Issue: Administrative Review of Case #8218; Ruling Date: March 9, 2006; Ruling #2006-1250; Agency: Virginia Information Technologies Agency; Outcome: hearing decision in compliance

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINSTRATIVE REVIEW OF DIRECTOR

In the matter of the Virginia Information Technologies Agency
Ruling Number 2006-1250
March 9, 2006

The grievant has requested an administrative review of the hearing officer's decision in Case Number 8218.

FACTS

The Virginia Information Technologies Agency (VITA or the agency) employs the grievant as an Information Technology (IT) Specialist.[1] In this capacity, he provides information technology support to the Department of Corrections (DOC).[2] On September 15, 2005, the agency issued the grievant a Group III Written Notice for computer gaming and inappropriate use of the Internet.[3] The Written Notice charged the grievant with violations of Va. Code § 2.2-2827; Department of Human Resource Management (DHRM) Policy No. 1.75, "Use of Internet and Electronic Communication Systems"; DHRM Policy 1.60, "Standards of Conduct"; VITA "Acceptable Internet, E-mail and Other Electronic Communications Usage Policy"[4]; VITA "Personal Computer and Local Area Network Policy"; VITA's Employee Standards of Conduct Special Provisions; VITA's Employee Code of Ethics; and VITA's Information Security Access Agreement.[5] In conjunction with the Written Notice, the grievant was suspended without pay for three weeks.[6]

The grievant initiated a grievance challenging the agency's actions on October 13, 2005.[7] After the parties failed to resolve the grievance during the management resolution steps, the agency head qualified the grievance for hearing.[8] A hearing was held on December 15, 2005, and on December 22, 2005, the hearing officer issued a decision upholding the disciplinary

[1] Hearing Decision at 2.
[2] *Id.* at 2 and n. 4.
[3] Hearing Exhibit 1.
[4] Although the agency cited its "Acceptable Internet, E-mail and Other Electronic Communications Usage Policy" in the Written Notice, it did not produce this policy at hearing. Instead, the agency produced a document entitled "Acceptable Internet Use Policy." *See* Hearing Exhibit 13.
[5] Hearing Exhibit 1.
[6] Hearing Decision at 2.
[7] *Id.* at 2 n. 2.
[8] *Id.* at 2.

action.[9] The hearing officer subsequently issued a reconsideration decision affirming his December 22nd ruling.[10]

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."[11] 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.[12]

In disciplinary actions, the agency must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.[13] Hearing officers make "findings of fact as to the material issues in the case"[14] and determine the grievance based "on the material issues and grounds in the record for those findings."[15] 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. Further, as long as the hearing officer's findings are based upon evidence in the record and the materials issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

The grievant argues, in effect, that the hearing officer failed to require the agency to prove by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances, as required by § 5.8 of the *Grievance Procedure Manual*. The *Rules for Conducting Grievance Hearings* explain that in deciding whether an agency has made this showing, a hearing officer must review the facts *de novo* to determine (1) whether the employee engaged in the behavior described in the Written Notice, (2) whether that behavior constituted misconduct, and (3) whether the agency's discipline was consistent with law and policy.[16] Here, the grievant argues that he did not engage in misconduct under the applicable policies and that the discipline issued to him was inconsistent with policy. Each of these arguments will be addressed below.

Did the Hearing Officer Fail to Comply with the Grievance Procedure in Finding that the Grievant's Conduct Constituted Misconduct?

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[9] *Id.* at 1, 6.
[10] Reconsideration Decision at 1.
[11] Va. Code § 2.2-1001(2), (3), and (5).
[12] *See Grievance Procedure Manual* § 6.4(3).
[13] *See Grievance Procedure Manual* § 5.8(2).
[14] Va. Code § 2.2-3005.1(C)(ii).
[15] *Grievance Procedure Manual* § 5.9.
[16] *See Rules for Conducting Grievance Hearings* § VI(B).

