Issues: Group II Written Notice with termination (failure to follow supervisor's instruction, perform assigned work, or otherwise comply with established written policy, and Group III Written Notice with termination (violating Workplace Violence policy); Hearing Date: 12/10/02 and 01/09/03-01/10/03; Decision Issued: 04/28/03; Agency: DEQ; AHO: Carl Wilson Schmidt, Esq.; Case No. 5582/5583; **Administrative Review; HO Reconsideration Request received 05/06/03; Outcome: No newly discovered evidence or incorrect legal conclusions. Request to reconsider denied (05/19/03); Administrative Review; DHRM Ruling requested 05/06/03; Outcome pending**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5582 / 5583

Hearing Date: January 10, 2003
Decision Issued: April 28, 2003

PROCEDURAL HISTORY

On July 31, 2002, Grievant was issued a Group II Written Notice of disciplinary action with removal for:

> *1.60 – Standards of Conduct – Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy. Due to your work performance, which includes abusing your authority, your inability to work with the public and your lack of meeting deadlines, it was necessary to remove you from nine recent projects (a total of 17 projects over a three year period) due to your inability to work with consultants. You arbitrarily denied previously approved work activities with no explanation or sound business reasons. Further, once you gave a verbal approval of the AAFs, you continually missed deadlines on your recent approval of the AAFs. You overstepped your authority by authorizing [Consultant WEL] to perform site activity.*

And was issued a Group III Written Notice with removal for:

> *1.60 - Standards of Conduct – Threatening and slandering of DEQ staff, and consultants. 1.80 – Workplace Violence policy – In a May 24 and a June 26, 2002 meeting you displayed threatening behavior and verbal*

abuse. You harassed consultants by shouting and swearing. Parties in both meetings expressed fear and emotional distress by your behavior and actions. On several occasions, you slandered or questioned the competence of [Consultant O, Consultant EEI and Consultant SA] to their clients which has opened the agency to potential litigation. This is unacceptable behavior which in the judgement of DEQ management, undermines the effectiveness and mission of the agency, and jeopardizes the agency's reputation and credibility.

Grievant timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing for each grievance. At the Agency's request, the Director of the Department of Employment Dispute Resolution consolidated the two grievances. On November 12, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 10, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Agency party
Agency Advocate
Eight witnesses for the Agency
Grievant
Grievant's Counsel
Six witnesses for the Grievant.

ISSUE

1. Whether Grievant should receive a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy.

2. Whether the Grievant should receive a Group III Written Notice of disciplinary action for threatening and slandering Agency staff and consultants or engaging in workplace violence.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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 Environmental Quality employed Grievant as a Geologist Senior. His position,

> Implements the regional ground water remediation program in response to ground water contamination caused by leaking underground storage tanks (USTs) and other sources of ground water contamination in order to estimate the level of risk to ensure protection of human health and environment.[1]

Grievant was a diligent and technically oriented worker who focused on complying with Agency policy. In September 2001, Grievant's overall work performance was rated as a Contributor. A portion of the evaluation addressing Grievant's customer service states:

> Overall, [Grievant] has made significant improvements[2] with the Agency's customer service values by interacting well with both the regulated community and other DEQ staff both on a technical and personal level. He has improved his working relationships with the regulated community and (almost) consistently meets the DEQ customer service goals (friendly, tactful, helpful, and courteous.) Numerous comments from both within DEQ and outside have made references that reflect this improvement. Although overall improvement for the year is noted, recent occurrences of inappropriate behavior must not be repeated to avoid a Standards of Conduct disciplinary action.[3]

Grievant worked for the Agency for approximately 11 years until his removal on July 31, 2002.

DEQ oversees the petroleum storage program. This program ensures that petroleum spills are cleaned up and that petroleum tank leaks are identified and corrected. If a petroleum spill occurs on private property, DEQ staff do not clean it up.

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[1] Agency Exhibit 3.

