Issue: Administrative Review of Case #'s 8051 and 8052; Grievance Procedure/Hearing Decision; grievance issues/discipline/computer misuse; Ruling Date: September 30, 2005; Ruling # 2005-1053; Agency: Virginia Information Technologies Agency; Outcome: decision remanded for clarification

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Virginia Information Technology Agency
Ruling Number 2005-1053
September 30, 2005

The grievant has requested administrative reviews in Case Numbers 8051 and 8052.

FACTS

The Virginia Information Technologies Agency (VITA) employed the grievant as an Information Technology (IT) Specialist I. He provided information technology support to employees of the Virginia Department of Transportation (VDOT). On January 3, 2005, VITA issued the grievant a Group II Written Notice of disciplinary action with a four workday suspension for misuse of state property, abuse of state time, and failure to follow management's instruction—all stemming from alleged internet abuse. On February 2, 2005, the grievant filed a grievance challenging VITA's disciplinary action (Grievance #1).

On March 16, 2005, the grievant initiated a second grievance, alleging that he had been improperly denied the opportunity to attend a particular training, which constituted a misapplication of policy and/or retaliation. (Grievance #2). The outcomes of the third resolution steps of the two grievances were not satisfactory to the grievant and he requested a hearing. Both grievances were qualified for hearing by the agency head and on April 18, 2005, the EDR Director issued Ruling Numbers 2005-1013 and 2005-1014 consolidating cases 8052 and 8051 for a single hearing. On May 11, 2005, a hearing was held at the agency's regional office.

The hearing officer upheld the Group II Notice for computer misuse challenged in Grievance #1. While he found that the grievant had spent excessive time browsing the internet for personal use, he concluded that the grievant had not engaged in improper conduct by accessing sexually explicit web-sites.

Regarding Grievance #2, the hearing officer concluded that although the grievant had "raised many legitimate questions and concerns about the role of the VDOT Business Manager in his denial of training," the hearing officer lacked the authority to take any action concerning VDOT because VDOT was not a party to the grievance. Accordingly, the hearing officer provided the grievant with no relief.

On June 9, 2005, the grievant's employment was terminated for alleged misuse of state property, abuse of state time, and failure to follow management's instruction, again based on purported computer misuse. The grievant grieved his termination and a hearing was held on August 30, 2005. In his August 31st hearing decision, the hearing officer upheld the Written Notice and termination. The August 31st decision has also been appealed to this Department and will be addressed in a separate ruling.

As to Grievance #1, the grievant contends that the agency violated the grievance procedure by not providing a full copy of the grievance record to the hearing officer. The grievant also claims that VITA's advocate at the hearing was unprofessional and that the hearing decision is inconsistent with DHRM policy and a previous EDR hearing decision. He also claims that the agency's guidance as to what constitutes reasonable personal Internet use was vague. Finally, as to Grievance #2, the grievant claims that the hearing officer should have reopened the hearing and allowed him to proceed against the "correct" party, VDOT.

DISCUSSION

Grievance #1

Failure to Provide a Complete Copy of the Grievance Record to the Hearing Officer

The grievant asserts that the agency violated the grievance procedure by not providing a full copy of the grievance record to the hearing officer. According to the grievant, he had stated at the pre-hearing conference that he wanted to have a copy of the grievance record admitted into evidence. The agency advocate purportedly stated that the hearing officer had been provided a copy and that another copy would be duplicative. The grievant contends that the copy of the grievance record provided by the agency to the hearing officer was incomplete. The grievant raised this issue with the hearing officer at the grievance hearing and the hearing officer addressed this alleged non-compliance in his hearing decision. Citing to §4.3 of the *Grievance Procedure Manual*, the hearing officer concluded that he could not determine whether the agency had complied with the "requirement" to provide a copy of the grievance record, complete with attachments, to EDR. The hearing officer further concluded that even if it was assumed that VITA failed to submit all of the contents of the original grievance record, such an omission would constitute harmless error because hearing decisions are based on the relevant evidence presented at the hearing by the parties. The hearing officer observed in his decision that during the prehearing conference and through a subsequent correspondence, the parties were advised by the hearing officer to submit whatever documents they intended to rely upon to establish their respective cases.

