

Issues: Group II (failure to follow policy), Group III (workplace violence), Group III (falsifying records), and Termination; Hearing Date: 02/08/17; Decision Issued: 05/15/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10935, 10936, 10937; Outcome: Partial Relief; **Administrative Review: Ruling Request received 05/18/17 from Grievant, and 05/30/17 from Agency; EDR Ruling No. 2017-4554, 2017-4558 issued 06/08/17; Outcome: Remanded to AHO; Remand Decision issued 09/01/17; Outcome: Original decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10935 /10936 /10937

Hearing Date: February 8, 2017
Decision Issued: May 15, 2017

PROCEDURAL HISTORY

On October 28, 2016, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow policy. On October 28, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence. On October 28, 2016, Grievant was issued a second Group III Written Notice with removal for falsifying records.

Grievant timely filed grievances to challenge the Agency's actions. The matter proceeded to hearing. On December 8, 2016, the Office of Employment Dispute Resolution issued Ruling Number 2017-4454 consolidating the three grievances for a single hearing. On December 21, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 8, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
2. Whether the behavior constituted misconduct?
3. 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)?
4. 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?

BURDEN OF PROOF

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. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Behavioral Health and Developmental Services employed Grievant as a Human Care Services Specialist at one of its facilities. He had been employed by the Agency for approximately 19 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Virginia Sickness and Disability Program (VDSP) is administered by the Virginia Retirement System (VRS) in conjunction with the Third Party Administrator. VSDP provides income protection if an employee cannot work because of a non-work-related or work-related illness or injury.

Grievant's 2014 annual performance evaluation stated, "[Grievant] received a verbal counsel concerning inappropriate contact (disturbing text message he sent to his supervisor[])."

Grievant reported to the OT Supervisor from January 10, 2016 until his removal from employment.

Grievant began taking leave on March 7, 2016. He was taking care of his parents. He was being treated for depression. Grievant was placed on short-term disability (STD) status. He asked to use his leave to account for any salary reduction resulting from being on STD.

Grievant sometimes became upset because he was not being paid at the rate he believed was required while he was on leave.

On January 21, 2016, the OT Supervisor sent Grievant an email stating:

Please make sure that when call off, you contact [Name] first. If you cannot reach her by phone or pager then call or page me. If you cannot reach either of us, phone or page [Name].¹

Grievant frequently communicated with the Third Party Administrator regarding his leave. On August 6, 2016 at 1:41 a.m., Grievant sent an email to a Third Party Administrator employee, Ms. M, stating:

We just talk about getting better and Goin to work instead of back and forth and that's what I tried to do Thursday and Friday until all of this. ME and you talk about and I said I'm going to stay working and not going back out. BUT WITH MY ILLNESS DID GET ME TO NERVOUS BREAKDOWN AND ANXIETY WORSE I THOUGHT YALL WAS AVAILABLE TO CARE ABOUT YALL CLAIMS THAT WE FE FOR. NOW I'M SICK AGAIN PROBABLY WORSE THIS TIME SO I MOST LIKELY WILL GET ADMITTED IF I DON'T' GET BETTER BY MONDAY. IT'S MESS UP BECAUSE ILLNESS I WILL ALWAYS HAVE BUT I GUESS SOMEONE E WANTS ME TO HAVE A BREAKDOWN AND SUICIDAL OR WANT ME TO BE HOMCIDIAL OR SOMETHING.²

On August 6, 2016 at 1:45 a.m., Grievant sent Ms. M an email stating:

ALL OF THIS STUFF GOING IN THE WORLD LIKE SHOOTING PEOPLE AND KILLING THEMSELVES AND PEOPLE STILL DO STUFF SO PEOPLE CAN BREAKDOWN AND ILLNESS GET WORSE AND HURT PEOPLE FOR MYSELF BEHIND THIS MY CONDITION ALWAYS HAD THIS ILLNESS S.T.D. FMLA ILLNESS AND WITH THAT TGA LAWYER SAID NO ONE CAN DENY ME BECAUSE EI WORK WITH INMATE AND PATIENTS AND IT'S NOT SELF FOR ME AND OTHERS. PLEASE KEEP THESE EMAIL MESSAGE I MIGHT NEED IT FOR MY LAWER [NAME] AND OR FOR COUT APPEAL.³

¹ Agency Exhibit 1.

² Agency Exhibit 1.

³ Agency Exhibit 1.

On August 6, 2016 at 1:49 a.m., Grievant sent Ms. M an email stating:

This stuff is having me thought racing, depress, anxiety panic and unique control anger it's real f—k up and something will be done about it I'd it tale me to hurt someone or self it will get taken care of. BE SAFE I have a copy of my FMLA PAPERWORK AND THE YEAR AND DATE I WAS DIAGNOSED WITH THIS ILLNESS.⁴

On August 6, 2016 at 1:56 a.m., Grievant sent Ms. M an email stating:

Subject: Be safe because I'm having bad thoughts again I thought we were going to stay at work for now on but I guess that's you didn't want me to do you must font twang to work

How can I work if I was staying up everyday with only 2 or 3 hours of sleep I can't work like that in secure environment. I wish you could no how it feel with this illness I was better now back from the start again. BE HONEST WHAT DO YALL WANT ME TO DO HURT SOMEBODY SNAP OR MYSELF JUST LET ME KNOW AND I CAN DO IT. ***⁵

Grievant sent several text messages to the OT Supervisor that created concern.

And people wonder why they have bad luck GET RIGHT WITH GOD AND EVERYTHING WILL BE OK. HE'S NOT GOING TO PUT NOMORE ON YOU THAT WE CAN'T HANDE. WHAT GOES AROUND COMEBACK AROUND I WISH EVERYONE THE BEST LIFE. LOL LOL LOL.

The OT Supervisor was fearful regarding several of Grievant's statements such as "what goes around comeback around."

The OT Supervisor reported those messages to the Regional HR Director. The Regional HR Director spoke with Mr. P who said his employees felt threatened by Grievant's emails.

Grievant was provided with the OT Supervisor's home telephone and personal cell phone as well as a work telephone number to call when he could not report to work as scheduled.

Grievant received a written notice (now inactive) on December 20, 2012 reminding him "You must speak with a supervisor" when calling in to report unscheduled

⁴ Agency Exhibit 1.

⁵ Agency Exhibit 1.

absences.⁶ The OT Supervisor informed Grievant that it was unacceptable to send a text message without calling and speaking with a supervisor when he would not be reporting to work.

On August 2, 2016, Grievant sent the OT Supervisor a text saying he would not be in that day and that he was seeing another doctor and would keep her posted. He did not call the supervisor.

Grievant obtained a preprinted form from the Third Party Administrator entitled "Return to Work". Under the section "Return to Work Authorization (Completed by treating healthcare provider)" a block was checked indicating "Employee may return to work with NO restrictions on __/__/__." The date entered on the form when Grievant received the note was "9/14/16." When Grievant presented the note to the Agency, the date read "9/15/16." The Third Party Administrator spoke with the Regional HR Director and confirmed that the original date written was "9/14/16". Grievant denied writing 9/15/16.

Grievant obtained an excuse note from his Dentist. The note stated:

[Grievant] has an appointment for necessary dental services on Tues. Sept. 27, 2016 at 2:00 p.m. Should additional appointments be necessary separate excuse slips will be presented to you by the employee/student.

Grievant realized the Dentist had not written a return to work date. He called the Dentist who informed him his return to work date would be September 30, 2016 and Grievant wrote on the note: "Return to work 9/30/16." He presented the note to the Agency for the purpose of excusing his absence from work. After he presented the note to the Agency, Grievant obtain another note from his Dentist that showed he "was ex. until 9/30."⁷

On October 6, 2016, Grievant received a note from the Third Party Administrator indicating that his leave for an Employee Health Condition was scheduled to end on September 29, 2016. He was informed "[y]ou are presently scheduled to return to work on 10/10/2016. Please contact your manager to verify your return date and to make any necessary arrangements. As of 10/10/2016 your case will be closed by [Third Party Administrator]."⁸

⁶ Agency Exhibit 6.

⁷ Grievant Exhibit 3.

⁸ Grievant Exhibit 2.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”⁹ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Group II Written Notice – Failure to Follow Policy

The Facility Policy governing Attendance/Call-in Procedure provided:

In the event an employee must call-in to request leave because of an inability to report to work as scheduled, the employee must personally transact the call-in telephone procedure and speak directly to their immediate Supervisor or designee (unless totally incapacitated)¹⁰

The Agency argued that Grievant repeatedly violated this policy because he sent texts to his supervisor instead of calling her. The Agency did not keep a log of the dates that Grievant failed to call the supervisor. The Agency presented evidence showing that Grievant sent a text to the Supervisor on August 2, 2016 but did not call her.

In order to show a violation of the Facility Policy, the Agency must show that Grievant was obligated “to report to work as scheduled” on August 2, 2016. It is not clear that Grievant was obligated to report to work on August 2, 2016. Grievant Exhibit 2 shows Grievant was on approved leave on August 2, 2016. There is no basis to take disciplinary action.

Group III Written Notice – Workplace Violence

Grievant’s emails and text messages appear to be more the random thoughts of someone who is depressed and less like the expressions of someone intent on harming himself or others. Grievant expressed frustration with his circumstances. He did not identify any specific person he intended to harm. This conclusion is confirmed by the rambling nature of the thoughts expressed in Grievant’s emails, his numerous misspellings, unusual wording, and the early morning hour Grievant drafted several of his emails. The Group III Written Notice for workplace violence is not supported by the evidence.

⁹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

¹⁰ Agency Exhibit 9.

Group III Written Notice – Falsifying Records

"[F]alsification of records" is a Group III offense.¹¹ Falsification is not defined by the Standards of Conduct but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

Medical provider notes submitted to an agency are agency records. Those records should not be falsified by the employee submitting the document.

Grievant received a Return to Work preprinted form with a handwritten date of September 14, 2016. The document he submitted to the Agency showed the return to work date of September 15, 2016. Grievant denied changing the date. There is no reason any other person would have changed the date other than Grievant. Grievant demonstrated a pattern of amending written excuses. He modified a note from his Dentist to indicate his return to work date was September 30, 2016. He justified his actions as being intended to correct an omission from the Dentist. He obtained another note from his Dentist containing all of the needed information. Based on the facts of this case, the most logical conclusion is that Grievant changed the date of 9/14/16 to 9/15/16 without authorization. No other employee would have reason to change the date. This evidence is sufficient to show that Grievant falsified an agency record thereby justifying the issuance of a Group III Written Notice.

Grievant argued that he was not actually scheduled to work on September 14, 2016 and September 30, 2016. Although this conclusion is supported by Grievant Exhibit 2, it does not affect the outcome of this case. The insignificance of the agency record being falsified does not reverse the falsification.

Mitigation

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource

¹¹ See, Attachment A, DHRM Policy 1.60.

Management”¹² Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow policy is **rescinded**. The Agency’s issuance to the Grievant of a Group III Written Notice for workplace violence is **rescinded**. The Agency’s issuance to the Grievant of a Group III Written Notice with removal for falsification of records is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

¹² Va. Code § 2.2-3005.

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹³

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Office of Equal Employment and Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 10935 / 10936 / 10937-R

Reconsideration Decision Issued: September 1, 2017

RECONSIDERATION DECISION

EEDR issued Ruling Numbers 2017-4554, 2017-4558 remanding this matter to the Hearing Officer as follows:

Having reviewed the evidence in the record, EEDR cannot find that the hearing officer has squarely addressed why the messages sent by the grievant to his supervisor and/or others did not constitute misconduct. Though the hearing officer characterized the grievant's communications with his supervisor as "random thoughts. . . express[ing] frustration with his circumstances," the grievant's supervisor testified to feelings of fear and concern that she was being threatened following her receipt of such messages. It may be that the hearing officer did not find this testimony credible or persuasive. However, the decision lacks sufficient analysis of the applicable policies, which prohibit "harassment of any nature" as well as "threatening behavior" and why the grievant's communications were not misconduct in light of the supervisor's testimony. In short, the hearing officer must reconsider and further explain his determinations with regard to the Group III Written Notice for alleged workplace violence.

The Hearing Officer upheld Grievant's removal on other grounds. Thus, the Agency's appeal and EEDR's remand of the matter to the Hearing Officer does not affect the outcome of this grievance.¹⁴

Grievant was on leave from May through August 2016. He experienced depression and stress relating to his illness and to the poor health of his parents.

¹⁴ The Agency mistakenly asserted that the Hearing Officer's decision denying its discipline served as precedent. Hearing decisions do not set precedent.

Grievant said he was having difficulty “handling it” (his parent’s illness). He was frustrated with how the Agency and the Third Party Administrator were handling several of his claims. He expressed his frustration primarily through his emails and text messages to his Supervisor and Ms. M who worked for the Third Party Administrator. He sought to gain attention and emphasize his plight by using inflammatory language.

Grievant testified he did not intend to hurt anyone. His testimony was credible.

Words in emails are easily misconstrued by persons receiving those emails. The recipient of an email sometimes cannot determine the sender’s meaning, feeling, or intent based solely on the words contained in the email. Sarcasm, sincerity, immediacy, intensity and other emotional factors are not easily determinable merely from reading an email.

There is a difference between emails that create uneasiness in the reader and ones that are workplace violence. A reader may not know what the email sender means because the sender is using email instead of speaking which would reveal his intent. An email writer, however, is not responsible for assumptions made by someone receiving an email.

It is not enough for the Agency to show recipients of Grievant’s emails felt threatened or upset by Grievant’s written words. The Agency must also show that Grievant intended his words to be threats or otherwise workplace violence.

Grievant’s emails contained many misspellings. It is sometimes unclear what he is trying to communicate. Grievant did not know that using capital letters could be interpreted as shouting. This undermines the ability to discern Grievant’s intent.

Grievant’s comments cannot be only considered separately. His pattern of emails reveals that he did not intend to harm anyone.

Several of his emails were sent on an early weekend morning and contain references to Grievant being unable to sleep. Grievant’s mental state may have been affected by lack of sleep.

Grievant sent many emails to Ms. M who worked for the Third Party Administrator. He sent many email and text messages to the Supervisor. There are too many of these messages to address each one. The Hearing Officer reviewed all of them when drafting the original decision and again on reconsideration. Some of these messages are listed below.

On May 11, 2016, Grievant sent the Supervisor an email stating:

SOME PEOPLE DON'T HAVE NO HEART TO WHAT I'M GOING THRU WITH MY PARENTS AND PEOPLE WONDER WHY THEY HAVE BAD LUCK. DONE SAY ANYTHING AND YOU KNOW WHEN I'M THER I

WILL DO ANYTHING MY SUPERVISORS OR COWORKERS ASK ME TO DO. BE BLESS

In this email, Grievant expresses his frustration with his parent's illness and discusses bad luck. He concludes by wishing the Supervisor to have blessings. He does not make a threat. Suggesting people may have bad luck is not workplace violence.

On May 11, 2016, Grievant sent the Supervisor an email with the subject line, "Nothing AGAINST YOU but that's how [NAME] WANT TO BE NASTY IT'S ALL GOOD." He wrote in the email:

Hello my parent are not doing good and [name] trying to make someone come in that mess up. The people in aRicond said long as I have documentation I'm ok especially FMLA for my mom. THEY SUPPOSED TO BE CHECKING ON IT BUT I TOLD THEM I'LL SEE FIRST BECAUSE I HAVE MY DOCTOR NOTES AND EVERYTHING. BUT I'M NOT A FOOL MY PARENTS COME FIRST. YOU HAVE PEOPLE THAT BEEN MONTHS AND MONTHS AT A TIME OR BEING REFUSE TO NOT ACCEPT CALL INS. BUT I HAVE EVERYTHING DOCUMATION. THAT'S WHY I STAY STRESS BECAUSE OF THE WRONGFUL DOING AT THAT [FACILITY] AND ALSO TGEY SAID THEY CAN NOT OVER RULE THE DOCTOR DOCUMATION NOTES.

In this email, Grievant states that he has nothing against the Supervisor. He expresses concern for his parents and confirms that he has documentation for his FMLA claim. Grievant does not threaten anyone.

On June 1, 2016, Grievant sent the Supervisor an email:

Good evening I wasn't upset with you last week someone said they heard I was upset with you. It's a small and short world I'm not that type of person. Thanks for everything. I try to let you this morning I could fix when you get in before your group but no answer. TAKE CARE.

In this email, Grievant expresses that he is not upset with the Supervisor. He does not threaten the Supervisor.

Grievant sent text messages to the Supervisor on various dates not specified in the record. These texts included:

I think the world of your but my mid is not right I apologize with any negative towards you. Sorry I don't know if I'm coming or going cont to pay.

I'm not threatening anyone but things do happen in expected good or bad it's just human nature the man upstairs have control of all of that. Be bless

[Name] DIDN'T SAY THAT ABOUT THE WEEKEND I HAD TOW ORK YOU FEEL ME BUT YOU HAVE SOME NASTY PEOPLE IN THIS WORLD AND THEY WONDER WHY BAD THINGS HAPPEN OUT OF THE BLUE. I DON'T GET MAD I WASN'T RAISE LIKE THA BUT EVERYTHING HAPPNE FOR A REASON. BUT I'M GOING TO RICHMODN AND SEE ABOUT AL OF THIS FRIDAY OR TUESDAY I KNOW WHAT WAS REALLY SAID ABOUT MONDAY AND TODAY, NOT PUTTING ANYBODY NAME IN IT YET.

It's not to you GOD KNOW WHO'S I'M TALKING ABOUT. ON MY WAY TO EMERGENCY ROO. TELL ALL MY SINCERE COWORKERS GOD BLESS THEM THE ONES THAT REALLY CARE. THE END

I don't know why people mess with people in the time they are going thru things but its' all good. TELL HER THE PERSON SHE WANT TO WORK MONDAY AND TAKE MY HOURS LET THEM WORK JUNE 18TH AND 19TH.

I tell them one thing since I'm over my FMLA 480hrs as of June 15th. I WANT ALL MY TIME BACK FOR EVERYDAY AFTER JUNE 15TH AND THAT'S MY RIGHT. I DON'T CARE ABOUT A SHORT CHECK OR NOT. SINCE [Facility name] WANT TO BE NASTY HOW CAN SHE APPROVE MY TIMEIF I'M OVER 480 AS OF JUNE 15TH PEOPLE JUST NASTY AND DON'T HAVE TIME LIME THAT AND THEY WONDER WHY I DON'T WANT TO USE MY TIME THAT'S MY EIGHT I DON'T APPROVES NOBODY MONEY APPROVE SKIS APPROVESKNDNOTHER THING IS NO ONE SUPERVISOR NEED STO CALL [number] ABOUT AGO AND ASK ABOUT MY DAD FMLA THAT'S APPROVESKNDNOTHERNOTHER THING TO THAT APPROVESKNDNOTHERNOTHER NOW ABOUT AND THAT'S AGAINST THE HIPPA LAW. NASTY NASTY NASTY. THEY NEED TO GET RIGHT WON'T GOD AND STOP [F—king] WITH ME. BECAUSE OTHER PEOPLE ARE TAKEN OFF TREAT PEOPLE RIGHT AND MAY BE THEY WANT. THE WORLD GO AROUND.

Hello I have a conference call meeting MONDAY with RICHMOND to explain what's going on and can be done. EITHER CHANGE OVER TO L.T.D. OR LEAVE WITHOUT PAY WITH A DOCTOR DOCUMENTATION. EVERYBODY NEEDS THERE JOB BUT A LOT OF PEOPLE HAVE A LOT OF DEVIL INSIDE OF THEM. MY DAD IS REAL SICK AND THEY COMING WITH ALL THESE RULES. IF I CAN'T HOD IT TOGETHER I KNOW I TIRED. NOTHING TOWARDS YOU I'M JUST

TIRED MENTALLY AND PEOPLE WONDER WHY PEOPLE DO THE THINGS THEY DO I'M HUMAN I HAVE FEELINGS BUT I DON'T PLAY ABOUT MY PARENTS. NOT MAD WITH YOU AT ALL!!! BE BLESS AND SAFE.

And people wonder why they have bad luck GET RIGHT WITH GOD AND EVERYTHING WILL BE OK. HE'S NOT GOING TO PUT ANY MORE ON YOU THAT WE CAN'T HANDLE. WHAT GOES AROUND COMES BACK AROUND I WISH EVERYONE THE BEST LIFE. LOL LOL LOL.

I'm sorry I have been going through a lot with my parents and worrying about PARENTS and the job too. BUT I KNOW YOU NOT GOING TO LEAD ME IN THE WRONG DIRECTION I'M GOING TO LISTEN TO YOU. YOU KNOW I'M A PRETTY GOOD WORKER FUN GUY NOT NEGATIVE I WAS OFF TRACK A LITTLE BIT SORRY.

Just wanted to let you know I'm going to be out this week keep you posted thanks about everything you do for me. At the hospital blood transfusion I don't know how many this [s—t] is crazy. Driven me crazy too but trying to keep it together.

Grievant apologized to the Supervisor for his negative attitude. Grievant said "the man upstairs" has control over good and bad things. Grievant mentioned nasty people in this world who wonder about bad things happening out of the blue. Grievant said to tell his sincere coworkers God bless them. Grievant questioned why people mess with someone going through "things" but it was "all good". Grievant said people were being nasty to him and they need to get right with God and stop f—king with him. He said he was tired mentally and he had nothing towards the Supervisor. He questioned why people do the things they do. He said he was not mad at the Supervisor and for her to be blessed and safe. Grievant said to get right with God and that what goes around comes back around. He wished everyone the best life. Grievant said he knew the Supervisor would not lead him in the wrong direction and he would listen to her. None of Grievant's statements rise to the level of disciplinary action.

Grievant repeatedly told the Supervisor to be blessed, be safe, and take care. Grievant repeatedly told the Supervisor he had nothing against her and was not mad with her. This certainly suggests Grievant had no intention of harming the Supervisor.

Grievant's claim that other people are nasty is not a threat or otherwise workplace violence. He is expressing frustration to his supervisor about his father's illness and how his claim is being processed.

Many of Grievant's statements could have had several meanings. For example, he said what goes around comes back around. The Agency presumed this was a threat. Given Grievant's references to getting right with God, his comments could have

meant that nasty people will face God's displeasure. Without knowing the tone of Grievant's statement it is speculative to conclude he intended to harm anyone.

Early in the morning on Saturday August 6, 2016, Grievant began sending Ms. M with the Third Party Administrator a series of emails. At 1:41 a.m., Grievant sent an email to Ms. M stating:

We just talk about me getting better and Goin to work instead of back and forth and that's what I tried to do Thursday and Friday until all of this. ME and you talk about and I said I'm going to stay working and not going back out. BUT WITH MY ILLNESS DID GOT ME TO NERVOUS BREAKDOWN AND ANXIETY WORSE I THOUGH YALL WAS AVAILABLE TO CARE ABOUT YALL CLAIMS THAT WE FE FOR. NOW I'M SICK AGAIN PROBABLY WORSE THIS TIME SO I MOST LIKELY WILL GET ADMITTED IF I DON'T GET BETTER BY MONDAY. IT'S MESSED UP BECAUSE ILLNESS I WILL ALWAYS HAVE BUT I GUESS SOMEONE E WANTS ME TO HAVE A BREAKDOWN AND SUICIDAL OR WANT ME TO BE HOMOCIDAL OR SOMETHING.

In this email, Grievant referred to his illness and expresses frustration with his claim. He speculated regarding what others might want him to do (e.g. breakdown, suicidal, homicidal) but did not say he intended to do those things. Grievant made inflammatory statements to emphasize the significant of his plight and claim.

Four minutes later, Grievant sent Ms. M another email stating:

ALL OF THIS STUFF GOING ON IN THE WORLD LIKE SOOTING PEOPLE AND KILLING THEMSELVES AND PEOPLE STILL DO STUFF SO PEOPLE CAN BREAKDOWN AND ILLNESS GET WORSE AND HURT PEOPLE OR MYSELF BEHIND MY CONDITION ALWAYS HAD THIS ILLNESS S.T.D. FMLA ILLNESS AND WITH THAT TGE LAWYER SAID NO ONE CAN DENY ME BECAUSE EI WORK WITH INMATE AND PATIENTS AND IT'S NOT SELF FOR ME AND OTHERS. PLEASE KEEP THESE EMAIL MESSAGE I MIGHT NEED IT FOR MY LAWYER [NAME] AND FO RTHE COURT APPEAL.

In this email, Grievant refers to his illness. He describes the seriousness of his illness by using inflammatory language. He refers to his lawyer and the court of appeals which suggests he is aware of legal and appropriate means of resolving his dispute. He does not threaten to harm Ms. M or himself. Grievant's comment about people killing and shooting themselves did not indicate he intended to shoot anyone or kill himself. Without knowing his spoken tone, it is speculative to conclude Grievant intended to harm anyone.

At 1:49 a.m., Grievant sent an email to Ms. M of the Third Party Administrator stating:

This stuff is having the thought racing, depressed, anxiety panic and unique control anger its real [f--c] up and something will be done about it I'd it tale me to hurt someone or self it will get taken care of. Be safe I have a copy of my FMLA PAPERWORK AND THE YEAR AND DATE I WAS DIAGNOSED WITH THIS ILLNESS.

The email may be upsetting to a reader but it does not contain a threat of immediate or actual harm. The email is best described as Grievant's expression of his frustration with the processing of his claim. Grievant claimed "something will be done" in the same email in which he refers to his FMLA paperwork. Grievant's misspelling and incomplete wording in the sentence "I'd it tale me to hurt someone or self it will get taken care of" makes it difficult to determine his intent. Grievant uses inflammatory language to emphasize his frustration. Grievant wrote "Be safe" which is consistent with his other references of "be bless" or "take care". Grievant uses "be bless" to wish well of the recipient.

At 1:56 a.m., Grievant sent Ms. M an email stating:

How can I work if I was staying up everyday with only 2 or 3 hours of sleep I can't work like that in a secure environment. I wish you could no how it feel with this illness. I was beteer now back from the start again. BE HONEST WHAT DO YALL WANT ME TO DO HURT SOMEBODY SNAP OR MYSELF SNAP OR MY SELF JUST LET ME KNOW AND I CAN DO IT. I'M NOT SLEEPING THE WHOLE WEEKEND I WANT TO WORK BUT EVERYTHING I GO BACK IT'S ALWAYS ABOUT TTEH SAME DAMN PAPERWORK I KNOW WHAT I WILL AND NOBODY GOING TO LIKE IT KEEP THIS WAS FUTUER REFERENCE AND COURT DATE. THE GOD UPSTAIRS WITH TAKE CARE OF EVERYTING. IF MY TIME IS STILL PENDING I CAN'T WORK BECAUSE ITS ABOUT TO SWITCH TO LONG TERM AND MY SAID THEY NEED TO KNOW ASAP BECAUSE THEM DAYS WILL TRUE IN TO 9 OCCURRENCE FOR EACH DAY AMD IF ANYONE GETS 6 OCCURRENCE THEY GET A GROUP OR FIRE. I HAVE A SICK father. But I still work and help him when I get off but I can't help in like this.

In this email, Grievant speculates about hurting someone or himself if the Third Party Administrator wants him to do so. Grievant is not threatening anyone. He is expressing his frustration and using inflammatory language to express his frustration.

Agency HR managers made many assumptions about what Grievant meant in his emails. The Agency sought the advice of a Senior Assistant Attorney General who wrote:

On our call, you mentioned that possibility of a Group III for Workplace Violence, but I really don't think you have that here. *** From what you've

told me so far, I'm not sure I'd go with the Group II. I mean, would that just be for these texts because I don't think they warrant that. What would you pin it on? How about a written counseling with an EAP referral?¹⁵

The Agency disregarded this advice and proceeded with a Group III Written Notice for workplace violence.

In conclusion, Grievant's intent is difficult to measure because his communications were primarily through emails and text messages. Because Grievant communicated by email and text, it was easy for the Supervisor and Ms. M to assume incorrectly the worst motive behind Grievant's communications. Grievant does not make any specific threat such as "I will harm you or hurt you." His rambling statements reflected his depression and an attempt to draw attention to his difficult circumstances. It is important to consider the context of Grievant's communications, namely that he is attempting to resolve a dispute with the Agency. His behavior is protected activity unless he makes a threat or otherwise engages in workplace violence. Grievant has not exceeded the scope of protected activity in this case. There is no basis for disciplinary action.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁵ Agency Exhibit 1.