

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Department of Transportation, :  
Petitioner :  
 :  
v. : No. 1788 C.D. 2007  
 : Submitted: March 14, 2008  
State Civil Service Commission :  
(Sisofo), :  
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE DAN PELLEGRINI, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE LEAVITT

FILED: June 4, 2008

The Department of Transportation (Department) petitions for review of an adjudication of the State Civil Service Commission (Commission) reversing the Department's one-day suspension of its employee, Peter J. Sisofo, for his violation of the Department's email usage policy. In this case, we consider whether the Commission erred in concluding that the Department lacked the requisite "good cause" to suspend Sisofo. Finding no error in the Commission's holding, we will affirm.

Sisofo began his employment with the Department in September, 2004, as an Assistant Maintenance Manager at the Philadelphia County Maintenance Office. In order to complete his duties with the Department, Sisofo was required to use a Department computer and email account. As a supervisor of other Department employees, Sisofo was responsible for enforcing the Department's policies.

Relevant here is the policy concerning internet use and email communications that applies to all agencies, including the Department, set forth in a management directive of the Governor. Section (4) of Management Directive 205.34<sup>1</sup> provides, in relevant part:

- f. E-mail and the Internet are information tools that the Commonwealth has made available on Commonwealth computer resources for Commonwealth business purposes. However, *where the agency determines that personal use of these resources does not interfere with the efficiency of operations and is not otherwise in conflict with the interests of the agency, reasonable use of the Internet and/or E-mail for personal purposes will be permitted* in accordance with standards established for business use. Where authorized by the agency, such personal use shall be limited, occasional, and incidental. Any personal use which is inconsistent with Commonwealth policy regarding availability or capability of computer equipment, or appropriate content of communications as defined by this directive, is not permitted.

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- h. The standards and requirements outlined in this directive are to be reviewed during new employee orientation with all new staff who are authorized to access the Internet and/or E-mail on Commonwealth computer resources.
- i. Agencies must obtain a signed user agreement (Enclosure 3) from each employee who has been granted Internet and/or E-mail access as acknowledgement of receipt and understanding of this directive....

Management Directive 205.34(4); Reproduced Record at 159a (R.R. \_\_\_) (emphasis added). Department employees were specifically notified of this management

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<sup>1</sup> The relevant version of Management Directive 205.34 was issued on September 12, 2000. We note that Management Directive 205.34 was amended on March 28, 2007.

directive in a written memorandum dated January 27, 2003. That memorandum further provided, in relevant part, as follows:

Employees having Internet or E-mail access are permitted reasonable use of the Internet and E-mail for personal reasons, providing it does not interfere with Department operations. The Management Directive mandates that such personal use must be limited, occasional and incidental.

The following uses of the Internet and E-mail are expressly **prohibited**:

- Viewing, accessing, or transmitting any material that a reasonable individual may find personally offensive or inappropriate including but not limited to sexually suggestive, pornographic, or obscene materials.
- Viewing, accessing, or transmitting material that expresses or promotes discriminatory attitudes toward race, gender, age, nationality, religion, or other groups...

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- Non-business related use of Internet/E-mail resources which put a drain on the Department's information technology capacity/bandwidth. Examples include but are not limited to: chat rooms, instant messaging, web shots, listening to streaming audio, viewing streaming video, downloading and/or storage of audio/video files (MP3, JPEG, etc.), etc.

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- Transmitting any form of a "chain" letter.

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The Management Directive includes a Commonwealth Internet/E-Mail User Agreement as an attachment. With the issuance of this policy every employee with access to the Internet or Email will be required to read and sign a User Agreement. This requirement will be applicable to all employees with such access regardless if the employee has previously signed a User Agreement. This step is necessary to ensure that all employees with Internet/Email access have signed the most recent and up-to-date User Agreement.

R.R. 170a-172a (emphasis in the original).

In sum, in accordance with Management Directive 205.34, the Department determined that personal use of internet and email would be allowed so long as such use was limited, occasional, incidental, and not inappropriate or offensive. The Department reviews the internet and email standards with new employees and obtains a signed user agreement for each employee. Additionally, each time a user logs onto a Department computer, a message is displayed notifying the user that the computer is intended to be used for Department purposes only and any unauthorized use may subject the user to disciplinary action.

