

Issue: Group I Written Notice (unauthorized use of State records), Group III Written Notice with termination (falsifying a State record), and Group II Written Notice with termination (failure to follow established written policy); Hearing Date: 06/02/04; Decision Issued: 06/03/04; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 722



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 722**

Hearing Date: June 2, 2004  
Decision Issued: June 3, 2004

**PROCEDURAL HISTORY**

On February 18, 2004, Grievant was issued a Group I Written Notice of disciplinary action for:

*Unauthorized use of state records, accessing and viewing e-mails of [Supervisor] on a daily basis, between the dates as listed in the above offense; failure to report accessibility of confidential e-mails.*

On February 18, 2004, Grievant was issued a Group III Written Notice with removal effective February 13, 2004 for:

*Falsifying a State Record (e-mail) and forwarding to a third party unrelated to ABC.*

On February 18, 2004, Grievant was issued a Group II Written Notice with removal effective February 13, 2004 for:

*Failure to comply with established written policy by not fully cooperating in an Administrative investigation. The Administrative investigation identified multiple violations of the Standards of Conduct policy, three at the Group Notice level, thus resulting in termination of employment.*

On March 4, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On May 13, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 2, 2004, a hearing was held at the Agency's regional office. Although Grievant was notified of the hearing date and spoke with the Hearing Officer prior to the hearing, she did not appear at the hearing.<sup>1</sup>

## **APPEARANCES**

Agency Party Designee  
Agency Representative  
Witnesses

## **ISSUE**

1. Whether Grievant should receive a Group I Written Notice of disciplinary action for unauthorized use of State records.
2. Whether Grievant should receive a Group III Written Notice of disciplinary action falsifying a State record.
3. Whether Grievant should receive a Group II Written Notice of disciplinary action for failure to follow established written policy.

## **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:

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<sup>1</sup> Grievant submitted documents prior to the hearing and those documents were marked as Grievant Exhibit 1. Grievant submitted a written statement after the hearing. Very few of the comments in the subsequent written statement related to issuance of disciplinary action.

The Department of Alcoholic Beverage Control employed Grievant as a Program Support Technician Senior until her removal effective February 13, 2004. She had been employed by the Agency for approximately nine years. No evidence of prior disciplinary action was introduced. She received favorable evaluations during her tenure.

Grievant's Supervisor became aware that others may be accessing his email account. On December 22, 2003, he asked Agency managers for an investigation to be conducted. The Internal Audit Director authorized installation on Grievant's computer of monitoring software to record her computer usage from January 12, 2004 to January 29, 2004.

The Supervisor had given Grievant proxy rights<sup>2</sup> to read his calendar but she and any other employee were able to read all of his emails as well as his calendar. During a nine day period, Grievant used the proxy function to read each of her Supervisor's emails. On January 27, 2004, Grievant received a work related email from an agent which stated that [Mr. G] had taken a phone message but had not told Grievant about it; therefore, a withdrawal had not been processed in CORE as required. Grievant forwarded this email outside of the Agency to another law enforcement agency employee but changed Mr. G's name to the Supervisor's name in order to make it appear that the Supervisor had not done something correctly.

On February 9, 2004, Grievant was given an Administrative Investigation Warning informing her, in part:

I advised you that you are being questioned or requested to testify as part of an official investigation of this agency. This inquiry involves the above-described incident and is in accordance with departmental policies and procedures.

**REFUSAL TO ANSWER QUESTIONS OR TO TESTIFY TO MATTERS RELATED TO THIS INCIDENT IMPLIES THAT YOU HAVE VIOLATED DEPARTMENT POLICIES AND SUCH REFUSAL IS CAUSE FOR DISCIPLINARY ACTION, INCLUDING TERMINATION FROM THE DEPARTMENT. (Emphasis original.)**

Grievant signed the warning and was given a copy. She answered several questions posed to her on January 9, 2004. A follow-up phone call was made to Grievant on February 10, 2004 to ask why she accessed the Supervisor's email on a daily basis. When pressed for an answer as to why she accessed the Supervisor's email, Grievant said she had accepted another job that morning and asked if she really had to answer the question. When she was informed that she still had to answer the question, Grievant stated that she would not answer the question.

