Issue: Administrative Review of Hearing Decision; Ruling Date March 2, 2005; Ruling #2004-936; Agency: Virginia Department of Transportation; Outcome: decision returned to Hearing Officer for clarification

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2004-936
March 2, 2005

The Virginia Department of Transportation (VDOT or the agency) has requested that this Department administratively review the hearing officer's decision in Case Number 7298. The agency claims that the hearing officer (1) misunderstood the facts; (2) drew incorrect legal conclusions; (3) abused his authority; and (3) improperly interpreted state and/or agency policy in rendering his decision.

FACTS

In 2002, VDOT conducted an agency-wide review of non-work related use of the Internet by its employees. Numerous VDOT employees were disciplined as a result of the 2002 agency-wide audit. The grievant was not among those disciplined.

Subsequently, as a result of an anonymous complaint to the state's Fraud, Waste and Abuse Hotline, the grievant's Internet activity for four different weeks during the months of July, August, October and November, 2002 was examined by VDOT's Internal Audit Division. As a result of the audit, the grievant was issued a Group II Written Notice for abuse of state time, misuse of state equipment and failure to follow established written policy. Specifically, the written notice states:

> [y]our pattern of Internet usage throughout the four weeks during normal business hours averaged in excess of 1.09 hours per day in July, 1.53 hours per day in August, 1.03 hours per day October, and 2.01 hours per day in November. On three dates during the audited period, usage exceeded two hours per day.

The grievant challenged the written notice by initiating a grievance on May 3, 2003. The grievance proceeded to hearing on December 16, 2004. In his December 20, 2004 decision, the hearing officer rescinded the Group II Written Notice finding that the disciplinary action taken in the grievant's case constituted "disparate treatment."[1] The hearing officer upheld his determination in a reconsideration decision dated January 25, 2005.[2]

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[1] *See* Decision of Hearing Officer, Case No. 7928, issued December 20, 2004.
[2] *See* Reconsideration Decision of Hearing Officer, Case No. 7928, issued January 25, 2005.

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."[3] 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.[4]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[5] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[6] Further, "[i]n 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.[7] 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.[8] Further, the grievance procedure requires that the hearing officer's determination be supported and documented through a hearing decision that "contain[s] findings of fact on the material issues and the grounds in the record for those findings."[9]

Accordingly, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[10] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

In the present case, the hearing officer determined that the grievant's behavior violated the agency's zero tolerance policy in effect at the time because his internet usage averaged over one hour per day during the audit period.[11] However, the hearing officer apparently invoked his authority to remove the disciplinary action based on mitigating

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[3] Va. Code § 2.2-1001(2), (3), and (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] Va. Code § 2.2-3005(D)(ii).
[6] *Grievance Procedure Manual* § 5.9.
[7] *See Rules for Conducting Grievance Hearings*, § VI (B).
[8] *Grievance Procedure Manual* § 5.8(2).
[9] *Grievance Procedure Manual* § 5.9; *see also Rules for Conducting Grievance Hearings* § V(C).
[10] Va. Code § 2.2-3005(C)(5).
[11] *See* Decision of Hearing Officer, Case No. 7928, issued December 20, 2004.

circumstances.[12] Specifically, the hearing officer found that removal of the discipline was warranted as a result of the agency's alleged "disparate treatment" of the grievant compared with other similarly-situated employees.[13]

In making this determination, the hearing officer relied upon disciplinary action taken as a result of the 2002 agency-wide audit. In reference to such discipline, the hearing decision finds that, "only those whose personal usage time *was equal to or greater than two hours per day* were disciplined."[14] The hearing decision later states: "[i]t is undisputed that the agency's state-wide review of Internet usage resulted in discipline being issued only to employees with *average* personal Internet usage in excess of two hours per day"[15] and states that those employees with one hour and 59 minutes or less of personal usage were not disciplined in the agency-wide audit.[16] The hearing officer also finds that the grievant's personal Internet usage was overestimated and if recalculated appropriately, would result in the grievant's *average* Internet access times for personal business being less than two hours per day.[17] The hearing officer concludes that the discipline taken against the grievant was therefore inconsistent, on the ground that other similarly situated employees with the same level of Internet usage as the grievant were not disciplined in the 2002 agency-wide audit.[18]

The agency claims that the hearing officer abused his discretion and lists a host of challenges to the hearing officer's factual determinations.[19] Of particular significance for purposes of this ruling, the agency claims that *average* usage during the 2002 agency-wide audit week (i.e., April 8-14, 2002) was *not* considered and that averaging in the

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[12] Contrary to the agency's contention that the grievant's proven abuse of the zero tolerance policy in effect at the time is enough to warrant upholding the discipline, under the *Rules for Conducting Grievance Hearings*, "a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness." Examples of mitigating circumstances include whether the employee was given notice of the rule, consistency of the agency in implementing discipline, and whether the discipline was tainted by improper motive. See *Rules for Conducting Grievance Hearings,* § VI (B).

[13] *See* Decision of Hearing Officer, Case No. 7928, issued December 20, 2004.

[14] *Id.*, page 5 (Emphasis added.)

