

Issue: Administrative Review/agency requested review or hearing officer's decision; Ruling  
Date: March 24, 2006; Ruling #2006-1272; Agency: Virginia Information Technologies  
Agency; Outcome: hearing decision in compliance.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**ADMINISTRATIVE REVIEW RULING OF DIRECTOR**

In the matter of the Virginia Information Technologies Agency  
Ruling Number 2006-1272  
March 24, 2006

The Virginia Information Technologies Agency (VITA or the agency) has requested administrative review of the hearing officer's decision in Case Number 8233.

**FACTS**

The grievant is employed with the agency as an Information Technology Specialist III.<sup>1</sup> On September 15, 2005, the agency issued the grievant a Group III Written Notice of disciplinary action for violating state and agency policies on internet, electronic communications and computer use.<sup>2</sup> On October 13, 2005, the grievant initiated a grievance challenging the disciplinary action.<sup>3</sup> After the parties failed to resolve the grievance, it was qualified for hearing.<sup>4</sup> A hearing was held on January 19, 2006.<sup>5</sup>

In his written decision, issued on January 23, 2006, the hearing officer reduced the Group III Written Notice to a Group II Written Notice.<sup>6</sup> The hearing officer found that while the agency had shown that the grievant had failed to comply with applicable policies regarding internet, electronic communications, and computer use, failure to comply with established written policy was only a Group II offense under Department of Human Resource Management (DHRM) Policy 1.60, "Standards of Conduct," not a Group III as charged by the agency.<sup>7</sup> On February 6, 2006, the agency requested an administrative review of the hearing officer's decision by this Department and DHRM.

**DISCUSSION**

VITA asserts that DHRM Policy 1.75, "Use of Internet and Electronic Communications System," allows it the discretion to discipline the grievant at the level of a Group III offense. VITA also asserts that the hearing officer erred when he concluded that it could not discipline the

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<sup>1</sup> Hearing Decision at 2.

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 1, 6.

<sup>7</sup> *Id.* at 4-5.

grievant for conduct occurring while the grievant was employed by the Virginia Department of Corrections, prior to his employment with VITA.

*Discretion to Discipline as Group III*

VITA challenges the hearing officer's conclusion that the grievant's failure to comply with policy could not be disciplined at the Group III level. In particular, the agency argues that "it has long been a practice to group several offenses into one Group III offense, or other level of offense as appropriate." The agency also argues that Policy 1.75 "permits the agency head to determine if a single violation or multiple related violations rises to the level of a Group III offense and warrants termination."

The determination of whether the hearing officer correctly interpreted policy does not lie with the EDR Director. 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.<sup>8</sup> Only a determination by that agency could establish whether or not the hearing officer erred in his interpretation of state and agency policy. In the event DHRM concludes that a hearing officer's interpretation of policy is incorrect, the DHRM Director's authority is limited to ordering the hearing officer to revise the decision in accordance with its interpretation of policy.<sup>9</sup> VITA has requested an administrative review by DHRM, and that review is pending.

DHRM's decision in this case will have significant implications for the application of the Standards of Conduct. First, as stated by the hearing officer in his decision, aggregating multiple Group II offenses into a single Group III would result in a longer active life for the disciplinary action.<sup>10</sup> In addition, while the Standards of Conduct specifically provide that violations of Policy 1.05, "Alcohol and Other Drugs;" Policy 2.30, "Workplace Harassment;" and Policy 2.05, "Equal Employment Opportunity" may be subject to discipline at a Group I, II, or III level in the agency's discretion,<sup>11</sup> the Standards of Conduct do not similarly state that violations of Policy 1.75 may be disciplined at any of the three levels; indeed, Policy 1.75 currently provides that any violations must be addressed under, and in a manner consistent, with the Standards of Conduct.<sup>12</sup> Again, these are matters of policy interpretation for DHRM's director or designee.

*Conduct at Previous Agency*

VITA also asserts that the hearing officer erred in concluding that it could not discipline the grievant for his conduct while he was an employee of another state agency. As previously explained, whether a hearing officer's decision is consistent with policy may only be determined by the DHRM Director or her designee. Here, too, DHRM's decision in this case will have significant policy implications. VITA's position could appear to suggest that agency employees should not be

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<sup>8</sup> Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

<sup>9</sup> *Id.* at § 7.2(a)(2).

<sup>10</sup> Hearing Decision at 5.

<sup>11</sup> DHRM Policy 1.60, "Standards of Conduct" (effective 9/16/93) at 5-8.

<sup>12</sup> DHRM Policy 1.75, "Use of Internet and Electronic Communication Systems" (effective 8/1/01) at 4.

considered to be employees merely of the agency in which they work, but rather that the Commonwealth itself should be considered to be a single employer of all executive branch employees. This would be a significant departure from previous practice and interpretation in many personnel-related areas. For example, under the grievance procedure, employees may initiate grievances only against state agencies that have employed them, and not against the Commonwealth as a single employer.<sup>13</sup> If the Commonwealth is to be considered a single employer for the purposes of disciplining an employee, it may be inconsistent for the grievance procedure (or other personnel-related processes) to continue to consider each agency to be an independent employer.

Finally, in the event the DHRM Director directs the hearing officer to reconsider his decision with respect to the issue of disciplining for conduct at a previous agency, the hearing officer is reminded that under the grievance procedure, in determining whether the disciplinary action was warranted and appropriate under the circumstances, he must consider (1) whether the behavior constituted misconduct at the time it occurred and under the policies then in effect and (2) whether the grievant had adequate notice—at the time the alleged misconduct occurred—of the policies under which he is charged with misconduct.<sup>14</sup>

### 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.<sup>15</sup> If the DHRM Director directs the hearing officer to revise or reconsider his decision, the hearing decision does not become final until the hearing officer issues the revised decision.<sup>16</sup> 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.<sup>17</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>18</sup>

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Claudia T. Farr  
Director

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<sup>13</sup> *Grievance Procedure Manual* § 2.4.

<sup>14</sup> *Id.* at § 5.9; see also *Rules for Conducting Grievance Hearings* § VI(B).

<sup>15</sup> *Grievance Procedure Manual*, § 7.2(d).

<sup>16</sup> *Id.*

<sup>17</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

<sup>18</sup> *Id.* See also *Va. Dept. of State Police vs. Barton*, 39 Va. App. 439, 573 S.E. 2d 319 (2002).