[2] Grievant received a rating of Fair But Needs Improvement for the customer service expectation of his 1998 evaluation. Grievant's supervisor states, "Several instances of strained interpersonal relationships between [Grievant], a consultant, co-workers and the GW Manager, caused difficulty for all involved earlier in the year." See, Agency Exhibit 4. Grievant's 2000 evaluation reflects a similar comment. See, Agency Exhibit 5.

[3] Agency Exhibit 3.

The responsible property owner selects the contractor to do the work. Consultants are private businesses specializing in various environmental fields. When property owners need qualifying environmental services to be performed on their property, the consultants will provide those services.

On May 9th or 10th, 2002, Consultant O was hired to remove an underground storage tank and to stop releases from the tank into a pond used by a camp for girls.[4] Free product in the form of heating oil appeared on the pond.[5] On May 13, 2002, Consultant O hired Consultant EEI as a subcontractor for the project to remove the tank from the ground and conduct abatement as required. Mr. EW of Consultant O met with Grievant at the job site. Grievant said Consultant O needed to use a harbor boom for the project. Grievant recommended hiring Consultant WEL as subcontractor. During their conversation, Grievant mentioned both a harbor boom and using a surfactant. Mr. EW called Mr. LH who also worked for Consultant O and relayed Grievant's recommendation. Mr. LH called Consultant WEL to obtain a bid on a harbor boom. Consultant O hired WEL to provide a harbor boom but not to spray a surfactant.

On May 16, 2002, Mr. EW and Mr. LH of Consultant O were at the pond when Mr. W of subcontractor WEL began spraying Biosolv[6] on the pond. Mr. EW of Consultant O asked Mr. W of WEL why he was spraying on the pond. Mr. W of WEL said because Grievant had approved the spraying up to amount costing $2,000. Mr. EW considered that to be improper because it was Consultant O's responsibility to select subcontractors and determine their work duties. Grievant had instructed Mr. DW of Consultant WEL to spray the Biosolv because he mistakenly believed Mr. EW had approved spraying the product and it was important to act quickly before the camp opened on June 1, 2002.

On May 24, 2002, Grievant and Mr. EW and Mr. LH were at the job site.[7] Mr. EW mentioned to Grievant that Grievant had hired Consultant WEL as a subcontractor for Consultant O. Mr. EW suggested DEQ had an unethical relationship with Consultant WEL but he would not make an issue of that relationship. Upon hearing the accusation, Grievant became angry and exploded and started screaming obscenities. Among other things, Grievant told Mr. EW to "if you are not going to make an issue of it, keep your f—king mouth shut." Mr. EW listened to Grievant for about ten seconds and then turned and walked away.[8] Grievant continued screaming as Mr. EW walked away. Mr. LH tried to calmly discuss the issue with Grievant but Grievant continued screaming and

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[4] Grievant felt the work should be completed as quickly as possible since the camp was set to open June 1st and a lot of the camp activities included using the pond.

[5] A single 1,000 gallon, heating oil underground storage tank located behind the residence at the camp was discovered to have discharged a portion of its contents. Grievant Exhibit 38.

[6] Biosolv is a surfactant.

[7] Grievant Exhibit 25.

[8] From approximately 150 feet away, Mr. EW could hear Grievant continue to yell at Mr. LH.

yelling for an additional two minutes. Grievant called Mr. LH a "wimp" and said Mr. LH could call Grievant's boss if he wanted to. Because of this altercation, Mr. LH became concerned about working with Grievant in the future since case managers had a lot of discretion regarding reimbursement. Mr. LH felt that Grievant may not act favorably towards Consultant O.[9] On May 30, 2002, Grievant called Mr. EW and left a message on his answering machine to apologize for his outburst. He did not contact Mr. LH to offer an apology.

When consultants clean up petroleum spills, they are reimbursed through DEQ. Payment[10] for the services is made from funds administered by the Agency.[11] Before the Agency will authorize reimbursement to a consultant, the consultant must have completed an Activity Authorization Form ("AAF") outlining the environmental services to be performed and submitted the AAF to the Agency for approval.[12] If a consultant performs work for a property owner without first having approval from the Agency, the consultant is at risk of not being reimbursed for the work performed. Thus, from the consultant's perspective, Agency approval through an AAF is essential to assuring payment for services rendered.