[15] *Id.*, page 7 (Emphasis added).

[16] *Id.*, page 7.

[17] *See* Decision of Hearing Officer, Case No. 7928, issued December 20, 2004 (Emphasis added).

[18] *Id.* See also Reconsideration Decision of Hearing Officer, Case No. 7928, issued January 25, 2005. In the Reconsideration Decision, the hearing officer correctly notes that his original decision did not (nor could it) require an agency to use the same methodology for all investigations of Internet abuse; the decision merely recognizes that whatever methodologies are used, discipline should be consistent for employees with the same levels of personal Internet use. This does not mean that to avoid mitigation, an agency is perpetually bound by a particular standard or threshold for determining the level of discipline to be issued (e.g., a Group II Written Notice for a certain number of hours of personal Internet usage). As long as employees are provided clear notice of the adoption of a new disciplinary standard, and agency disciplinary actions with respect to that standard are consistent, agency discipline will be less subject to mitigation.

[19] While this ruling may not expressly address every argument of alleged non-compliance, all arguments advanced have been reviewed and considered in light of this Department's responsibility to assure that the hearing officer's conduct of the hearing and written decision comply with the grievance procedure.

grievant's case was actually to his advantage compared to other employees.[20] Notably, the agency's request for administrative review further asserts that the grievant's personal Internet usage on three workdays of the audited period exceeded two hours. This assertion is consistent with charges in the Written Notice, which, among other things, cite the grievant with exceeding two hours per day in personal Internet usage during three days within the audit period.

Documentary evidence in the record lends support to the agency's contention: on its face, grievant's Exhibit 26 indicates that the 2002 agency-wide audit team examined an employee's Internet use on any one day during the audit week and if the user reached two hours of non-work related activity "*on that day*," he or she was deemed a "substantial" abuser of the internet.[21] As noted above, the hearing officer makes his determination of "disparate treatment" based upon the "undisputed" fact that the 2002 agency-wide audit resulted in discipline being issued to those employees whose *average* personal Internet usage exceeded two hours per day. However, based upon record evidence, specifically grievant's Exhibit 26, it does not appear that average use was a consideration in the 2002 agency-wide audit; rather, it appears that personal Internet use on any one day during the audited period was the determining factor for disciplinary purposes. Accordingly, the hearing officer is ordered to reconsider his decision in light of the above evidence, and to clarify in his decision the grounds in the record for his findings.

Additionally, as noted above, the Written Notice states, in an attachment, that on three of the dates examined during the audit period, the grievant's personal Internet use exceeded two hours per day. The hearing decision fails to address that portion of the Written Notice regarding the grievant's personal Internet usage on any one day during the audit period. Because it was raised in an attachment to the Written Notice and thus could be a material issue in this case, particularly in light of the issues discussed above, the hearing officer is ordered to address in his reconsidered decision the issue of the grievant's personal Internet usage on those days where it allegedly exceeded two hours per day, and to clarify in his decision the grounds in the record for his findings.

Policy Interpretation

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[20] In support of this contention, the agency offered with its request for administrative review a confidential report on Non-Work Related Use of the Internet by VDOT Employees, dated October 4, 2002. In his reconsideration decision, the hearing officer disregards the report because it was not entered into evidence at hearing and does not constitute "newly discovered evidence." *See* Reconsideration Decision of Hearing Officer, Case No. 7928, issued January 25, 2005. While the hearing officer is technically correct, a substantially similar document was entered into evidence at hearing, namely grievant's Exhibit 26. grievant's Exhibit 26 contains a confidential report of Non-Work Related Use of the Internet by VDOT Employees, dated December 4, 2002. This Department deems it appropriate to note that some of the information referenced by the agency in its request for reconsideration and contained in the October 4, 2002 report, is also present in the December 4, 2002 report of grievant's Exhibit 26.

[21] *See* grievant's Exhibit 26. (Emphasis added.)

The remainder of the agency's claims are based on the hearing officer's interpretation of state and/or agency policy and law, which are not issues for this Department to address. Rather, the Director of DHRM (or her designee) has the authority to interpret all policies affecting state employees, and has the authority to assure that hearing decisions are consistent with state and agency policy.[22] In addition to its appeal to this Department on procedural grounds, the agency has properly appealed to DHRM on the basis of policy. If DHRM finds that the hearing officer's interpretation of policy was not correct, DHRM may direct the hearing officer to reconsider his decision in accordance with its interpretation of policy.[23] Likewise, questions regarding the decision's conformity with law are to be reviewed by the circuit court in the jurisdiction in which the grievance arose, not this Department.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this Department orders the hearing officer to reconsider his decision and to clarify in his decision the grounds in the record for his findings. 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.[24] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[25] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[26] This Department's rulings on matters of procedural compliance are final and nonappealable.[27]

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Claudia T. Farr
Director

[22] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).
[23] *Grievance Procedure Manual* § 7.2 (a)(2).
[24] *Grievance Procedure Manual,* § 7.2(d).
[25] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual,* § 7.3(a).
[26] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).
[27] Va. Code § 2.2-1001 (5).