As an initial point, we note that the agency had no obligation to provide a copy of the grievance record under §4.3 because that section applies only when the agency head has denied qualification of the grievance for hearing and EDR has been asked to make a

subsequent qualification determination. Because the agency head had qualified both grievances, §4.3 never applied.

The hearing officer was correct, however, that parties are responsible for submitting any documents that they intend to rely upon at hearing. As the hearing officer noted, to the extent the grievance record failed to contain documents supporting the grievant's position, the grievant could have submitted those exhibits during the hearing. A review of the hearing tapes confirms that the hearing officer twice extended the grievant the opportunity to submit any documents that he believed were relevant.[1] Thus, because the agency had no obligation under §4.3, and because the hearing officer provided the grievant with a chance to submit additional documents, we find no error regarding this issue.

Demeanor and Behavior of the Agency Advocate

The grievant also claims that VITA's advocate at the hearing was unprofessional and sometimes bordered on rudeness. After reviewing the hearing tapes, this Department concludes that on at least one occasion, the agency representative interrupted the grievant's attempt to respond to questions, and while the hearing officer would not have been remiss in cautioning the representative to allow the grievant to finish his answers, her overall behavior was not so disruptive as to prevent the grievant from presenting his case or mounting a defense to the charges against him.

Inconsistency with DHRM Policy

The grievant claims that the hearing decision does not follow the Department of Human Resources Management (DHRM) policy. Under the grievance procedure, a request for an administrative review based on inconsistency with state policy must be made to the DHRM Director, with a copy also going to the agency. If the grievant wishes to request that the hearing decision be reviewed by the DHRM Director on the basis that the decision does not conform to policy, the grievant must make a written request to the DHRM Director, which must be **received within 15 calendar days of this decision**. Because the initial requests for review were timely, a request for administrative review to DHRM within this 15-day period will be deemed timely as well.

Inconsistency with Prior EDR Hearing Decisions/Vagueness of Policy

The grievant claims that the hearing officer's decision is inconsistent with a prior EDR ruling. This case is presumed to be Case Number 687, which is mentioned in the Third-Step Respondent's response to the grievance.[2] In Case Number 687, VDOT allowed employees to use their lunch breaks (45 minutes) and their 15 minute morning and afternoon break periods for personal Internet use. In addition to this hour and 15

[1] Hearing tape 1, side 2, counter 905-920; 1040-1085.
[2] Agency Hearing Exhibit Number 2.

minutes of permitted use, VDOT employees were allowed an additional 29 minutes grace period for a total of one hour and 44 minutes of allowed use. At the hearing, the grievant asserted that he believed that he too was entitled to the same amount of personal Internet use as the VDOT employees,[3] and claims in his request for administrative review that he looked to the EDR opinion for guidance. In sum, he claims that the VITA's policy on permissible Internet use was vague and that he followed VDOT's and EDR's interpretation of DHRM Policy 1.75.[4]

First, a hearing officer is bound to use standards and policies of the *employing* agency. He may not substitute the standards of another agency when deciding a case.[5] Likewise, when considering potential mitigating circumstances, such as consistency of discipline, the hearing officer must confine his review of consistency within the *employing* agency, not other agencies. Furthermore, agencies are permitted to alter their policies, which can render obsolete any prior standards or rulings based on those standards. Therefore, prior opinions may have little bearing on subsequent cases.

