Issue: Group III Written Notice with Termination (internet abuse); Hearing Date: 08/03/12; Decision Issued: 08/16/12; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9864; Outcome: Partial Relief; **Administrative Review: DHRM Ruling Requested 08/22/12; DHRM Ruling issued 09/21/12; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9864

Hearing Date: August 3, 2012
Decision Issued: August 16, 2012

PROCEDURAL HISTORY

On May 31, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating DHRM Policy 1.75.

On June 19, 2012, 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 July 18, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 3, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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 Virginia Community College System employed Grievant as a Trades Technician IV at one of its campuses. Grievant had prior active disciplinary action consisting of a Group III Written Notice with demotion and ten work day suspension for workplace harassment and disrupting behaviors.

Grievant was issued an Agency owned computer and provided with a unique login identification secured by a password. Grievant had access to the Internet through this computer. The Agency had the ability to monitor the websites that Grievant accessed.

Grievant was on disciplinary suspension from May 3, 2012 through May 16, 2012. During that time, Grievant's email was forwarded to the Supervisor. The Supervisor noticed that Grievant received an email containing an image of a nude female bodybuilder. He initiated an investigation by the Agency's information technology staff. As part of the investigation, the Agency viewed Grievant's internet access records and the information contained on the computer issued to Grievant.

On January 26, 2012, Grievant received an email from a friend who was not an employee of the Agency. The subject line of the email stated "You may want to file this data base …..". The text of the email stated:

The Mother of All Data Bases

> Well guys here is my belated Christmas Present for you. On the site below, is a data base listing EVERY Playmate in Playboy history. When you find a name just click on the name and the photo will appear. Have fun!!!!!

Attached to the email was a link with a web address entitled playmatehunter.com. Grievant clicked on link to the website at approximately 4:46 p.m. and viewed the images in the database until approximately 4:54 p.m. Most of the images showed full frontal nudity of women who appeared to be at least 18 years old but younger than 30 years old.

Grievant sent a reply email to his friend stating:

> Funny that the one girl that my wife graduated with [name] is not in the list. She was the 20th anniversary playmate and fold out. I knew her very well and I graduated with her sister. I wanted to tell them she was excluded but didn't see anywhere to contact playboy about this terrible mistake for leaving her out of the list. I did enjoy seeing the others. Thanks.[1]

The Agency presented evidence of other items it asserted that Grievant inappropriately viewed. Insufficient evidence was presented to show that Grievant did more than open the emails and immediately delete them when he realized the contents were inappropriate.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[2] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

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

> Accessing, uploading, downloading, transmitting, printing, posting, or storing information with sexually explicit content as prohibited by law (see Code of Virginia §2.2-2827).

[1] Agency Exhibit 8.

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

DHRM Policy 1.75 also states:

> 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.

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.

Code of Virginia Section 18.2-390 defines “nudity” as:

> "Nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

The pictures viewed by Grievant contained nudity. The images showed undressed women with exposed breasts and pubic area. The theme of the pictures was a prurient interest in sex. The pictures viewed by Grievant represent a lewd exhibition of nudity. All of the pictures exceed customary limits of candor. None of the pictures had serious literary, artistic, political, or scientific value. On January 26, 2012, Grievant viewed sexually explicit material using his Agency owned computer.

Grievant’s actions were contrary to DHRM Policy 1.75. The question becomes what level of disciplinary action is appropriate. DHRM Policy 1.75 states:

> 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.

Failure to follow policy is a Group II offense.[3] Grievant viewed sexually explicit content contrary to DHRM Policy 1.75 thereby justifying the issuance of a Group II Written Notice.

The Agency argued that Grievant should receive a Group III Written Notice. This argument fails. The images Grievant viewed were sexually explicit but they did not depict "hard-core" pornography. Grievant's motive to view the images was not for sexual gratification but rather was to determine whether the database contained the name of a woman he knew. If the database only had contained pictures of the women's faces without nudity, it is likely that Grievant would have searched the database to determine whether it contained the name of a woman he knew.

Upon the issuance of two Group II Written Notices, an agency may remove an employee. Grievant has received a Group III Written Notice and a Group II Written Notice thereby justifying the Agency's decision to remove him from employment.

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…."[4] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued that he did not have sufficient notice of DHRM Policy 1.75 because the Agency did not present him with and require him to sign the Certificate of Receipt attached to DHRM Policy 1.75. The Certificate states, in part:

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[3] See, Attachment A, DHRM Policy 1.60.