As a case manager, Grievant has ten workdays to respond to a consultant regarding an AAF after the AAF is assigned to Grievant. The first day begins on the day after Grievant receives the AAF. The goal is to have 90 percent of the AAFs done on a timely basis.

DEQ case managers sometimes verbally approve AAFs so that work at the site can begin immediately. Once the consultant has obtained the necessary paperwork, the AAF would be submitted to the DEQ case manager to be finalized for reimbursement.

After the consultant completes work on the site, the consultant prepares a technical report and submits that report to DEQ. Along with that report is a copy of the approved AAF with added notation by the consultant of the actual amount of approved work that was performed. This AAF is referred to as the work performed AAF.

If a consultant disagreed with DEQ case manager's denial of charges, the consultant may file an appeal with the reconsideration panel. DEQ's reconsideration panel addresses many appeals called pre-approval disputes where a case manager has

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[9] In a July 25, 2002 email to the Agency, Mr. LH stated, "In all of the years I have dealt with clients and DEQ staff, I have never experienced anything like that."

[10] Reimbursement is in accordance with the Usual and Customary Rates set forth in the Virginia Petroleum Storage Tank Fund Reimbursement Guidance Manual.

[11] Va. Code § 62.1-44.34:11(A)(2)(a) provides the authority for the State Water Control Board to disburse funds from the Virginia Petroleum Storage Tank fund for "reasonable and necessary" costs of corrective action. DEQ administers this fund on behalf of the Board. See 9 VAC 25-590-230.

[12] DEQ sets the maximum charge for specific items of work.

supposedly verbally approved work but then refused to give final approval to the written AAF. Typically, if the panel finds that a cost was verbally approved by the case manager, then the panel will award the cost as long as the cost is not otherwise ineligible.

Consultant SA was responsible for providing environmental services to owners of adjoining properties known as the former Grocery and former Chevron sites. On April 19, 2002, Consultant SA submitted an AAF to Grievant to seek Grievant's approval for reimbursement regarding work the consultant had competed and proposed for the Grocery site. Use of a liquid ring pump was one of the items listed on the AAF. During a May 22, 2002 meeting, Grievant informed Mr. RT of Consultant SA that Grievant would be approving the AAF for the Grocery site. Thus, Mr. RT believed Consultant SA would ultimately be reimbursed for the liquid ring pump used at the Grocery site. Grievant did not sign off on the AAF within 14 days because he had some technical questions in his mind and needed additional information prior to approval. In June 2002, free product returned to the Grocery site. Free product is a separate product floating on top of water (e.g. petroleum floating on top of water). When free product returns to a site, the consultant must restart the corrective action process to remove the free product.

On May 23, 2002, Consultant SA submitted an AAF for the Chevron site.[13] On June 11, 2002, Consultant SA submitted a second AAF for the Chevron site.[14] Grievant approved additional work for the consultant to perform on the Chevron site. Grievant also correctly pointed out that a comparison of the cost to lease verses the cost to own analysis was necessary. He was relying on the requirements of a new DEQ program implemented in May 2002. After the Chevron project was reassigned to another case manager, the AAF was denied on July 11, 2002 because lease vs. purchase analysis was not correctly performed.

On June 24, 2002, Grievant cancelled the AAFs for the Chevron site and asked Consultant SA to resubmit two AAF concerning the Chevron site. Grievant was asking Consultant SA to do some additional work because of the return of free product. He faxed a memorandum to Consultant SA instructing the consultant to "Resubmit a SCR Addendum AAF and a CAP Addendum AAF by July 2, 2002. I would like to approve this work before I go on vacation from July 4 to Monday, July 15."[15] On June 24, 2002, Grievant sent the owner of the Chevron site a fax stating that "I do not agree with some of the proposed work. The work [Consultant SA] has completed to date is okay. It is just not enough. There are times when DEQ staff can tie consultant's hands; not letting them do what is necessary."[16]

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[13] Grievant Exhibit 26.

