Issue: Administrative Review of Case #8437/ Hearing decision appeal; Ruling Date: January 25, 2007; Ruling #2007-1481; Agency: Virginia Department of Transportation; Outcome: hearing decision not in compliance

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2007-1481
January 25, 2007

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8437. For the reasons set forth below, the grievance is remanded to the hearing officer for further proceedings in accordance with this ruling.

FACTS

In Case Number 8437, the hearing officer upheld a Group II Written Notice with removal for violation of DHRM Policy 1.75 on Use of the Internet.[1] The hearing officer found that the grievant had a "high rate of internet access."[2] A "detailed report" of the grievant's usage during a week in May 2006 showed approximately three and a half hours of viewing websites not related to agency work on the day during which the grievant allegedly used the internet the least amount.[3] In addition, the hearing officer found that, even when discounting certain time gaps and periods during which it is alleged that the grievant viewed sports-related video files, the grievant's personal usage amounted to approximately 84 minutes during the same day.[4] The grievant sought administrative review asserting that the hearing decision exceeded the limits of reasonableness and did not address proper procedure.

The grievant posits three main arguments. First, the grievant claims that there were procedural violations when the Written Notice was issued. He was given oral notification of the charges against him on June 14, 2006, as well as a copy of an internet activity report. The grievant was given until the following day to respond to the charges. At that time, he requested a copy of the detailed report of his alleged personal use of the internet. On June 29, 2006, the grievant met with management, received the Written Notice, and was informed of his termination. Though he was shown the document during

[1] The grievant had prior active disciplinary action consisting of a Group II Written Notice and a Group I Written Notice thereby justifying his termination based upon an accumulation. Decision of Hearing Officer, Case No. 8437, Oct. 25, 2006 ("Hearing Decision"), at 2, 6.
[2] *Id.* at 3.
[3] *Id.*
[4] *Id.* at 4.

the meeting with management, the grievant received a copy of the detailed report about an hour later as he was packing up his office. The grievant claims that he was not provided a reasonable opportunity to respond to the charges against him because he was not given the agency's evidence until after he met with management and was given the Written Notice.

Second, the grievant claims that the agency's internet activity report does not accurately measure an employee's internet use. He specifically cites language from the report itself that states the computation is an "educated guess." Lastly, the grievant argues that his medical condition and personal and financial concerns were not taken into account, either in the form of disability discrimination or as mitigation. The grievant claims that he suffers from anxiety, depression, panic disorder, and obsessive-compulsive disorder. In addition, the grievant offered a timeline at hearing of various events in his life concerning his medical condition and divorce.

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."[5] 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.[6]

Due Process

"The essence of due process is notice of the charges and an opportunity to be heard."[7] Moreover, the opportunity to be heard must be provided "'at a meaningful time and in a meaningful manner.'"[8] The United States Constitution and state and agency policy generally entitle a non-probationary, non-exempt employee of the Commonwealth to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[9]

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

[6] *See Grievance Procedure Manual* § 6.4(3).

[7] Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Matthews v. Eldridge, 424 U.S. 319, 348 (1976) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'") (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (alteration in original)); Bowens v. N.C. Dep't of Human Res., 710 F.2d 1015, 1019 (4th Cir. 1983) ("At a minimum, due process usually requires adequate notice of the charges and a fair opportunity to meet them.").

[8] Matthews, 424 U.S. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

[9] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985). State policy requires:

> Prior to any (1) disciplinary suspension, demotion, and/or transfer with disciplinary salary action, or (2) disciplinary removal action, employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, p. 15 of 20.

The *Loudermill* decision prescribes that only limited due process protections must be afforded an employee prior to the disciplinary action or deprivation of property. "To satisfy procedural due process requirements, [the agency is] required, at a minimum, to give [the employee]: (1) notice of the charges against him, and (2) a meaningful opportunity to respond."[10] However, this is the minimum amount of due process required given a later post-deprivation hearing with more protections in place (such as questioning witnesses, the presence of counsel, and the ability to present evidence).[11]

While the grievant did not receive the detailed report until after his termination, he did receive notice of the charges against him along with an internet activity report, and given an opportunity to explain his use of the internet by the following day. The grievant was on notice that he was being disciplined for personal use of the internet at this time, well before the meeting with management on June 29, 2006. In addition, because the grievant received a full post-deprivation hearing, the alleged pre-deprivation due process violation was effectively cured by the additional protections of the full administrative hearing.[12] The grievant was aware of the charges against him and had received the agency's evidence well in advance of the hearing. Consequently, the grievant's due process argument presents no grounds to reverse the hearing officer's decision.

Internet Activity Time

The grievant has argued that the internet activity report on which his termination was based is nothing more than an "educated guess," indeed by its own terms.[13] While the grievant appears to have raised arguments showing that the measurement is less than accurate, he has not offered any evidence to suggest that the hearing officer abused his discretion in upholding the discipline. The grievant fails to argue that he never engaged in personal use of the internet, nor has he presented evidence to show that this personal use was limited in nature. Therefore, though he may have shown that the internet activity report may not provide a precise measure of the grievant's personal use, the hearing officer would not have abused his discretion to find that personal use did indeed occur. Moreover, the grievant has not argued at this stage about any anomalies contained in the detailed report of internet activity on which the hearing officer relied in upholding the discipline.[14]

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[10] Virginia Dep't of Corrections v. Compton, 47 Va. App. 202, 221, 623 S.E.2d 397, 406 (2005) (citing *Loudermill*); *see also* McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property.").