[4] Va. Code § 2.2-3005.

> I have been given a copy of Department of Human Resource Management Policy 1.75, "Use of Electronic Communications and Social Media" and I understand that it is my responsibility to read and abide by this policy, even if I do not agree with it. If I have any questions about the policy, I understand that I need to ask my supervisor or the agency/institution Human Resource Officer for clarification.

The Agency has substantially complied with the requirement to ensure that Grievant had notice of DHRM Policy 1.75. The Agency required its employees to take online training that includes a review of DHRM Policy 1.75. The Training required Grievant to accept "electronically" the Agency's User Agreement which provides, in part:

> I agree to abide by all applicable state, federal, VCCS, college policies, procedures, and standards that relate to the Virginia Department of Human Resource Management Policy 1.75 – Use of Internet and Electronic Communication Systems, VCCS Information Security Standard, and to the VCCS Information Technology Accessible Use Standard.

Grievant acknowledged this language in 2008, 2009, 2010, and on August 18, 2011.[5]

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further 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 **reduced** to a Group II Written Notice of disciplinary action. Grievant's removal is **upheld** based upon the accumulation of disciplinary action.

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

[5] Agency Exhibit 5.

to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

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

or, send by fax to (804) 371-7401,or email.

3. If you believe that the hearing decision does not comply with the grievance procedure, or if you have new evidence that could not have been discovered before the hearing, you may request the Office of Employment Dispute Resolution to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

Or, send by email to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 EDR. 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.[6]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
Lord Fairfax Community College
September 21, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9864. For the reasons stated below, the Department of Human Resource Management (DHRM) will not intercede in the application of this decision. The agency head of DHRM, Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In his **PROCEDURAL HISTORY**, the hearing officer stated the following:

> On May 31, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating DHRM Policy 1.75.
>
> On June 19, 2012, 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 July 18, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 3, 2012, a hearing was held at the Agency's office.

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The hearing officer identified the **ISSUES** of this case as follows:

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

2. Whether the behavior constituted misconduct? 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)?

3. 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?

****

The relevant **FINDINGS OF FACT**, as identified by the hearing officer, are as follows:

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

The Virginia Community College System employed Grievant as a Trades Technician IV at one of its campuses. Grievant had prior active disciplinary action consisting of a Group **III** Written Notice with demotion and ten-work day suspension for workplace harassment and disrupting behaviors.

Grievant was issued an Agency owned computer and provided with a unique login identification secured by a password. Grievant had access to the Internet through this computer. The Agency had the ability to monitor the websites that Grievant accessed.

Grievant was on disciplinary suspension from May 3, 2012 through May 16, 2012. During that time, Grievant's email was forwarded to the Supervisor. The Supervisor noticed that Grievant received an email containing an image of a nude female bodybuilder. He initiated an investigation by the Agency's information technology staff. As part of the investigation, the Agency viewed Grievant's internet access records and the information contained on the computer issued to Grievant.

On January 26, 2012, Grievant received an email from a friend who was not an employee of the Agency. The subject line of the email stated "You may want to file this data base". The text of the email stated:

The Mother of All Data Bases

Well guys here is my belated Christmas Present for you. On the site below, is a data base listing EVERY Playmate in Playboy history. When you find a name just click on the name and the photo will appear. Have fun!

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Grievant sent a reply email to his friend stating:

"Funny that the one girl that my wife graduated with [name] is not in the list. She was the 20th anniversary playmate and fold out. I knew her very well and I graduated with her sister. I wanted to tell them she was excluded but didn't see anywhere to contact playboy about this terrible mistake for leaving her out of the list. I did enjoy seeing the others. Thanks."

The Agency presented evidence of other items it asserted that Grievant inappropriately viewed. Insufficient evidence was presented to show that Grievant did more than open the emails and immediately delete them when he realized the contents were inappropriate.

The **CONCLUSIONS OF POLICY** in this case are as follows:

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

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

> Accessing, uploading, downloading, transmitting, printing, posting, or storing information with sexually explicit content as prohibited by law (see Code of Virginia §2.2-2827).

DHRM Policy 1.75 also states:

> 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.

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).
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> "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.