In the fall of 2006, Tiffany Burnhauser, a Human Resource Analyst in the Department's central office, received a complaint about an email sent by a clerk at the Philadelphia County Maintenance Office.<sup>2</sup> As a result, Burnhauser investigated the clerk's email account and discovered that the clerk had forwarded several chain emails in violation of the Department's policy. In accordance with the Department's investigation policy, Burnhauser also reviewed the accounts of all other employees who had either received emails from, or sent emails to, the clerk in question.<sup>3</sup> As part

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<sup>2</sup> Burnhauser was responsible for investigating employee misconduct, conducting pre-disciplinary conferences, determining discipline, and drafting discipline notices and letters.

<sup>3</sup> Burnhauser reviewed the email accounts of 30 to 35 employees of the Philadelphia County Maintenance Office.

of her investigation, Burnhauser reviewed Sisofo's email account and discovered several allegedly inappropriate emails.

On January 22, 2007, the Department conducted a pre-disciplinary hearing conference with Sisofo regarding his conduct.<sup>4</sup> Following the hearing, the Department suspended Sisofo for one day without pay for violating the Department's email policy and for failing to discharge his duty as a supervisor to enforce that policy. Sisofo appealed to the Commission pursuant to Section 951(b) of the Civil Service Act (Act), 71 P.S. §741.951(b).<sup>5</sup> Sisofo contended that he was suspended without good cause.

At a hearing before the Commission, the Department introduced evidence of 11 purportedly inappropriate emails sent or received by Sisofo:

1. An email received by Sisofo on September 13, 2006, with an attached audio file of a song about a disgruntled employee who is about to "whip somebody's a\*\*."
2. An email received by Sisofo on October 19, 2006, with an attached photo of a monkey performing a sexual act.
3. An email received by Sisofo on October 30, 2006, with six attached photos of people in various costumes.

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<sup>4</sup> The Department conducted between 20 and 30 pre-disciplinary hearings for employees of the Philadelphia County Maintenance Office for misuse of email. All of these employees received discipline ranging from a verbal reprimand to a five-day suspension with a final warning. Two of the investigated employees received counseling concerning their email use.

<sup>5</sup> Act of August 5, 1941, P.L. 752, §951(b) added by the Act of August 27, 1963, P.L. 1257, *as amended*, 71 P.S. §741.951(b). Section 951 (b) states:

Any person who is aggrieved by an alleged violation of section 905.1 of this act may appeal in writing to the commission within twenty calendar days of the alleged violation. Upon receipt of such notice of appeal, the commission shall promptly schedule and hold a public hearing.

71 P.S. §741.951(b).

4. An email received by Sisofo on October 31, 2006, which forwarded a picture and story about a final child support payment.
5. An email received by Sisofo on October 31, 2006, with an attached video file labeled "Deer Hunter." The video file depicted a practical joke involving a deer strapped to the hood of a car that would occasionally move and make comments as people walked by the car. On November 1, 2006, Sisofo forwarded the "Deer Hunter" email using his Department email account.
6. An email forwarded by Sisofo twice from his Department email account on November 3, 2006, labeled "Funny Bear". The message included a link to a website with a picture of a smiling teddy bear with a message requesting the viewer to click on the teddy bear. Clicking on the image caused the teddy bear to frown and launched an audio clip of the bear spewing profanities. Sisofo also forwarded the "Funny Bear" message on November 17, 2006.
7. An email sent by Sisofo on November 6, 2006, to his supervisor, Lynn Greer, with an attached photo of Greer's son, who is a professional basketball player.
8. An email received by Sisofo on November 7, 2006, with an attached picture of an elderly woman in various states of undress displaying tattoos and body piercings.
9. A personal email sent by Sisofo to his spouse on November 17, 2006.
10. An email received by Sisofo on November 27, 2006, with a poem about members of the armed services at Christmas.
11. A chain email received by Sisofo on November 28, 2006, with a religious message.

Commission Adjudication at 7-11; Findings of Fact Nos. 19-38.

