

Issue: Compliance/Administrative Review of Hearing Decision; Ruling Date: March 6, 2003; Ruling #2003-023; Agency: Department of Transportation; Outcome: Hearing officer in compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation/ No.2003-023
March 6, 2003

The grievant has requested that this Department administratively review the hearing officer's decision in Case #5600. The grievant asserts that the decision does not comply with the grievance procedure because the hearing officer used a Department of Human Resource Management (DHRM) policy to uphold the discipline issued instead of the Virginia Department of Transportation (VDOT) policy¹ cited in the Group II Written Notice at issue here.² For the reasons set forth below, this Department concludes that based on the hearing record, the hearing officer acted in accordance with the grievance procedure and neither abused his discretion nor exceeded his authority. However, based upon a recent DHRM opinion in a similar case,³ it appears that the hearing officer incorrectly concluded that VDOT Policy IT-98 is unenforceable. Therefore, once DHRM issues its decision in this case, the hearing officer will be required to conform his original opinion to this recent DHRM holding.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to procedural compliance with the grievance procedure."⁴ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁵ In addition, the Department of

¹ VDOT Policy IT-98.

² See Administrative Review request dated January 31, 2003. Although the grievant contested in Case Number 5600 both Group II Written Notices that led to his dismissal, the review request directed to this Department challenged only the Group II Written Notice based on the alleged violation of VDOT Policy IT-98. The grievant did not administratively challenge, to this Department, the second Group II Notice based on the downloading of sexually explicit materials.

³ See DHRM Ruling re: Case # 5610.

⁴ Va. Code § 2.2-1001(2), (3), and (5).

⁵ *Grievance Procedure Manual* § 7.2(a)(3), page 19.

Human Resource Management has the authority to determine whether the hearing decision is consistent with policy⁶ and the circuit court in the jurisdiction where the grievance arose has appellate jurisdiction to determine whether the hearing decision is consistent with law.⁷

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁸ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁹ Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action. Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.¹⁰ Hearing decisions must also be consistent with law and policy.¹¹

The grievant claims that the hearing officer, after ruling the agency’s Policy IT-98 unenforceable,¹² should not have continued his consideration of the grievance using DHRM Policy 1.75.¹³ As a preliminary matter, this Department concludes that the hearing officer did not violate any aspect of the grievance process by considering the enforceability of IT-98. Hearing officers must have the ability to examine and consider a policy in order to apply it to the facts in a given case. Here, the hearing officer considered IT-98 and determined that, on its face, it was inconsistent with DHRM Policy 1.75. While this preliminary determination by the hearing officer does not violate the grievance procedure, whether a policy is enforceable is a conclusion that is subject to DHRM’s review.¹⁴ Thus, if DHRM concludes that a policy is enforceable, then the hearing officer is bound by DHRM’s decision and the hearing officer will be required to conform his opinion to DHRM’s determination.¹⁵

In accordance with the above, the grievant in this case has requested an administrative determination from DHRM. While DHRM does not appear to have ruled yet in this case, it ruled in a similar case (#5610) that VDOT Policy IT-98 is enforceable, reasoning that although it is more restrictive than DHRM Policy 1.75, it is not contrary to that policy. Presumably, the forthcoming DHRM ruling in this case will be consistent with its ruling in Case Number 5610. Therefore, once DHRM issues its

⁶ Va. Code § 2.2-3006 (A).

⁷ Va. Code § 2.2-3006 (B).

⁸ Va. Code § 2.2-3005(D)(ii).

⁹ *Grievance Procedure Manual* § 5.9, page 15.

¹⁰ *Grievance Procedure Manual* § 5.8(2), page 14.

¹¹ Va. Code §2.2-3005 (D)(iii).

¹² See Decision of Hearing Officer Case Number 5600, issued January 24, 2003, FN 8, page 7.

¹³ DHRM Policy No. 1.75, Use of Internet and Electronic Communication Systems, effective date, 8/1/01.

¹⁴ See Va. Code § 2.2-1201(13); *Murray v. Stokes*, 237 Va. 653 (1989).

¹⁵ *Grievance Procedure Manual*, § 7.2(a)(3), page 19.

decision in this matter, the hearing officer will be required to conform his original decision to any similar DHRM holding.

Because the hearing officer will presumably have to conform his decision to the DHRM holding that VDOT Policy IT-98 is enforceable, the issue of his substitution of DHRM Policy 1.75 has apparently been made moot. However, as explained below, this Department finds no error from a standpoint of compliance with the grievance process with the hearing officer's analysis of the discipline under a policy not expressly cited in the Group II Notice, *given the facts of this particular case*.

Prior to his termination, as a non-probationary employee covered by the Virginia Personnel Act, the grievant was entitled under the Commonwealth's Standards of Conduct to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to respond to the charges.¹⁶ The grievant was provided notice that he was being disciplined for violation of VDOT Policy IT-98 *and* because he had "spent more than 2 hours [during a single day] visiting non-work related sites." Thus, the grievant clearly had notice that he was being disciplined for spending an unreasonable amount of time browsing the Internet for personal purposes. The DHRM policy cited by the hearing officer, Policy 1.75, allows an employee to use a state computer for "incidental and occasional personal use" but only if that use does not interfere with the user's productivity or work performance.¹⁷ The agency, by issuing the Group II Notice, apparently (and reasonably) concluded that spending more than two hours per day on-line for personal use could not help but interfere with productivity or work performance.¹⁸

Based on the forgoing, this Department concludes that the grievant had sufficient notice of the nature of the charges against him (excessive personal computer use) and was given ample opportunity to rebut those charges both prior to hearing and at his grievance hearing. Thus, this Department finds no error, in this particular case, by the hearing officer's application policy of a policy not expressly cited in the Group II Notice.

APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.¹⁹ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction

¹⁶ See DHRM Policy 1.60, VII (E)(2).

¹⁷ DHRM Policy 1.75, effective date 8/01/01, page 2 of 5.

¹⁸ The grievant was one of many that were disciplined for spending excessive amounts of time on the Internet browsing Websites for personal use. Despite the zero-tolerance of IT-Policy 98, the agency disciplined only those employees who (1) spent more than two hour on line in a given day, or (2) had visited sexually explicit sites. Thus, the agency essentially adopted a "per se" rule that more than two hours per day browsing the Internet interferes with productivity and work performance.

¹⁹ *Grievance Procedure Manual*, § 7.2(d), page 20.

in which the grievance arose.²⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²¹ This Department's rulings on matters of procedural compliance are final and nonappealable.²²

Claudia T. Farr
Director

Deborah M. Amatulli
Employment Dispute Resolution Consultant

²⁰ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a), page 20.

²¹ *Id.*

²² Va. Code § 2.2-1001 (5).