Code of *Virginia* Section 18.2-390 defines "nudity" as:

> "Nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

The pictures viewed by Grievant contained nudity. The images showed undressed women with exposed breasts and pubic area. The theme of the pictures was a prurient interest in sex. The pictures viewed by Grievant represent a lewd exhibition of nudity. All of the pictures exceed customary limits of candor. None of the pictures had serious literary, artistic, political, or scientific value. On January 26, 2012, Grievant viewed sexually explicit material using his Agency owned computer.

Grievant's actions were contrary to DHRM Policy 1.75. The question becomes what level of disciplinary action is appropriate. DHRM Policy 1.75 states:

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.

Failure to follow policy is a Group II offense." Grievant viewed sexually explicit content contrary to DHRM Policy 1.75 thereby justifying the issuance of a Group **II** Written Notice.

The Agency argued that Grievant should receive a Group **III** Written Notice. This argument fails. The images Grievant viewed were sexually explicit but they did not depict "hard-core" pornography. Grievant's motive to view the images was not for sexual gratification but rather was to determine whether the database contained the name of a woman he knew. If the database only had contained pictures of the women's faces without nudity, it is likely that Grievant would have searched the database to determine whether it contained the name of a woman he knew.

Upon the issuance of two Group **II** Written Notices, an agency may remove an employee. Grievant has received a Group **III** Written Notice and a Group **II** Written Notice thereby justifying the Agency's decision to remove him from employment.

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 ...." 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 nonexclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued that he did not have sufficient notice of DHRM Policy 1.75 because the Agency did not present him with and require him to sign the Certificate of Receipt attached to DHRM Policy 1.75. The Certificate states, in part:

I have been given a copy of Department of Human Resource Management Policy 1.75, "Use of Electronic Communications and Social Media" and I understand that it is my responsibility to read and abide by this policy, even if I do not agree with it. If I have any questions about the policy, I understand that I need to ask my supervisor or the agency/institution Human Resource Officer for clarification.

The Agency has substantially complied with the requirement to ensure that Grievant had notice of DHRM Policy 1.75. The Agency required its employees to take online training that includes a review of DHRM Policy 1.75. The Training required Grievant to accept "electronically" the Agency's User Agreement which provides, in part:

I agree to abide by all applicable state, federal, VCCS, college policies,

> procedures, and standards that relate to the Virginia Department of Human Resource Management Policy 1.75 - Use of Internet and Electronic Communication Systems, VCCS Information Security Standard, and to the VCCS Information Technology Accessible Use Standard.

Grievant acknowledged this language in 2008, 2009, 2010, and on August 18, 2011.

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

The hearing officer included the following in his **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 **reduced** to a Group II Written Notice of disciplinary action. Grievant's removal is **upheld** based upon the accumulation of disciplinary action.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority regarding policy issues, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the instant case, according to the evidence as outlined in the hearing decision, the grievant was charged with violation of DHRM Policy 1.75, Use of the Internet and Electronic Communication Systems. For that violation, the agency issued to him a Group III Written Notice with termination.

In his appeal to the DHRM, the grievant maintained that the agency failed to provide due process to the grievant. In addition, he alleged the following:

1. the agency assigned him to work a shift that no one had ever been assigned prior;

2. grievant's email was blocked and forwarded to the supervisor;

3. the agency failed to provide any evidence that other employees were subjected to investigation of emails dating back as far as 10 months;

4. the agency pointed out several employees that received emails from grievant. Yet none of these employees were investigated for accessing, downloading or forwarding materials of a questionable nature.

Concerning lack of due process, the hearing officer properly address that issue in his ruling. Concerning items 1 and 2, it appears that these were disciplinary actions taken by the agency as a result of a prior Group III Written Notice. There is no nexus between these actions taken by the agency and his filing the grievance that is the subject of this appeal.

Concerning items 3 and 4, it appears that the grievant is contesting the evidence considered by the hearing officer, the weight he attributed to that evidence and the witnesses,

and the conclusions he drew as a result of that assessment. The review of the grievance form A submitted by the grievant reveals that the issues he raised in his appeal were not raised in his original grievance.

Regarding the disciplinary action, the hearing officer rightfully determined that the grievant violated DHRM Policy No. 1.75. However, he concluded the inappropriate pictures he viewed were not of the "hard core" type and reduced the disciplinary action to a Group II Written Notice. However, the grievant remained terminated because he had an active Group III Written Notice in his files. This Agency cannot disagree with that conclusion. We therefore will not interfere with the application of this hearing decision.

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Ernest G. Spratley, Assistant Director
Office of Equal Employment Services