On behalf of the Department, Burnhauser testified about the nature of the above-identified emails. Burnhauser opined that Sisofo had opened the emails at issue because the name, date and subject of each email was no longer in boldface type in the Department's email program, and the corresponding envelope icons indicated the emails had been opened. Burnhauser conceded that there was no way to determine if Sisofo had actually viewed the attachments or activated the links contained in the emails. Burnhauser stated that she did not know whether Sisofo received the Department's email usage policy and admitted that the Department did not have a signed user agreement for Sisofo as required by the Department policy.

The Department also introduced the testimony of Karen Brown, a Labor Relations Analyst, who testified that the employees who sent emails to, or received emails from, Sisofo were not his direct subordinates but could on occasion be under his supervision. Brown further stated that Sisofo acknowledged at his pre-disciplinary hearing that he was aware of the Department's email policy. Brown testified that she did not know whether Sisofo actually viewed the emails at issue and, instead, relied on Burnhauser's representations.

Sisofo appeared *pro se* and testified that he did not sign the user agreement until after his pre-disciplinary hearing.<sup>6</sup> Sisofo stated that he did not open the links or attachments for 7 of the 11 emails at issue and, thus, did not see the material deemed inappropriate by the Department. Sisofo admitted to sending the non-work related email to his wife, as well as the email to Greer with a picture of her son. Sisofo further admitted to sending the "Deer Hunter" and "Funny Bear" emails.

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<sup>6</sup> Sisofo asserted that he initially refused to sign the user agreement because it expressly referenced a management directive, which, according to Sisofo, was not provided with the user agreement.

Sisofo acknowledged that the “Funny Bear” email was inappropriate and apologized for sending it.

On August 23, 2007, the Commission issued a decision reversing Sisofo’s one-day suspension. The Commission found that the Department failed to meet its burden of establishing that Sisofo had notice of the Department’s internet and email policy. The Commission also found that the Department failed to establish that Sisofo actually viewed the material deemed inappropriate by the Department.<sup>7</sup> The Commission determined that, although the “Funny Bear” email was inappropriate, Sisofo’s forwarding of that one email did not warrant a one-day suspension, even when viewed together with his forwarding of the “Deer Hunter” email. Instead, the Commission concluded that Sisofo’s conduct could have been adequately addressed by counseling. Finally, the Commission determined that the Department failed to establish that Sisofo failed to carry out his duties as a supervisor because there was no evidence that any of the other employees receiving these forwarded emails were under Sisofo’s direct supervision. Based on the foregoing findings, the Commission held that the Department lacked good cause to suspend Sisofo. The Department now petitions for this Court’s review.<sup>8</sup>

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<sup>7</sup> With respect to 7 of the 11 emails at issue, the Commission found that the material deemed inappropriate by the Department appeared in links or attachments that had to be affirmatively opened in order to be viewed, and that the Department failed to prove that Sisofo did so. The Commission also found that the email Sisofo sent to his spouse and the picture he sent to Greer did not violate the Department’s policy.

<sup>8</sup> Our review of a decision of the State Civil Service Commission is limited to determining whether findings of fact are supported by competent evidence, whether errors of law have been committed, and whether constitutional rights have been violated. *Thompson v. State Civil Service Commission (Beaver County Area Agency on Aging)*, 863 A.2d 180, 184 (Pa. Cmwlth. 2004). Questions of credibility and the weight to be accorded evidence are determined by the State Civil Service Commission, and this Court will not re-weigh the evidence or substitute its judgment even though it might have reached a different factual conclusion. *Id.*

The Department raises one issue for this Court’s review: whether the Commission erred in concluding that the Department lacked good cause to impose the one-day suspension. In support, the Department argues that the Commission erred in finding that Sisofo lacked notice of the Department’s email policy. The Department further contends that the Commission erred in finding that Sisofo did not violate the Department’s email policy or fail to carry out his duties as a supervisor.

We begin with a review of the law governing the power of an appointing authority, such as the Department, to suspend a civil service employee. Section 803 of the Act provides in relevant part that “[a]n appointing authority may for good cause suspend without pay for disciplinary purposes an employe holding a position in the classified service.” 71 P.S. §741.803. Although the term “good cause” is not defined in the Act, a regulation of the Commission states as follows:

- (a) Good cause for suspension is one of the following:
  - (1) Insubordination.
  - (2) Habitual lateness in reporting for work.
  - (3) Misconduct amounting to violation of law, rule or lawful and reasonable Departmental orders.
  - (4) Intoxication while on duty.
  - (5) Conduct either on or off duty which may bring the service of the Commonwealth into disrepute.
  - (6) Similar substantial reasons.