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<sup>2</sup> The Agency uses a sophisticated calendar and email system called GroupWise. An employee can control who has access to his or her information contained in GroupWise. Apparently, either the system technicians or the Supervisor granted more access rights to other employees than were intended.

On February 10, 2004, Grievant presented the Supervisor with a letter of resignation from employment. The Supervisor accepted Grievant's resignation on that date.

## **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).<sup>3</sup> 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).

### **Unsatisfactory Job Performance**

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant knew or should have known that she was not authorized to read her Supervisor's emails. It was not necessary for her to read her Supervisor's emails in order to carry out her job duties. She had a duty to notify her Supervisor that she had access to his emails and that she was reading them. Her failure to notify her Supervisor that his email could be read and her reading of all of his emails is inadequate job performance thereby justifying issuance of a Group I Written Notice.

### **Falsification of Documents**

"Falsifying any records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents" constitutes a Group III offense. DHRM § 1.60(V)(B)(3)(b).<sup>4</sup> "Falsifying" is not defined by DHRM § 1.60(V)(B)(3)(b), 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 (6<sup>th</sup> Edition) as follows:

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<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>4</sup> The Hearing Officer construes this language to include the circumstances where an employee creates a false document and then submits it to an agency where that document becomes a record of the agency.

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*.

Although an email is in electronic form unless printed, the Hearing Officer finds that an email sent by an employee to a third-party in the normal course of business is an official State document.

By changing an in-coming email received by the Supervisor to show a mistake being made by the Supervisor and then forwarding that re-revised email to a law enforcement agency outside of the Agency, Grievant falsified an official State document. Her intent was to embarrass her Supervisor by falsely suggesting he made a mistake. The Agency has presented sufficient evidence to support issuance of a Group III Written Notice. Removal from employment is appropriate when a Group III Written Notice is issued.

### **Failure to Follow Instructions**

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense.<sup>5</sup> Agency policy required Grievant to fully answer questions as part of its administrative investigation. Grievant received a written notification of that policy. Knowing the policy, Grievant refused to answer a question. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice. Based on the accumulation of disciplinary action, the Group II Written Notice supports removal from employment.

### **Other Matters**

Grievant argues that she resigned from her position prior to the Agency taking action to discipline her and that the Agency should accept her resignation without issuing disciplinary action. This argument fails because nothing in DHRM Policy 1.60 establishes a pre-condition to taking disciplinary action that the employee be employed at the time the Written Notice is issued. An agency may discipline an employee for behavior arising while the employee was employed, even if the Written Notice is issued after the individual is no longer employed by the agency.

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<sup>5</sup> DHRM § 1.60(V)(B)(2)(a).

Grievant contends the Agency failed to comply with the time requirements of the grievance procedure. Grievant's concerns are moot.<sup>6</sup> By proceeding to a hearing, Grievant's objections to the Agency's actions during the step-process must be resolved by the EDR Director and not by the Hearing Officer.

Grievant argues the disciplinary action arose because her Supervisor wished to retaliate against her for her participation in a prior investigation involving the Supervisor. The evidence showed that numerous employees were interviewed as part of that investigation and that the Supervisor did not know what Grievant said about him. Any adverse comments made about the Supervisor could have come from many employees. The Supervisor testified with credibility that he did not initiate disciplinary action against Grievant because of any prior investigation in which she may have participated.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice, Group III Written Notice, and Group II Written Notice of disciplinary action is **upheld**. Grievant's removal from employment 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. Please address your request to:

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

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. Please address your request to:

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<sup>6</sup> See, *Grievance Procedure Manual* § 6.3.

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

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.<sup>7</sup>

[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

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<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.