Issue: Response to Agency's Request for Reconsideration of Ruling #2002-215; Ruling Date: January 28, 2003; Ruling #2002-241; Agency: Virginia Department of Transportation; Outcome: agency's request has no merit.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR
In the matter of the Virginia Department of Transportation (VDOT)
Ruling Number 2002-241
January 28, 2003

Response to Agency's Request for Reconsideration of Ruling #2002-215

The Virginia Department of Transportation (VDOT) asserts that this Department's December 17, 2002 compliance ruling, which directs the agency to provide certain documents to a grievant, was "inconsistent and incorrect" in light of a circuit court opinion rendered in an unrelated matter.[1] While not specifically denoted as such, we view these written objections to the prior ruling as a request for reconsideration. For the reasons discussed below, we conclude that there is no merit to VDOT's objections to the December 17, 2002 ruling.

FACTS

At issue in the December 17, 2002 compliance ruling was whether VDOT had failed to provide a grievant with requested documents and information relevant to his grievance.[2] The grievant's employment was terminated after an agency investigation into inappropriate Internet usage by VDOT employees, and the grievant challenged his termination by initiating a grievance.[3] At that time, he also requested all relevant documents, including those documents related to any proposed and/or implemented discipline of any other VDOT employees resulting from the agency's Internet investigation. In response to his request, the agency provided certain relevant documentation, but refused to release any information about the disciplining of other employees, citing the attorney-client privilege and later claiming, during this Department's investigation, that the information concerning other employees was not

[1] *See* letter from the Employee Relations Manager to the Director of EDR, dated December 27, 2002.

[2] In his ruling request, the grievant also claimed the agency failed to provide the requested information in a timely manner. As to that issue, this Department found that under the facts and circumstances presented (the request of a number of documents many of which were technical in nature), the agency had not been unreasonable in its production of documents.

[3] In April 2002, VDOT conducted an internal audit of computer use within the agency, resulting in 90 employees being disciplined on the charge of excessive computer use. Sixteen of those employees, including the grievant, were terminated on the charge of accessing sexually explicit material on the Internet while using state computers.

relevant to the issues. The grievant then requested a compliance ruling from this Department.

In the subsequent compliance ruling,[4] this Department held that written counseling, corrective action and/or discipline received by VDOT employees as a result of the April 2002 investigation, along with any documents pertaining to the agency's action or inaction with respect to such employees were relevant and not protected by the attorney-client privilege. Thus, VDOT was directed to provide all such documents (with personally identifiable information redacted) to the grievant within five workdays of receipt of the ruling.[5] While the agency has complied with the mandates in the ruling, it disputes the propriety of this Department's decision.

DISCUSSION

The agency asserts that this Department's prior ruling is inconsistent with a decision rendered by a circuit court in an appeal of an unrelated grievance.[6] Specifically, VDOT interprets this circuit court decision as holding that discipline issued to other agency employees is "not germane to the issue of a grievant's discipline."[7] Based upon this interpretation, VDOT contends that the agency need not provide information about the disciplining of other employees in the Internet investigation to the grievant. As discussed below, this Department concludes that the agency's analysis of the circuit court case is erroneous.

In the cited case, the court considers whether a hearing officer's decision to rescind the discipline issued to a University police officer for damaging his vehicle was contrary to law because it ignored the University's statutory right to manage the affairs and operations of the University.[8] Contrary to VDOT's assertion, in reaching its determination, the court explicitly considers prior disciplinary actions by the University, discussing with specificity four incidents in which other officers had accidents in their respective police vehicles.[9] If management's disciplinary actions (or the lack thereof) with respect to these other employees had no relevance to the case at hand, the court would have so stated rather than reviewing each incident in turn. What the court ultimately rejects is not the relevance of the discipline issued in other cases to the

[4] *See* EDR Ruling #2002-215.
[5] This Department stated that any documentation provided to the grievant should be produced with all personally identifying information redacted to protect the legitimate privacy interests of third parties. Further, the parties were advised that they could agree for VDOT to organize the same information in a single chart or other format for production to the grievant, omitting any personally identifying information.
[6] Case No. HS-21-4, Circuit Court of the City of Richmond (February 14, 2002).
[7] *See* letter from Employee Relations Manager to the Director of EDR, dated December 27, 2002.
[8] *See* Case No. HS-21-4 at 1.
[9] *Id.* at 1-2.

grievance at hand, but the hearing officer's conclusion that the cases were comparable.[10] The court plainly states that "none of the instances just referred to are comparable to what happened in [the grievant's] case."[11] Later in its opinion, the court again compares the facts and circumstances surrounding the grievant's discipline with the facts and circumstances surrounding the discipline of the other employee and finds them not to be comparable:

> VCU was within its rights to treat [the grievant's] conduct, which caused more than $13,000 in damage to state property, differently than it treated the conduct of other officers, which at most caused $5,000 in damage. And that ignores the fact that the officer involved in the $5,000 accident was never officially found to have been at fault. Where fault was found, the most damage any other officer ever caused was $1,500.[12]

Thus, the court clearly considers the consistency of management's disciplinary actions to be of relevance and import in the evaluation of whether the discipline issued to the grievant was warranted and appropriate under all the facts and circumstances, or whether it was arbitrary in light of discipline issued to others under similar circumstances. This is consistent with this Department's *Rules for Conducting Grievance Hearings* and state human resources policy.[13]

In light of the above, this Department concludes that there is no merit to the agency's objection to Ruling No. 2002-215. Finally, we must emphasize that this reconsidered compliance ruling has no bearing on the ultimate merits of this grievance.

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Claudia T. Farr
Director

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Susan L. Curtis
Employment Relations Consultant

[10] Additionally, the court indicates that it "also rejects the hearing officer's suggestion, which is implicit in his decision, that VCU is somehow limited in its consideration of the amount of damage caused by an employee's conduct when deciding what discipline to administer." *Id.* at 3.
[11] *Id.*
[12] *Id.* at 5.
[13] *Rules for Conducting Grievance Hearings* page 12 and *Standards of Conduct*, DHRM Policy No. 1.60(VI)(C) ("[m]anagement should apply corrective actions consistently, while taking into consideration the specifics of each individual case").