In some circumstances, however, a prior decision *may* relate to a subsequent case. Here, the grievant argued at hearing that when he was moved from VDOT into VITA, he reasonably assumed that the Internet use policy adopted by VDOT still remained in effect.[6] The grievant asserts that VITA's policy (which appears to have essentially been his supervisor's verbal instructions) regarding personal Internet use was vague, thus he had little guidance other than the earlier VDOT standard (as articulated in the earlier EDR hearing decision) to direct his usage. In addition, he asserts that once VITA determined that he had not violated the VDOT standard, VITA made up a new policy, making it more restrictive than VDOT's so that be could be disciplined.[7]

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[3] The grievant's lunch break was only a half an hour, thus the grievant's total allowable time, if the VDOT policy had applied to him, would have been reduced by 15 minutes.

[4] DHRM Policy 1.75 is the policy that governs personal Internet use.

[5] This is not to say that only *agency* policy should be considered by the hearing officer, as there is also state policy promulgated by DHRM. Agencies "are authorized to develop human resource policies that do not conflict with state policies or procedures." DHRM Policy 1.01. Such agency specific policies may be more restrictive than DHRM policy, so long as they do not conflict with DHRM policy. *See* DHRM Ruling re: Case # 5610. Furthermore, agencies are encouraged to seek guidance and assistance from DHRM when developing agency-specific policies or guidelines. DHRM Policy 1.01. Thus, while agency policies are generally presumed to comport with DHRM policy, if the hearing officer finds a conflict between DHRM and agency policy, the hearing officer must confine his policy deliberations to DHRM policy only. In addition, if an agency adopts a policy that is more restrictive than DHRM policy, it is appropriate for a hearing officer to consider as a potential mitigating circumstance whether the agency provided its employees with notice of the agency policy, how the agency interprets its policy, and the potential consequences of not complying with the agency policy. *See Rules for Conducting Grievance Hearings,* VI (B)(1).

[6] Hearing tape 1, side 2, counter 600-640.

[7] Specifically the grievant asserts:

> The hearing officer's Decision is in direct conflict with the opinion rendered in a subsequent case of this nature and does not follow DHRM standards, the Internet policy is vague in finding this opinion, I find that the VDOT internal auditors have said that the break point for use vs. abuse is 2 X 15 minute breaks and one 30 minute lunch. Then on top of that another 30 minutes of occasional and incidental use. The Agency proved that I had NOT gone over this grace period and subsequently had to make the rule they stated to be "no usage outside of regular break periods." This is discriminatory and contradicts

The hearing decision correctly states that 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. To reach this determination, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) 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) and, finally, (iv) 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.[8]

In this case, evidence in the hearing record supports the hearing officer's determination that the employee engaged in the behavior described in the written notice, at least as to the amount of time the grievant spent engaged in personal Internet use.[9] The hearing officer found that the grievant had spent the following amounts of time engaged in personal Internet use over and above lunch and break time:

November 2, 2004	29 minutes, 53 seconds.
November 3, 2004	28 minutes, 13 seconds.
November 4, 2004	16 minutes, 38 seconds.
November 5, 2004	26 minutes, 47 seconds.
November 9, 2004	22 minutes, 12 seconds.
November 10, 2004	5 minutes, 42 seconds.
November 15, 2004	22 minutes, 27 seconds.
November 16, 2004	15 minutes, 35 seconds.

As to whether these amounts of personal usage constituted misconduct,[10] the hearing officer concluded that the grievant had been "instructed to minimize his personal

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> DHRM policy 1.75. There is no written VITA internet policy which "holds us to a higher standard." The only policy that I had to go by for guidance was the DHRM policy and the opinion on the EDR website. It is not my interpretation of it. It is VDOT's/EDR's interpretation of it, I am just following it.

[8] *Rules for Conducting Grievance Hearings*, VI(B).

[9] Agency Exhibit 3, log of grievant's Internet use.