In his initial decision, the hearing officer found that the grievant violated DHRM Policy 1.75 and the agency's "Acceptable Internet Use Policy" by loading and storing an unauthorized computer game on state-owned computer equipment and transmitting obscene and vulgar e-mail messages.[17] In his request for reconsideration, the grievant asserted that he never sent, stored, or accessed sexually explicit content (as charged by the agency); that the evidence at hearing showed that he never used the internet for game playing or e-mail; and that he had not installed or uploaded any software to his state-owned computer, but rather played games by attaching his personal hard drive (on which the game was installed) to his state laptop.

In his subsequent decision on reconsideration, the hearing officer concluded, in response to the grievant's objections, that the grievant had stored sexually explicit content by forwarding e-mails with descriptions of sexual conduct; that by attaching his personal hard drive to his laptop, the grievant had exposed his state-owned computer to the game "just as though the grievant had physically installed his hard drive in the laptop"; that while "the evidence did not reveal a policy that specifically prohibits the connection of a personal hard drive to a state-owned computer," because such a connection "can affect the state-owned computer in adverse ways," "personal hard drives are not to be connected to state-owned equipment for the same reason that unauthorized equipment is not to be installed on state-owned equipment"; and that testimony at hearing "established that the e-mails at issue were sent via the Internet." [18]

The grievant argues that the hearing officer's reconsidered decision contains "multiple discrepancies and personal beliefs that have no merit in a case such as this." In particular, the grievant asserts that he neither stored nor forwarded e-mail containing sexually explicit content;[19] that by using his personal hard drive for game play, he did not expose the state system to any additional risk; that testimony at hearing established that the e-mail for which he was disciplined was sent via a local network rather than the internet; that he did not forward or store e-mail with "four-letter words" (although he does not deny that he authored such e-mail); and that he did not install or use unauthorized software on state computers.

1. Use of E-mail

Here, the grievant's objections, even if proved, are insufficient to mandate a finding that the hearing officer erred. Policy 1.75 prohibits the transmission of obscene messages or images by Internet or electronic communication.[20] In his initial decision, the hearing officer found that the grievant had exchanged e-mail containing "obscene language" and that the transmission of

[17] Hearing Decision at 4-5.
[18] Reconsideration Decision at 2-3.
[19] In addition, the grievant notes that the phrase "where the F@!?" cited in the hearing decision was not written by him. We note that, contrary to the grievant's claim, the hearing officer did not necessarily attribute this phrase to the grievant, as it was contained in a listing of phrases used "by grievant and others to avoid detection by screening software." Hearing Decision at 3.
[20] DHRM Policy 1.75, "Use of Internet and Electronic Communication Systems" (effective 8/1/01), at 2 ("Certain activities are prohibited when using the Internet or electronic communications. These include, but are not limited to . . .downloading or transmitting fraudulent, threatening, obscene, intimidating, defamatory, harassing, discriminatory, or otherwise unlawful messages or images . . . ")

"obscene and vulgar e-mail messages" constituted a violation of policy.[21] The grievant does not deny that he authored most of the e-mail cited by the hearing officer in his decision, nor does he challenge the hearing officer's finding that certain language was obscene. As, under Policy 1.75, the mere transmission of obscene material via e-mail is prohibited, irrespective of whether such material was also sexually explicit, this Department finds no error by the hearing officer with respect to his finding that the grievant's use of e-mail constituted misconduct.

2. Computer Gaming

In his initial decision, the hearing officer concluded that the grievant "violated agency policy by connecting his personal hard drive to an agency computer and thereafter uploaded and played an unauthorized software game on state-owned computer equipment."[22] Subsequently, in his reconsideration decision, the hearing officer stated,

> Grievant admitted to playing the commercial game Half Life on his state-owned laptop but he asserts that he did not upload the game to his laptop. However, grievant connected his personal hard drive to the laptop via USA cable. This exposed the state-owned computer to the game (and other programs) just as though grievant had physically installed his hard drive in the laptop. Grievant has not demonstrated that there is any operational difference between the two.[23]

