Issue: Compliance/Management actions – records management; Ruling Date: July 27, 2004; Ruling #2004-829; Agency: Department of Transportation; Outcome: agency's question regarding rehearings of cases #655 and 688 not necessary; agency directed to supplement any prior document productions in pending grievances in accord with instructions in ruling.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Virginia Department of Transportation
EDR Ruling No. 829
July 27, 2004

The Virginia Department of Transportation (VDOT) seeks guidance from this Department regarding several grievances initiated by its employees relating to alleged computer misuse.

FACTS

VDOT has undertaken several audits of employee computer usage in an effort to determine whether employees had either (1) used their computers to visit unauthorized Internet web-sites (e.g. pornographic sites), or (2) abused state time by spending an inordinate amount of time on the Internet engaged in non-business related, personal use. The most recent audit focused on the period of July 21-27, 2003.

When calculating employee Internet use, time spent on the Internet prior to and after the regular work schedule was not counted against employees. Likewise, time spent on the Internet during meal and other regularly scheduled breaks was not included. Salaried non-probationary employees who spent more than 30 minutes on the Internet engaged in personal use either received counseling or formal discipline.

As a result of the discipline, a number of employees initiated grievances challenging the discipline. In several cases, employees withdrew their grievances prior to their administrative hearings. In other instances, the discipline was reduced or withdrawn during the management resolution steps based upon information provided to VDOT by the employees. To date, at least three cases arising from the 2003-2004 audit have proceeded to hearing and been ruled upon by this Department's Division of Hearings (case numbers 655, 687, and 688). In each of these cases, the hearing officer found the grievant's usage exceeded 30 minutes and upheld the agency imposed discipline.

In another related case, the hearing was stopped when it was discovered that the agency had erred in calculating the employee's personal Internet usage. Because the employee's usage was less than 30 minutes, the agency rescinded the discipline and restored the lost pay and benefits.

VDOT has since re-calculated the personal Internet usage of employees tracked during the week of July 21-27, 2003. VDOT asserts that in only three cases (none of which included cases 655, 687, and 688) did the net personal use drop below 30 minutes. One of the employees in the cases where usage dropped below 30 minutes had already had the discipline rescinded by one of the management step respondents. The discipline of the remaining two, which was not challenged by either employee, is now under review by their respective managers. In each of the cases decided at hearing by this Department (655, 687, and 688), VDOT reports that the recalculated usage still did not fall below 30 minutes. In one of those cases, No. 687, the recalculated usage amount was available prior to hearing and admitted as evidence. The recalculations had not been conducted prior to hearing in cases 655 or 688, although even as recalculated, VDOT states that the usage remained over 30 minutes.

In the interest of full disclosure, VDOT has provided the above information to this Department and seeks guidance as to whether there is any need for reconsideration of the decisions in cases 655 and 688.

DISCUSSION

Whether the Previously Decided Grievances Should Be Re-opened or Re-considered

Once a hearing decision has become final and the period for judicial review has expired, this Department has held that a request for a rehearing or reopening cannot be granted absent extreme circumstances, for example, where a party can clearly show that a fraud was perpetrated upon the hearing process.[1]

Here the agency has conceded that it provided inaccurate information to grievants regarding their Internet usage. VDOT's admission of this error, however, does not support a finding of fraud or such extreme circumstances such that reopening of the grievances would be warranted. While not binding on this Department, Virginia court opinions on the reopening of trials are instructive. In trial courts, even where there is a claim of perjury and supporting evidence (which is not the case here), rehearing requests arising after a final judgment have been consistently denied.[2] Courts have reasoned that the original trial (or hearing) constituted the parties' opportunity to cross-examine and impeach witnesses, and to ferret out and expose any erroneous or false information presented to trier of fact. Those courts also opined that to allow rehearings after a final judgment, on the basis of perjury (or, presumably, other false or inaccurate testimony) could prolong the adjudicative process indefinitely, and thus hinder the need for finality in litigation. Under the rationale of those courts, a party's claim of erroneous evidence or perjury at a grievance hearing, coming after the hearing decision became final, would not warrant reopening. Indeed, the grievants in cases 655 and 688 had the opportunity at

[1] *See* EDR Ruling No. 2001-187.
[2] *See, e.g.*, Peet v. Peet, 16 Va. App. 323 (1993); Jones v. Willard, 224 Va. 602 (1983); McClung v. Folks, 126 Va. 259 (1919).

hearing to question agency witnesses about the evidence on Internet use and to attempt to ferret out any false testimony or error. In light of all the above, as well as the absence of any claim or evidence of extreme circumstances or fraud, rehearings in cases 655 and 688 are not warranted.

Impact on Pending Grievances

The information disclosed above, however, does have a bearing on one or more pending grievances. For instance, in response to EDR Ruling 2003-419, VDOT provided an employee who had been disciplined for excessive personal Internet use with a copy of a redacted spreadsheet of disciplinary actions related to Internet abuse in 2002 *and* copies of redacted written notices related to Internet abuse investigations that have occurred since those noted on the spreadsheet. To the extent that erroneous information on Internet usage was provided to the grievant involved with Ruling 2003-419 (or any other grievants with currently pending grievances), the agency shall, if it has not already done so, provide the correct information within five workdays of receipt of this Ruling, in a manner that preserves the personal privacy of those not involved with a given grievance.

CONCLUSION

The agency is directed to supplement any prior document productions in pending grievances in accord with the instruction above. This Department's rulings on matters of compliance are final and nonappealable.[3]

Claudia T. Farr
Director

[3] Va. Code § 2.2-1001(5).