[10] The pertinent policy/instruction allegedly violated by the grievant, is reflected in an attachment to the Written Notice Form. The grievant's supervisor wrote:

> I cautioned you and the other members of the Information Technology staff on the proper use of Internet access during work hours. I have advised everyone in the Section that the Internet is an important tool and a significant resource to IT employees in performing their jobs. I have stated to all IT staff that I expect this tool to be used for business related reasons and personal use to kept within policy guidelines of occasional use.

use of the internet not to exceed approximately 30 minutes during lunch or during breaks." [11] The hearing officer found that:

> During staff meetings attended by Grievant, the unit Manager reminded information technology staff that they were to be held to a very high standard regarding their usage of the internet because VITA is responsible for providing technology and services to other State agencies who may discipline their respective employees for excessive internet usage. *The Manager gave examples of permitted personal internet usage such as 30 minutes during lunch or during short breaks.*[12]

A review of the hearing record confirmed the above except the last sentence, which does not appear to be supported by the record evidence. The actual testimony of the manager regarding lunch and meal break use of the Internet was as follows:

> *If* there were any indications [of permissible use] Mr. [hearing officer], it would have been during verbal conversations in those meetings when the topic was being discussed. Thinking back, examples of 30 minutes during lunch was fine, during a break time, short break time. *If* examples were given, those *would have been* the examples.[13]

Thus, while the hearing record contains testimony of the supervisor that he would consider personal Internet use during lunch or a break to be acceptable, it also reflects uncertainty as to whether the supervisor ever presented these examples of acceptable personal use at any meeting. As to any instruction from the supervisor regarding the outer limits of permissible use, the hearing officer appropriately inquired of the supervisor: "Was [the grievant] told of what amount of personal use he could have?" The supervisor responded, "To my recollection, no sir."[14]

Additional testimony on lunch and break use of the Internet was provided by the third-step respondent, the VITA Service Level Director (SL Director). When pressed by the grievant at hearing as to the amount of time that VITA employees were allowed for personal use, the SL Director attempted to draw a distinction between the VITA and

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> As part of my responsibilities to uphold the policies and practices of VITA, I have been monitoring Internet usage of staff over the last several months. In monitoring your Internet usage, I have found an excessive use of the Internet for personal use that is clearly not business related . . . .
> In accordance with the Standards of Conduct, your actions constitute misuse of state property, abuse of state time, and failure to follow management's instructions. In addition, your actions violate DHRM's Internet policy.

[11] Hearing Decision, p. 4.

[12] (Emphasis added). Hearing Decision, p. 3.

[13] (Emphasis added). Hearing Tape 1, side 1, counter 750-775. This testimony was a response to the question by the hearing officer: "How was [the grievant] to know when his personal use exceeded what would be the high standard that you set?"

[14] Hearing tape 1, side 1, counter 735-740.

VDOT policies. He stated somewhat equivocally that "We've not working for VDOT, so that standard [the VDOT standard of approximately an hour and a half of permissible personal use] is *not necessarily* upheld. Any minute over your break and lunch *can be* deemed usage that exceeds what it should be."[15] Moreover, the SL Director's testimony at hearing contradicts his earlier written communications with the grievant. In his third-step response to the grievant, the SL Director's commentary on the grievant's allowable personal Internet use was as follows:

> [The grievant's] internet use was monitored and cited for two weeks from 10/31/2004 through 11/16/2004. I additionally pulled for review the period from 11/30/2004 to 12/13/2004. The actual facts to how Audit applies allowable usage applied in the case hearing #687 were as follows: an allotment of 15 minutes in the morning and 15 minutes in the afternoon for breaks, as well as an allotment of 45 minutes for lunch was applied. An additional 30 minutes was allotted across the entire day for personal usage. This total was one hour and forty-five minutes of personal usage allowed daily.
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> In [the grievant's] case, I determined, from current and previous management, his work hours are and have been from 7 am to 3:30 p.m. Monday thru Friday with 30 minute lunches. With this information I was able to determine his allowable time would be reduced by 15 minutes since the original case allowed for a 45 minute lunch period and he did not have that long for lunch. *This brings [the grievant's] total allotment down to one hour and thirty minutes for his daily personal Internet allowable usage*.[16]