The hearing officer further explained that while the agency had not shown the existence of a policy specifically prohibiting the connection of a personal hard drive to a state-owned computer, because such a connection can affect the state-owned computer in adverse ways (such as the transmission of viruses), hard drives "are not to be connected to state-owned equipment for the same reason that unauthorized software is not to be installed on state-owned equipment."[24] In addition, the hearing officer concluded that the grievant's use of the personal hard drive was an attempt to circumvent the prohibition against installing the game on the system directly, and that the agency had shown that the use of unauthorized games on state computers was prohibited.[25]

The grievant challenges the hearing officer's findings on two grounds. First, he argues that the hearing officer's conclusions regarding the potential adverse effect of using a personal hard drive were based on the hearing officer's personal belief and lacked support in the record evidence. In addition, he asserts that policy does not prohibit the use of a personal hard drive to play games on state equipment.

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[21] Hearing Decision at 3, 5.
[22] Hearing Decision at 4. The manager who issued the Group III Written Notice testified at hearing that he did not know whether the grievant had installed the game program on the laptop or put it on a personal hard drive and then played the game from the laptop. Hearing Tape 2, Side A, at Counter Nos. 166-190.
[23] Reconsideration Decision at 2.
[24] *Id.*
[25] *Id.* at 3.

This Department's review of the hearing tapes and exhibits suggests that the grievant is correct that no evidence was presented at hearing regarding any possible adverse effects of using a personal hard drive with a laptop, such as virus transmission. However, the potential adverse impact of using a personal hard drive was not the only basis upon which the hearing officer concluded that the grievant's conduct was prohibited by policy. Rather, the hearing officer also appears to have relied on a finding that the mere use of unauthorized games was prohibited by policy.

The grievant also asserts that the use of a personal hard drive to play games on state-owned equipment is not a violation of policy, where the software was not installed or loaded. However, the hearing officer's interpretation of state and/or agency policy is not an issue 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.[26] Only a determination by that agency could establish whether or not the hearing officer erred in his interpretation of state and agency policy.

We note that in this case, the grievant has requested a ruling from DHRM. This ruling request is currently pending. In the event DHRM finds that the hearing officer's interpretation of policy was incorrect, the DHRM Director's authority is limited to asking the hearing officer to reconsider his decision in accordance with its interpretation of policy.[27]

Did the Hearing Officer Fail to Comply with the Grievance Procedure in Finding that the Discipline Was Consistent with Law and Policy?

The grievant also argues that the Group III Written Notice he received was inconsistent with DHRM Policy 1.60, "Standards of Conduct." He notes that under that policy, the use of obscene language is classified as a Group I offense. He also notes that in a case involving another employee who engaged in the same game-playing and e-mail exchanges, a different hearing officer reduced the Group III Written Notice issued by the agency to a Group II, on the ground that a Group III was inconsistent with the Standards of Conduct.[28]

The challenge raised by the grievant is to the hearing officer's interpretation of policy—specifically, whether a failure to follow policies regarding electronic communications and computer use may be disciplined at the Group III level. Such a challenge may not be addressed by this Department, but must instead be raised to DHRM. As previously noted, the grievant has submitted a ruling request to DHRM, which is currently pending.

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[26] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).
[27] *Grievance Procedure Manual* § 7.2(a)(2).
[28] Hearing Decision in Case No. 8233, at 4. While the grievant is correct that the hearing officers reached different conclusions in these two cases, hearing decisions do not carry precedential weight. In the absence of an existing DHRM ruling interpreting a particular policy, each hearing officer may reach his or her own determination regarding the proper interpretation of that policy.

CONCLUSION AND APPEAL RIGHTS

This Department's rulings on matters of procedural compliance are final and nonappealable.[29] Therefore, this ruling may not be appealed. However, once DHRM issues its decision, the hearing officer's original decision will become a final hearing decision.[30] Within 30 calendar days of DHRM's issuance of its decision, either party may appeal the *final hearing decision* to the circuit court in the jurisdiction in which the grievance arose.[31] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[32]

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Claudia T. Farr
Director

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