[14] Grievant Exhibit 31.

[15] Grievant Exhibit 37.

[16] Grievant Exhibit 36.

Mr. JS of Consultant SA became concerned that Grievant had not approved in writing two AAFs containing work Grievant had previously authorized verbally. Mr. JS had prepared two revised AAFs as Grievant had instructed and wished to meet with DEQ staff to finalize the reimbursement. On June 26, 2002 at the DEQ offices, Grievant met with Mr. JS, Mr. MA and Mr. RT of Consultant SA and with Mr. RH, Geologist Supervisor, Mr. DE, Senior Geologist of DEQ.

On June 27, 2002, the President of Consultant SA wrote the DEQ Deputy Director of Operations and stated:

> I am writing to formally request that you direct appropriate members of your staff to address a personnel problem in the [Regional Office] which is so serious that members of our staff fear for their personal safety as well as for the financial and professional safety of our company.
>
> It was apparent that problems were developing when we submitted an activity authorization form for the [Grocery] site on April 19, and as of yesterday it had not been approved or denied. Likewise we had forms for the other adjacent former Chevron site that had been in [Grievant's] hand for four and two weeks respectively.
>
> Two senior members of my staff (Mr. RT and Mr. MA) met with [Grievant] on May 28 to determine the course of action at the former Chevron site. *** [Grievant] directed them to install some additional wells and to proceed while he processed the AAF. On June 6, we attempted to install these wells and encountered some drilling difficulties. At our staff meeting June 10, I became aware that [Grievant] intended to visit the site later on that day while we were working there. *** Upon arrival at the site, I met with [Grievant]. I had in the meanwhile become aware he had not yet signed the … AAF that he had verbally approved. In our meeting, I asked him what the status was. He stated that he was thinking about not approving the AAF even though we had done the work as directed. *** [Grievant] during this time stated that although [Mr. DC] could approve an AAF in three or four days, he [Grievant] could not approve these things in less than a month. My parting comment (as I recognized that [Grievant] was in an abusive mode) was to the effect that he had screwed with us in the past and I had not taken action.[17] I did state that he had better sign the AAF's that he had committed to or that I would file a complaint. I would note that the language I used was somewhat saltier than that.
>
> On Monday of this week, late in the day before we were scheduled to continue our efforts at this site, we received two AAF's from [Grievant] that were signed, then crossed out, and had the note that we had to take

[17] Mr. JS's actual words were "you f—cked with us and better not f—ck with us again."

further action and re-submit. *** We requested a meeting for yesterday to straighten out this matter as [Grievant] was out of the office on Tuesday. It was suggested that we honor his request and resubmit the AAF's. *** We scheduled a meeting for 1:00 p.m. yesterday. The purpose of the meeting in my mind and as stated to both [Grievant] and [Mr. RH] was to come to an agreement on the course of action for these projects and to get the AAF's approved. *** We started the meeting by my summarizing where we were and that we needed to determine a few technical issues. I reiterated that it did not matter that perhaps the sites had not been fully characterized in the past; we were simply there to move forward. I explained where we were and what we needed (approval of AAF's). *** At some point [Grievant], accused me of not respecting him and said that I needed to shut up and listen to him and respect what a geologist had to say. He said that I had had my back to him while I sketched on the white board to illustrate a point ("Look at me when I talk to you. You will respect me. I know that you hate me and are out to get me.")[18] I tried to reiterate and said that indeed I respected his role and the importance of the geologist. I tried to reiterate that we were here to get AAF's approved – that he had had AAF's for two months and had us working for hours trying to meet his demands but he continued to lead us on and ask for more and never approve anything for reimbursement. *** At this point our discussion moved through a rather heated discussion. I can remember some of the following statements by [Grievant]:

- I understand that you [Mr. JS] expect your company to try to operate efficiently. It is important that you keep all of your people and equipment fully employed. My job is the opposite.
- With the new program emphasis in Richmond, I can no longer do my job (as a geologist). I must make all of these requests for documentation. I must do everything to cover my ass.
- I did verbally promise [Mr. RT] that I would approve the work I requested while I was reviewing the AAF's. I have decided to change my mind.[19]
- [Mr. DC] has been overworked. He did not do his job correctly. I am finding all kinds of mistakes with these projects.
- [Mr. TP] did not do his job correctly. This project should not have moved to corrective action.