[11] *See, e.g.*, Brock v. Roadway Express, Inc., 481 U.S. 252, 264-65 (1987); Loudermill, 470 U.S. at 545-46.

[12] *See, e.g., Loudermill*, 470 U.S. at 545-46. "[T]he pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.*

[13] An agency document provided by the grievant as an exhibit states that the "time calculated by the [internet activity report] is intended to be an *educated guess* to alert managers of potential problems that may need attention."

[14] Hearing Decision at 4.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[15] and to determine the grievance based "on the material issues and grounds in the record for those findings."[16] 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.

It was within the hearing officer's discretion in this case then, to assess whether the grievant's personal use was sufficient to warrant the discipline received. Based on the evidence in the hearing record, this Department can conclude neither that the hearing officer's findings or conclusions are unsupported by the evidence, nor that the hearing officer abused his discretion. Consequently, there is no basis on which this Department should disturb the hearing officer's findings in this regard.

Disability Discrimination

DHRM Policy 2.05 "[p]rovides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability."[17] Under Policy 2.05, "'disability' is defined in accordance with the Americans with Disabilities Act," the relevant law governing disability accommodations.[18] Like Policy 2.05, the Americans with Disabilities Act (ADA) prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.[19] In this case, the hearing officer determined that the grievant did not present evidence to support a claim of disability discrimination.[20]

Under the ADA, the term "disability" means, "with respect to an individual-- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[21] Because there is no indication in the hearing record that at the time of the disciplinary action the grievant had a record of an impairment or was regarded as having such an impairment, whether the grievant would be considered "disabled" under the ADA turns on whether his mental and psychological condition substantially limited a major life activity. To be "substantially limited" in a major life activity, the grievant must be significantly restricted in performing the activity.[22] Major

[15] Va. Code § 2.2-3005(C)(ii).
[16] *Grievance Procedure Manual* § 5.9.
[17] DHRM Policy 2.05, page 1 of 4.
[18] 42 U.S.C. §§ 12101 *et seq.*
[19] 42 U.S.C. § 12112.
[20] *See* Reconsideration Decision, Case No. 8437-R, Dec. 27, 2006, at 2.
[21] 42 U.S.C. § 12102(2).
[22] Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 196-97 (2002).

life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[23] The grievance record contains no claim or evidence that the grievant was substantially limited in performing any major life activity due to a mental impairment.[24] As such, there is no indication that the hearing officer erred in considering the grievant's claim of disability discrimination.

Mitigation

Although the hearing officer properly exercised his authority in determining that the grievant had not presented sufficient evidence of disability discrimination, the grievant's evidence should have been analyzed in the hearing decision under the framework for mitigation. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."[25] The grievant presented evidence that the stress he endured as a result of his divorce, medical condition, and his psychological disorders contributed to his use of the internet.[26] The hearing officer, however, in the original decision, incorrectly stated that "Grievant's medical and financial problems are not of the type considered as mitigating circumstances under the *EDR Rules for Governing Grievance Hearings.*"[27] EDR's Rules for Conducting Grievance Hearings provide no such limitation on what grounds can be taken into account in an assessment of mitigating and aggravating circumstances.

While the hearing officer must "give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances," the hearing officer is permitted to mitigate a disciplinary action if it "exceeds the limits of reasonableness."[28] Moreover, the list of examples of mitigating circumstances in the Rules for Conducting Grievance Hearings -- lack of notice, inconsistent application, and improper motive[29] -- is not all-inclusive. It was, therefore, error for the hearing officer to determine that the grievant's evidence of medical, financial, and personal problems could not be considered or analyzed under the mitigation framework. Though the hearing officer has determined that the grievant did not present sufficient evidence to allege disability discrimination under the ADA, the evidence considered on mitigation need not meet the requirements of the ADA to be considered a mitigating circumstance. Thus, the hearing officer must

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[23] 29 C.F. R. § 1630.2(i).
[24] The grievant offered an exhibit at hearing (Gr. Ex. 4) that showed dates in 2003, 2004, and 2005 during which he received counseling for anxiety and depression. The grievant also offered a letter from a licensed clinical social worker who began treating him about a month after his termination. However, again there was no evidence within these exhibits or in any witness testimony that the grievant's mental impairments limited any of his major life activities.
[25] Va. Code § 2.2-3005(C)(6).
[26] *See, e.g.*, Hearing Tape 2, Side A, at Counter Nos. 161-68, 265-322.
[27] Hearing Decision at 5.
[28] *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.
[29] *Id.*

determine in this case whether the discipline exceeded the limits of reasonableness in light of the grievant's medical conditions and financial and personal concerns. The grievance must be remanded for further consideration and analysis of this evidence under the mitigation standard enunciated in the Rules. The hearing officer is directed to clarify that consideration and analysis, and explain the basis of that conclusion in his reconsidered decision. This ruling in no way determines that the hearing officer should mitigate the disciplinary action, only that consideration of the grievant's evidence is warranted.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the hearing officer is directed to consider the grievant's arguments as to his medical conditions and financial and personal concerns on mitigation and determine, based on these factors, whether the discipline, i.e., termination, exceeded the limits of reasonableness.

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 and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.[30] 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.[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

[30] *Grievance Procedure Manual* § 7.2(d).
[31] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[32] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).