4 Pa. Code §101.21. In addition, this Court has interpreted the term “good cause” as merit-related and rationally and logically related to an employee’s competency and ability to perform his job. *McCain v. Department of Education, East Stroudsburg*

*State College*, 454 A.2d 667, 669 (Pa. Cmwlth. 1983). The appointing authority has the burden of establishing that the employee was suspended for good cause. *Toland v. State Correctional Institution at Graterford, Bureau of Correction*, 506 A.2d 504, 506 (Pa. Cmwlth. 1986). Whether the actions of a civil service employee constitute just cause for removal is a question of law fully reviewable by this Court. *Ellerbe-Pryer v. State Civil Service Commission (Dept. of Corrections, SCI Graterford)*, 803 A.2d 249, 254 n.2 (Pa. Cmwlth. 2002).

Here, to establish that Sisofo was suspended for good cause, the Commission held that the Department had to prove that Sisofo had actual prior notice of the policies at issue and of the Department's expectations with respect to his responsibility to enforce them. Because the Department did not present evidence that he received the Department's memorandum incorporating Management Directive 205.34 or a signed user agreement from Sisofo, the Commission concluded that the Department failed to meet its burden of proof. This was error, according to the Department, because a management directive has the force and effect of law and knowledge of its contents is imputed to employees. *Keim v. Commonwealth, Department of Health*, 543 A.2d 1261, 1265 (Pa. Cmwlth. 1988).

We agree with the Department. Under *Keim*, Sisofo's actual knowledge of the requirement of Management Directive 205.34 "is irrelevant as that knowledge is imputed" to him.<sup>9</sup> *Keim*, 543 A.2d at 1265. Accordingly, the Commission erred as

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<sup>9</sup> The Department also notes that its evidence established that the policy is distributed to all employees; that Management Directive 205.34 is available online; and that each time an employee logs on they receive a warning that the computer is to be used only for Department business. Finally, the Department contends that the evidence established that Sisofo had actual knowledge of the policy because he admitted to violating the policy and stated that he counseled other employees about the policy. These are compelling arguments.

a matter of law in requiring the Department to prove that Sisofo had notice of the email policy in order to establish good cause for his suspension.

However, Sisofo's knowledge of the management directive was not the centerpiece of the Commission's decision to set aside Sisofo's suspension. With respect to the "Funny Bear" and "Deer Hunter" emails admittedly forwarded by Sisofo, the Commission found that, although the "Funny Bear" email was inappropriate, Sisofo apologized for sending the email. The Commission concluded that:

[L]ooking at [Sisofo's] conduct as a whole, we find that it simply does not rise to the level of good cause for suspension. [Sisofo] acknowledges that this message was inappropriate and apologizes for having forwarded it. *Sending one non-work-related message with inappropriate content is not a sufficient basis for imposing a suspension.* Even combined with the non-work-related "Deer Hunter" message, [Sisofo's] conduct could have been adequately addressed by a verbal counseling from the [Department]. In fact ... a supervisory counseling session would have been the perfect vehicle to both address his past conduct and put him on notice of what was expected of him thereafter.

Commission Adjudication at 26. Thus, Sisofo's admission that he forwarded the inappropriate "Funny Bear" and "Deer Hunter" emails was found not sufficient to constitute good cause for the discipline of a one-day suspension.

The Department argues that the evidence of record established that Sisofo failed to carry out his duties as a supervisor. In support, the Department notes that Sisofo admitted that the "Funny Bear" and "Deer Hunter" emails were inappropriate. The Department further argues that, although Sisofo claims that he did not open the other emails at issue, his statement that he opened "a lot of" the emails

implies that he must have opened some of the emails at issue.<sup>10</sup> Finally, the Department contends Sisofo also violated his duties as a supervisor because he forwarded and/or received emails from employees who were *sometimes* his subordinates.