[18] Mr. RH of DEQ who was also in the meeting testified he saw Grievant become very angry and yell, "Don't turn your back to me, you will respect me." Mr. DE of DEQ who was also in the meeting thought Grievant said "you will at least respect me" to Mr. JS. Grievant offered a milder account suggesting he said, "you don't have to like me but you need to at least respect me and listen to what I have to say."

[19] Mr. RH of DEQ who was also in the meeting confirmed that Grievant said he had changed his mind about authorizing payment for the Grocery site. He described this as "a jaw dropping statement." Grievant contends he only asked "Can't I change my mind?", but the weight of the evidence shows that Grievant stated he had changed his mind.

- You chose to keep operating a remediation system (even though the endpoints were not met) so that it could be kept busy until needed at the adjacent site. (Upon confrontation by R, [Grievant] essentially inferred that R was unethical for continuing corrective action even though [Grievant] had given his verbal approval and the endpoints had not been met.
- [Mr. JS], I get no support from management here. My boss … does not mentor me as well as you have. They will not even tell me the truth when I ask them about my behavior. (This comment was made after [Mr. RH] had left the room to get [Mr. DC]).

Prior to this last comment, I made the demand that [Grievant] remove himself or be removed from the project or I would personally request that to Mr. B that this action be addressed.[20]

Finally we were able to get [Grievant] to resign from all involvement with these projects. When we were able to get him to leave the room, we proceeded to discuss where we were going. I left my staff to work out the remaining issues with the normal professional give and take that I expect to occur.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).[21] Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

Group II Written Notice

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense.[22] The evidence is insufficient to support issuance of a Group II Written Notice.

[20] It was as much Grievant's decision to remove himself from the case as it was Mr. JS's request.

[21] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

[22] DHRM § 1.60(V)(B)(2)(a).

DEQ contends Grievant should receive a Group II Written Notice, in part, because he had to be removed from nine[23] recent projects. The evidence showed that Grievant suggested his removal and that rotating sites among case managers was not an uncommon practice. Grievant was not totally at fault for the dissolution of the relationship with Consultant SA. He recognized that Mr. JS's hostility towards him may justify his removal from sites involving Consultant SA.

DEQ contends Grievant arbitrarily denied previously approved work activities. In particular, the Agency contends Grievant verbally approved an April 19, 2002 AAF for work at the Grocery site and then reversed his decision during a June 26, 2002 meeting with Consultant SA. Although Grievant may have stated during the meeting that he was changing his mind, the Hearing Officer does not believe Grievant meant his statement. Grievant's statement was more likely a response to what he perceived as hostile comments made by Mr. JS of Consultant SA. Documents submitted during the hearing show that Grievant failed to timely approve in writing the April 19th AAF, but that he later asked for additional work at the site and asked Consultant SA to submit a revised AAF for approval. Consultant SA presented revised AAFs at the June 26, 2002 meeting as Grievant had requested.

DEQ contends Grievant overstepped his authority by authorizing Consultant WEL to spray Biosolv at the pond. The evidence showed that Grievant believed Consultant O had already decided that Consultant WEL would be spraying Biosolv on the pond. When Mr. EW accused Grievant of hiring Consultant WEL, Grievant's hostile reaction confirms his belief that he had not hired Consultant WEL to perform any work.

