufficient evidence, either documentary or oral, to find a causal link between the adverse action and a protected activity or status. Agency has provided a legitimate, nondiscriminatory business reason for its action and there is not sufficient evidence to find that the Agency's professed business reason for its action was a pretext or excuse for retaliation.

Furthermore, there is not sufficient evidence to find Grievant was subjected to discrimination on account of her sex.

INBOX: Grievant contends her INBOX e-mail activity should not be taken into consideration as she is not responsible for e-mail sent to her and has no control over who could send here-mails. While this may be true in some circumstances, Grievant may have the ability to control some e-mails sent her. However,

¹⁷ 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.

¹⁸ 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).

the Hearing *Officer* does not take into consideration any e-mail activity above listed as being in her INBOX and argumentatively which she had no control over it being received.

Testimony indicated only those personal/non-business deleted e-mails that were actually read/opened were included in the Agency's count. However even if Hearing *Officer* was to determination that all e-mails indicated above as being DELETED and PURGED were also excluded from consideration due to being INBOX e-mails which were deleted and then purged, the evidence indicates Grievant violated Policy 1.75. Only giving consideration to her personal/non-business internet usage and to her personal/non-business "SENT" e-mails (as above listed) her usage far exceeds the incidental and occasional personal use permitted by Policy 1.75 and violates Policy 1.75.

The evidence indicates, by a preponderance, that Grievant engaged in personal/non-business internet and e-mail usage on Agency computer while at work. The evidence further indicates Grievant violated Policy 1.75 and her usage at work significantly exceeded the "incidental and occasional personal use of the Commonwealth's electronic communications tools, including the Internet" permitted by Policy 1.75. By a preponderance, the evidence indicates Grievant's actions constituted computer/Internet misuse and a failure to follow instructions and/or policy. Furthermore, her usage Grievant's constituted an abuse of state time.

Due Process: Policy Number 1.60 provides for an advance notice of discipline to an employee prior to the issuance of a Written Notice and that the employee must be given oral or written notification of the *offense*, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

By letter dated October 2, 2012 Grievant was informed that she would be meeting this date to discuss issues related to compliance with Policy 1.60 and Policy No. 1.75. Additionally, a due process meeting was scheduled for October 3, 2012 for her to have opportunity to provide any information in writing she believed relevant to the disciplinary action and or mitigation.

The evidence indicates that, prior to the issuance of the Group II Written Notice, Grievant was given notification of the *offense*, an explanation of the agency's evidence in support of the charge, and reasonable opportunity to respond and present mitigating factors or denial of the charge.

Mitigation: Va. Code § 2.2-3005.1 authorizes hearing *officers* to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Under Va. Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Department of Human Resource Management."

§ VI. (A.) of the *Rules for Conducting Grievance Hearings*, Department of Human Resource Management, Office of Employment Dispute Resolution provides:

... a hearing officer is not a < super-personnel officer". Therefore, in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.

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.¹⁹

Agency did consider mitigating factors. Agency did not impose a suspension of up to 10 workdays as was an option for a Group II offense and Agency brought one Group II Written Notice for all offenses alleged. Even if the Hearing Officer were to disagree with the action, the *Rules* only allow a Hearing Officer to mitigate the discipline further if the Hearing Officer, upon consideration of the evidence, were to find that Agency's discipline exceeds the limits of reasonableness. Upon the evidence presented in this cause, the Hearing Officer does not find that Agency's discipline exceeds the limits of reasonableness.

CONCLUSION

For the reasons stated above, based upon consideration of all the evidence presented at hearing, Agency has proven, by a preponderance of the evidence, that:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action and Agency's discipline does not exceed the limits of reasonableness.

DECISION

For the reasons stated above, the Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group II Written Notice was warranted and appropriate under the circumstances and the Agency's issuance of a Group II Written Notice is **UPHELD**.

APPEAL RIGHTS

As the *Grievance Procedure Manual* (effective date: July 1, 2012) 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.

A. Administrative Review:

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

¹⁹ Rules for Conducting Grievance Hearings § VI. B. 2.

1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the DHRM Director. This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).

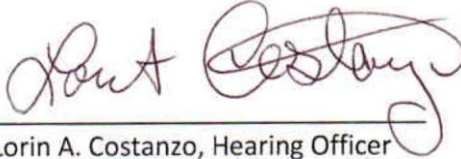
B. Final Hearing Decisions:

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.

C. Judicial Review of Final Hearing Decision:

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.


Lorin A. Costanzo, Hearing Officer