Based on all of the above, the hearing officer is ordered to review the record evidence and identify in his decision the factual basis of his determination that the grievant "was instructed to minimize his personal use of the internet not to exceed approximately 30 minutes during lunch or during breaks."[17] In the event that the hearing officer finds no support in the hearing record for that holding, he is ordered to determine what the limits of the personal use policy/instruction were at the time the grievant was disciplined, and apply that standard to this case.[18]

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[15] (Emphasis added). Hearing tape 1, side 2, counter 720-730.
[16] (Emphasis added). Agency Hearing Exhibit Number 2.
[17] Hearing Decision, p. 4.
[18] The hearing officer identified in his decision no day in which the grievant's use would have exceeded the standard articulated by the SL Director in his third-step response (one hour and 30 minutes). At hearing, December 9, 2005 was identified as a day in which the grievant's use exceeded 1 and ½ hours by 5 minutes. That day is not mentioned in the hearing decision, possibly because during cross-examination by the grievant, the SL Director conceded that December 9th was outside the scope of the Written Notice. Hearing tape 1, side 2, counter 335-340.

Mitigating Circumstances

The hearing officer found that "no credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings, (Rules).*" As described above, the grievant has objected to the hearing decision on the basis of the vagueness of the policy/instruction and agency's shifting of the standard. Given that a lack of notice of a policy can be viewed as a mitigating circumstance under the *Rules*, such an objection can fairly be viewed as a challenge to the hearing officer's finding that no credible mitigating evidence was presented at hearing.[19]

Given the apparent lack in the hearing record of any clear articulation of the outer limits of personal use, the hearing officer is ordered to reconsider his conclusion that "no credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings, (Rules).*" If after reviewing the hearing record the hearing officer finds that the grievant's supervisor's instruction on Internet use was vague, he must then determine whether that ambiguity warrants a reduction in discipline.

Grievance #2

Grieving Across Agency Lines

The grievant claims that he should be have been allowed to grieve across agency lines, in other words, to initiate his denial of training grievance with VDOT instead of his employing agency, VITA. First, this Department has generally precluded employees from grieving across agency lines in all but the most compelling circumstances.[20] Furthermore, any objection to having to grieve VDOT's denial of training with VITA has long since been waived.[21] For example, if the grievant had wanted to seek a ruling on this issue, he might have initiated a timely grievance with VDOT. If VDOT closed the grievance on the basis that the grievant worked for VITA, the grievant could have sought a compliance ruling from EDR well prior to hearing. Given that this grievance has advanced through the entire process, including hearing, before this issue was raised with

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[19] The *Rule, §VI (B)(1)* describe the mitigating circumstance of "Lack of Notice:

> The employee did not have notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with it. However, an employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee. Proper notice of the rule and/or its interpretation by the agency may also be found when the rule and/or interpretation have been communicated by word of mouth or by past practice. Notice may not be required when the misconduct is so severe, or is contrary to applicable professional standards, such that a reasonable employee should know that such behavior would not be acceptable.

[20] *See* EDR Ruling No. 2006-1113.

[21] The grievance procedure requires that all claims of noncompliance be raised immediately. *Grievance Procedure Manual* § 6.3. Thus, if a party proceeds with the grievance after becoming aware of a violation, that party may waive the right to challenge the noncompliance at a later time. *Id.*

EDR as a compliance matter, EDR will not re-open the grievance to join VDOT as a party. EDR's determination on this issue is final and non-appealable.[22]

CONCLUSION AND 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.[23] If the grievant does not elect to appeal to DHRM, the decision will become final when the hearing officer issues his revised decision. If the grievant appeals to DHRM, the decision becomes final when the DHRM Director issues her decision, *and* the hearing officer has issued all revised decisions ordered by the EDR and DHRM Directors. The date of the last of these decisions shall be considered the date upon which the hearing decision becomes final. 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.[24] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[25]

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Claudia T. Farr
Director

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