DEQ presented evidence suggesting Grievant failed to timely approve AAFs. Under Grievant's Employee Work Profile, Grievant is obligated to respond "to at least 90% of Petroleum Activity Authorization request within 10 work days of receipt …."[24] No evidence was presented to enable the Hearing Officer to determine whether Grievant failed to meet the 90 percent standard. In addition, the evidence showed that most of the AAFs for which the Agency alleged Grievant failed to timely respond, he did respond on a timely basis. Thus, the Agency's allegation that Grievant was untimely is unfounded.

Group III Written Notice.

DHRM § 1.60(V) lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section." DEQ contends that Grievant sometimes loses his temper, yells, curses

[23] Agency Exhibit 7 lists eight sites removed in July 2002 involving Consultant SA.

[24] Agency Exhibit 3.

and attempts to intimidate consultants. In the Agency's judgment, Grievant's behavior on May 24 and June 26 rises to the level of a Group III offense. The Hearing Officer believes the Agency has presented sufficient evidence to support its judgment that Grievant should receive a Group III Written Notice with removal.[25]

DEQ has repeatedly informed Grievant of the need for him to maintain a professional demeanor when he interacted with consultants. Consultants and other members of the public sometimes get upset with DEQ because DEQ causes them to spend or lose money. Grievant should anticipate that on some occasions consultants may become angry with him. DEQ expects its employees to avoid becoming involved in heated confrontations with consultants and to avoid being "baited" into arguments by those consultants. Grievant should have remained calm and reserved on May 24 and June 26 despite interacting with consultants whose behavior may also have been unprofessional.

Grievant contends that during the May 24, 2002 meeting Mr. EW provoked him by suggesting a DEQ manager had too close of a relationship with Consultant WEL. Grievant was offended by allegations he considered slanderous. Although Grievant's desire to defend his agency is understandable, his motive does not excuse his behavior.

During the June 26, 2002 meeting involving Grievant and Mr. JS of Consultant SA, Mr. JS hit his fist[26] on the table and said "Goddamn it!" Grievant contends this and other behavior of Mr. JS provoked Grievant's angry response. As a professional representing a government entity, Grievant was obligated not to respond to Mr. JS's conduct by engaging in similarly offensive conduct.

Grievant contends other staff us the "f" word without disciplinary action being taken against them. Grievant is not being disciplined simply for using the "f" word; he is being disciplined for how he used the term. He directed his comments at a member of the public with the intent to offend.

Grievant contends the disciplinary action against him should be mitigated because his behavior was influenced by some personal and health problems. Based on the description of these problems, the Hearing Officer believes they are unfortunate and

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[25] The Agency argued that Grievant slandered several consultants. Although some of Grievant's comments may have been inappropriate, they were not slanderous. See, Chaves v. Johnson, 230 Va. 112 (1985) ("Pure expressions of opinion … cannot form the basis of an action for defamation." Grievant was responsible for approving costs claimed by consultants. A certain degree of skepticism by Grievant of consultant claims is appropriate. No credible evidence was presented suggesting anyone understood Grievant to be expressing anything other than his personal opinion regarding consultant activities. Even though the Agency has not established that Grievant slandered anyone, it has presented sufficient evidence to justify issuance of a Group III Written Notice with removal.

[26] According to Mr. RH, Mr. JS hit his fist on the table after Grievant told Mr. JS that Grievant had changed his mind about approving the AAFs. Mr. JS was upset because suddenly he realized his company would be losing money for work already performed.

tragic but were not the primary cause for Grievant's behavior. There is no basis to mitigate 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 is **rescinded**. The Agency is directed to remove the Written Notice from the Grievant's personnel file in accordance with State policy.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice with removal is **upheld.**

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. 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.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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.[27]

[27] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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].

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Carl Wilson Schmidt, Esq.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5582 / 5583-R

Reconsideration Decision Issued: May 19, 2003

RECONSIDERATION DECISION

The Hearing Officer issued a decision on April 28, 2003 rescinding the Agency's issuance to the Grievant of a Group II Written Notice and upholding the issuance of a Group III Written Notice with removal. Grievant seeks reconsideration of the Hearing Officer's decision regarding the Group III Written Notice with removal.