With respect to the other emails deemed inappropriate by the Department, the Commission stated that there was insufficient evidence on which to find that Sisofo “actually affirmatively opened the attachments to even be aware that the content was inappropriate.” Commission Adjudication at 24. In making this finding, the Commission noted that Sisofo “credibly testified that he had not opened these messages or seen the material that the [Department] deemed was inappropriate content.” *Id.* Similarly, the Commission found that there was insufficient evidence to establish that Sisofo failed to carry out his supervisory duties. In reaching this conclusion, the Commission found as follows:

[T]he [Department] did not establish that any of the employees who sent [Sisofo] non-work-related messages were under his direct supervision. The [Department] offered testimony to the effect that these individuals “could have been subordinate” to [Sisofo] in terms of their classification and relative organizational status, but they never established that he had supervisory duties with regard to those employees.

Commission Adjudication at 25.

The Department disagrees with the facts found by the Commission, but they are beyond this Court to change. The Commission found the testimony of Sisofo credible, and not the witnesses of the Department, where there was a conflict. The Commission also gave greater weight to the testimony of Sisofo than to the

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<sup>10</sup> Additionally, the Department contends that Sisofo must have opened the other emails because he stated that he counseled employees that they should not be sending out those emails.

testimony of the Department's witnesses. It is the responsibility of the Commission, not this Court, to make credibility determinations and to decide how to weigh the evidence. *Shade v. State Civil Service Commission (Department of Transportation)*, 749 A.2d 1054, 1056 (Pa. Cmwlth. 2000).

The Commission found that the Department proved some misconduct by Sisofo, but it was determined to be too trifling to justify a suspension. The Commission is empowered to modify a penalty imposed by an appointing authority under Section 952(c) of the Act.<sup>11</sup> It states as follows:

In the case of any employe removed, furloughed, *suspended*, or demoted, the *commission may modify or set aside the action of the appointing authority*. Where appropriate, the commission may order reinstatement, with the payment of so much of the salary or wages lost, including employe benefits, as the commission may in its discretion award.

71 P.S. § 741.952(c) (emphasis added). Section 952(c) authorizes the Commission to modify the action of an appointing authority, even where the charges brought against the employee are proven. *Galant v. Department of Environmental Resources*, 534 Pa. 17, 21, 626 A.2d 496, 498 (1993). Nevertheless, the Commission's authority under Section 952(c) is not without boundaries. As explained by the Supreme Court, the Commission's ability to modify a penalty is limited as follows:

Courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion *in the absence of bad faith, fraud, capricious action or abuse of power...* That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; *judicial discretion may not be substituted for administrative discretion*.

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<sup>11</sup> Section 952 was added by the Act of June 26, 1989, P.L. 47.

*Bowman v. Department of Environmental Resources*, 549 Pa. 65, 69, 700 A.2d 427, 428 (1997) (quotation omitted) (emphasis added).<sup>12</sup>

Here, although Sisofo admitted to forwarding the “Funny Bear” and “Deer Hunter” emails, which he agreed was inappropriate, the Commission modified the penalty to, effectively, a warning. “[Sisofo] is now clearly on notice ... as to both the applicable policies ... and the types of material that will be deemed inappropriate. Consequently, should infractions of this policy occur in the future, we would be far more inclined to find that such conduct establishes cause for more severe discipline.” Adjudication at 27. The Department does not contend that the Commission acted capriciously or in bad faith by modifying the one-day suspension. What the Department really requests this Court to do is substitute its judgment for that of the Commission; under *Bowman*, this is not sufficient ground for judicial interference with an agency decision.

Based on the foregoing, we hold the Commission did not err in concluding that the Department lacked good cause for its one-day suspension of Sisofo. Accordingly, we affirm the Commission.

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MARY HANNAH LEAVITT, Judge

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<sup>12</sup> See also *Pennsylvania Game Commission v. State Civil Service Commission (Toth)*, 561 Pa. 19, 26-27, 747 A.2d 887, 891 (2000) (adopting *Bowman* as the standard for reviewing the Commission’s decision to modify a penalty).

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State Civil Service Commission	:	
(Sisofo),	:	
Respondent	:	

**ORDER**

AND NOW, this 4<sup>th</sup> day of June, 2008, the order of the State Civil Service Commission dated August 23, 2007, in the above-captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge