Issues: Group III Written Notice (workplace violence), Group II Written Notice (computer/internet misuse), and Termination; Hearing Date: 11/06/17; Decision Issued: 11/22/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11096, 11097; Outcome: Full Relief; **Administrative Review: Ruling Request received 12/07/17; EDR Ruling No. 2018-4654 issued on 01/18/18; Outcome: Remanded to AHO; Remand Decision issued 03/02/18; Outcome: Original decision affirmed; Administrative Review: Ruling Request on Remand Decision received 03/12/18; EEDR Ruling No. 2018-4692 issued 04/09/18; Outcome: Remanded to AHO again; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11096 / 11097

Hearing Date: November 6, 2017
Decision Issued: November 22, 2017

PROCEDURAL HISTORY

On August 1, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence. On August 1, 2017, Grievant was issued a Group II Written Notice of disciplinary action for computer/Internet misuse.

On August 24, 2017, Grievant timely filed grievances to challenge the Agency's actions. The matter proceeded to hearing. On September 18, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On November 6, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Corrections employed Grievant as an instructor at one of its facilities. Grievant had been employed by the Agency for approximately 19 years.

On several occasions, Grievant told the Supervisor that he intended to leave the Agency for medical reasons. Although he was reminded to file the appropriate paperwork, Grievant did not initiate the process to leave the Agency for medical reasons.

On June 7, 2017 at approximately 4 p.m., Grievant entered the Supervisor's office and asked what happened with the situation regarding her key card. She said that an incident report was completed and the key card was deactivated. Grievant said, "Is that it?" The Supervisor responded "yes." Grievant sat down and began telling the Supervisor he planned to go to the doctor to get a note to be taken out of work. The Supervisor reminded Grievant of the paperwork that he needed to complete before he left. She added some additional tasks. She began composing an email to Grievant as she spoke to him. Grievant became irritated while discussing the list. Grievant mentioned he intended to go to the doctor. The Supervisor cautioned Grievant to be mindful of what he does because he may want to return to State employment one day. Grievant said he had no intentions of returning and if she "thought what was going on is bad, then wait to see what is coming down the line." The Supervisor asked Grievant,

"What did you say?" Grievant turned around as he was walking out of the Supervisor's office and repeated his statement.

The Supervisor did not report to work on June 8, 2017. He feared Grievant intended to return to the Facility to harm her.

Grievant was prohibited from entering the Facility on June 8, 2017. After attempting to go to his desk and being denied admission to the Facility, Grievant met with the Human Resource Officer. She asked him if he had referenced the "Florida incident" because she wanted to clarify what he had said earlier. Grievant said, "I said to them that when you mess with someone's job, something could happen like the incident in Florida, but I had 19 years and would not do anything like that." He then told the HRO the Agency could search his vehicle because he did not have any weapons.

Mr. S worked as an HVAC teacher at the Facility. He developed a training presentation containing materials to teach inmates about the HVAC trade. He obtained permission from an Agency manager to insert pictures of women in bikinis among the presentation slides to keep inmates interested in an HVAC presentation that might otherwise be boring. Approximately 29 pictures of mostly women wearing bikinis were placed on a flash drive along with training materials relating to heating and air conditioning training in 2015. At some point, the presentation was transferred to Grievant. After Grievant's removal, a flash drive was found in Grievant's desk containing the training materials and the pictures.

The Agency also conducted a review of the websites Grievant accessed during his work hours. The Agency reviewed all of the websites viewed by Grievant from April 17, 2017 to June 7, 2017. Grievant accessed the Internet for reasons unrelated to the Agency's business.

CONCLUSIONS OF POLICY

The Agency contends Grievant should receive a Group III Written Notice with removal for workplace violence and a Group II Written Notice for computer/Internet misuse. The Agency has not met its burden of proof with respect to either Written Notice.

Group III Written Notice - Workplace Violence.

It is clear that the Supervisor believed Grievant threatened to harm her. Her subjective opinion, however, is not sufficient in itself to establish that Grievant threatened her. An objective reasonable person standard must also be applied.

The Supervisor testified Grievant said to her, if she "thought what was going on is bad, then wait to see what is coming down the line."

It is unclear what Grievant was referring to as to "what was going on." Evidence was presented showing Grievant may have referred to a workplace violence incident occurring in Florida on June 5, 2017. A disgruntled employee went to his workplace and shot several employees before killing himself. This evidence is insufficient to provide context to Grievant's statement to the Supervisor because the Supervisor did not write in her statement or testify that Grievant mentioned the Florida shooting to her. Grievant appears to be the source of the evidence relating to him commenting about the Florida shooting. He admitted referring to the Florida shooting to the Human Resource Officer. He also told the Human Resource Officer, "but I had 19 years and would not do anything like that." Therefore, Grievant's comment about a shooting in Florida does not provide sufficient context to explain "what was going on".

It is unclear what Grievant meant by "coming down the line." The Supervisor concluded Grievant was referring to physically harming her. Grievant asserted he was referring to his office being in shambles, he had a tool inventory to do, and monthly register updates to do and, thus, the following day would not be any better than today. It is certainly possible that "coming down the line" meant physical harm, but it is also equally likely Grievant meant other work duties or difficulties. The words in themselves are not sufficient to establish a threat. The Group III Written Notice for workplace violence must be reversed.

Grievant was sometimes emotional, annoying, and difficult for others to work with. His statements on June 7, 2017, however, are not sufficient to show that he threatened the Supervisor.

Group II Written Notice – Compute/Internet Abuse

The Agency alleged that Grievant should be disciplined because managers found in Grievant's desk a flash drive containing inappropriate pictures. Grievant did not bring the pictures into the Facility. He did not download them from the Internet. He obtained them from a co-worker as an attachment to training materials. The pictures were not inappropriate because their use by Mr. S had been approved by an Agency manager. There is no basis to discipline Grievant for his possession of a flash drive containing pictures of mostly women in bikinis.

The Agency alleged Grievant should be disciplined because of excessive internet usage. "Personal use means use that is not job-related. Internet use during work hours should be incidental and limited to not interfere with the performance of the employee's duties or the accomplishment of the unit's responsibilities."[1] The Agency did not determine how much time Grievant spent on the Internet each particular day. The Agency did not establish that Grievant's internet use interfered with his work or his work unit's performance. The Agency's assertion that Grievant had more personal use than did other employees is not sufficient to support disciplinary action.

[1] DOC Operating Procedure 310.2

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **rescinded**. The Agency's issuance to the Grievant of a Group II Written Notice is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. Grievant may elect, at his discretion, not to have the Agency provide retroactive health insurance coverage.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.[1]

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

/s/ Carl Wilson Schmidt

_____

Carl Wilson Schmidt, Esq.
Hearing Officer

[1] Agencies must request and receive prior approval from EEDR 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: 11096 / 11097-R

Reconsideration Decision Issued: March 2, 2018

RECONSIDERATION DECISION

In EEDR Ruling 2018-4642, this matter was remanded to the Hearing Officer. EEDR stated:

> In this case, the hearing officer incorrectly stated that an "objective reasonable person standard" should be used to determine whether an employee has made a threat that constitutes workplace violence under state and agency policy. Agencies must assess the totality of the circumstances when determining whether an employee has made a threat, and an employee may engage in workplace violence without explicitly threatening bodily harm to another person. For example, veiled threats or other statements that could be interpreted or understood as threatening, either by the target of the statement and/or by other individuals, may constitute workplace violence. This may be the case regardless of whether the employee intends the statement as a threat. In determining whether an employee's statement was threatening, agencies should consider the context of the statement and other surrounding circumstances, such as, for example, the employee's tone of voice and other behavior when making the statement, the employee's past conduct in the workplace, explanations or other clarification provided by the employee about nature of the statement, and any subjective fear of harm experienced by the target of the statement and/or other individuals. In short, if the agency makes a reasonable interpretation of the totality of the conduct as a threat, veiled or otherwise, it would meet the definition of "threatening behavior" prohibited by the policy. Accordingly, on remand, the appropriate consideration by the hearing officer is whether the agency's interpretation of the grievant's conduct as a threat was reasonable.

The Agency issued Grievant a Group III Written Notice because Grievant "communicated a threat to [the] Assistant Principal … [that] if you think today was bad, wait until tomorrow."

The Agency's interpretation of Grievant's conduct as a threat was not reasonable. The totality of the circumstances of this case do not provide a reason for disciplinary action.

The Agency relied on the Supervisor's account of her conversation with Grievant and her reaction to that conversation. Grievant sat down and began telling the Supervisor he planned to go to the doctor to get a note to be taken out of work. The Supervisor reminded Grievant of the paperwork that he needed to complete before he left. She added some additional tasks. She began composing an email to Grievant as she spoke to him. Grievant became irritated while discussing the list. Grievant mentioned he intended to go to the doctor. The Supervisor cautioned Grievant to be mindful of what he does because he may want to return to State employment one day. Grievant said he had no intentions of returning and if she "thought what was going on is bad, then wait to see what is coming down the line." The context of the discussion was about additional work duties for Grievant to perform. This is consistent with Grievant's assertion that his comment was about his "office was in a shambles, I had tool inventory to do, the monthly register, updates to make sure all the student files were accurate …." In her written statement, the Supervisor admitted, "I did not know how to interpret [Grievant's] statement."

Grievant's words did not constitute threatening behavior. His words did not cause a reasonable fear of injury to the Supervisor. The Supervisor's opinion that Grievant intended to harm her was unreasonable speculation by the Supervisor and cannot form a basis for disciplinary action.

The Written Notice asserts that Grievant said to the Supervisor, "if you think today was bad, wait until tomorrow." "Today" would have been June 7, 2017. The Florida shooting occurred on June 5, 2017 when a disgruntled former employee killed five employees before killing himself. This suggests Grievant's comment was about his workload as he claimed and not the Florida shooting.

Grievant was prohibited from entering the Facility on June 8, 2017. After attempting to go to his desk and being denied admission to the Facility, Grievant met with the Human Resource Officer. She asked him if he had referenced the "Florida incident" because she wanted to clarify what he had said earlier. Grievant said, "I said to them that when you mess with someone's job, something could happen like the incident in Florida, but I had 19 years and would not do anything like that." He then told her the Agency could search his vehicle because he did not have any weapons.

The Agency relied on Grievant's conversation with the Human Resource Officer to show that he referred to the Florida shooting when threatening the Supervisor. The

Supervisor did not hear Grievant refer to the Florida shooting. The Agency did not present testimony from a person who heard Grievant's comment when he made it. Thus, there is no way to establish the context or tone of his comment about the Florida shooting. The only evidence of Grievant's statement about the Florida shooting comes from Grievant. Grievant said he "would not do anything like that." The Agency seems to ignore this part of his statement, but doing so would be an arbitrary decision. Grievant's statement about the Florida shooting as recounted by Grievant does not form a basis for disciplinary action.

The Agency elected not to take disciplinary action against Grievant for another comment he allegedly made about a shooting. On June 7, 2017, the Regional Principal presented Grievant with a Notice of Improvement Needed. Grievant told the Regional Principal, "this is why things like Columbine happen."[2] "Columbine" is a common reference to shooting massacre at a high school. When asked why she took no action regarding Grievant's comment, the Regional Principal stated, "I did not give it a whole lot of energy because he said stuff like that all the time." She said she was not afraid and did not think Grievant would do anything like that. The Agency cannot "bootstrap" this evidence to justify disciplinary action regarding Grievant's comment to the Supervisor. The Agency did not discipline Grievant for this "Columbine" comment and did not place Grievant on notice that it considered that comment to be part of the disciplinary action relating to the Supervisor. In addition, the Hearing Officer is not convinced Grievant made the comment.

ORDER

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is rescinded. The Agency's issuance to the Grievant of a Group II Written Notice is rescinded. The Agency is ordered to reinstate Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with back pay less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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] Grievant denied making that statement.

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