To meets its burden of proof, the Agency must present facts sufficient to support its conclusion that Grievant engaged in behavior which in the "judgement of agency heads, undermines the effectiveness of agencies' activities"[28] such that issuance of a Group III Written Notice with removal is supported. DEQ does not need to prove each and every detail of the facts surrounding its judgment that an employee should be removed so long as the Agency proves sufficient facts[29] to support its conclusion that the employee's behavior is so inappropriate as to justify issuance of a Group III Written Notice.[30] For example, DEQ contends Grievant acted contrary to the Workplace Violence policy. The Hearing Officer finds that Grievant did not violate the Workplace

[28] DHRM § 1.60(V).

[29] Disciplinary action under DHRM Policy 1.60 is not a perfect science. Agencies frequently take numerous related or unrelated factual scenarios and issue one written notice based upon those facts, when in actuality, the agency could have issued several separate written notices. For example, an agency could issue one Group III Written Notice based on facts that would have otherwise justified issuance of three Group III Written Notices. If the matter then came before a Hearing Officer and the agency was able to prove only two of the three factual scenarios, it would be inappropriate for the Hearing Officer to reverse the Group III Written Notice when sufficient facts remain otherwise to support issuance of a Group III Written Notice.

[30] DEQ provided Grievant with the necessary procedural due process because it placed him on notice of the facts supporting its judgment that he should be removed from employment.

Violence policy because Grievant's behavior was not oriented towards physical violence. His threatening behavior related to consequences of a financial nature and not of a physical nature. DEQ's failure to establish that Grievant violated the Workplace Violence policy is not fatal to its allegation.

Grievant's counsel has made several powerful and thoughtful arguments built upon a detailed and well-reasoned defense. The fact remains, however, that DEQ has established a pattern of behavior[31] by Grievant demonstrating that Grievant is unable to control his temper when presented with stressful situations thereby resulting in damage to the Agency's relationship with and ability to serve the public including consultants. Given the number of times Grievant has been cautioned about his anger outbursts, there is no reason to believe Grievant would be able to control his anger if reinstated.

Grievant contends DEQ can issue only a Group I Written Notice to him because his behavior is, at best, "Use of obscene or abusive language" or "Disruptive behavior." Although certain behavior can be characterized as a Group I offense, this does not preclude the behavior from also being considered a Group III offense. For example, if an employee starts a fight with another employee, his behavior is disruptive. An Agency is not limited to issuing that employee a Group I Written Notice for disruptive behavior since that employee's behavior otherwise rises to the level of a Group III Written offense for "Fighting and/or other acts of physical violence."[32] In Grievant's case, for example, it is not just the use of the "f" word that is important – it is how he used this word. By yelling at Mr. EW to "keep your f—king mouth shut" Grievant's words were obscene, but they were also in the nature of "fighting words" that could have caused a breach of the peace. Each of Grievant's temper outbursts was disruptive behavior, but his pattern and degree of uncontrolled outbursts are what justify the Agency's judgment that Grievant should be removed from employment.

Grievant contends Department of Human Resource Management ("DHRM") Policy 1.60, Standards of Conduct, is part of his employment contract and should be construed strictly against DEQ. This argument fails. DHRM Policy 1.60 is part of DHRM's Policies and Procedures Manual. DHRM Policy 1.01(I)(A)(1) states,

> This manual sets forth policies that address the rights and responsibilities of Executive Branch agency employees and applicants for employment.
>
> 1. This manual contains general statements of policy and should not be read as including the fine procedural guidelines of each policy, nor as forming an express or implied contract.

[31] DEQ's representative summarizes much of that behavior on page 2 of her letter dated May 9, 2003 to the Hearing Officer.

[32] DHRM § 1.60(V)(B)(3)(f).

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant's request for reconsideration is **denied.**

APPEAL RIGHTS

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

1. The 10 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 EDR or 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.

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Carl Wilson Schmidt, Esq.
Hearing Officer