

Issue: Group I Written Notice with termination (disruptive behavior and abuse of State time), Group II Written Notice with termination (failure to follow direction and violation of workplace violence policy), Group III Written Notice with termination (altering State documents (email) and interfering with State investigations); Hearing Date: 08/27/04; Decision Issued: 09/07/04; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 833



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 833**

Hearing Date: August 27, 2004  
Decision Issued: September 7, 2004

**PROCEDURAL HISTORY**

On June 4, 2004, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior and abuse of State time, a Group II Written Notice for failure to follow direction and violation of workplace violence policy, and a Group III Written Notice for altering State documents (email) and interference with State investigations. All three were issued with removal effective June 4, 2004.

On June 29, 2004, Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 3, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 27, 2004, a hearing was held at the Agency's regional office. Grievant was notified of the hearing date, but did not appear to present testimony or written evidence.

**APPEARANCES**

Agency Party Designee  
Agency Representative  
Witnesses

## **ISSUES**

1. Whether Grievant should receive a Group I Written Notice of disciplinary action with removal for disruptive behavior and abuse of State time.
2. Whether Grievant should receive a Group II Written Notice of disciplinary action with removal for failure to follow direction and violation of workplace violence policy.
3. Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for altering State documents (email) and interfering with State investigations.

## **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 Virginia Department of Transportation employed Grievant as an Engineering Technician VI at one of its facilities. Prior to the events giving rise to this grievance, Grievant received disciplinary action. On August 21, 2003, Grievant received a Group II Written Notice for “Failure to follow supervisor’s instruction/established workplace violence policy.”<sup>1</sup> On November 19, 2003, Grievant received a Group I Written Notice with five workday suspension for “disruptive behavior, creating hostile environment.”<sup>2</sup>

Grievant had a dispute with the Agency and began sending emails to numerous employees of the Agency and to State Officials outside the Agency. The Agency and Administration began considering and investigating her complaint.

### Group I

On April 29, 2004, the Secretary of Administration instructed Grievant that “the prudent course of action at this time is to permit the State Internal Auditor to complete his investigation. I can assure you that DHRM and other agencies will provide

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<sup>1</sup> Agency Exhibit 5.

<sup>2</sup> Agency Exhibit 5.

appropriate assistance to ensure that the investigation is thorough and reaches accurate conclusions.” She also advised Grievant that Grievant’s attorney should be the point of contact in these matters in the event further assistance is necessary.

Grievant disregarded the Secretary of Administration’s instruction and continued to communicate with others about the subject of the investigation. Grievant’s actions prevented her attorney from serving as the point of contact.

On May 11, 2004, the Human Resource Administrator advised Grievant to discontinue emailing the VDOT Commissioner since the Administrator had been designated by the Commissioner to address Grievant’s issue. On May 12, 2004, Grievant sent an email and copied the Commissioner and other individuals not involved in the matter.

## Group II

During a meeting on May 3, 2004, Grievant suggested to her Supervisor that if Grievant’s issue was not dealt with appropriately she would bring the issue to the attention of a Virginia Delegate with whom she was friends. The Supervisor interpreted Grievant’s statements and demeanor to mean he should careful otherwise Grievant would report him to her friend who was a Virginia Delegate. Grievant then described how the relationship of supervisor and subordinate could change over time. The Supervisor interpreted Grievant’s comments and demeanor to mean that he should be careful how he treats Grievant since she may one day be his supervisor. Grievant also told the Supervisor that he had a nice home and family and that she would hate to see anything happen to them. Grievant had never been to the Supervisor’s home and had not met his family. The Supervisor interpreted Grievant’s comments and demeanor to mean there could be consequences to his home and family if he did not satisfy Grievant’s concerns.

On May 12, 2004, the Supervisor asked Grievant to provide certain documents regarding her claim of disability. Grievant responded that she would hate to see anything bad happen to the Supervisor.

## Group III

On May 4, 2004, Grievant sent an email to several people in her chain of command. Ms. G received Grievant’s email. Ms. G replied to Grievant and stated:

The attached is, again, unprofessional and very disruptive because it provides very little useful information, other than to request that we share copies of [the Secretary of Administration’s] letter with the addressees (which we will do). Otherwise, the message is filled with innuendo, negative inferences, and other references which are not clear.

Grievant sent a reply to Ms. G but copied the Secretary of Administration. Grievant's reply contained Ms. G's original email to Grievant. Grievant, however, had revised Ms. G's original email to say:

Now, I am disturbed by with (*sic*) the addressees (which we will do). Otherwise, the message is filled with innuendo, negative inferences, and other references whthe (*sic*) content and tone you use in the attached e-mail, even though you wrote it from your home computer and on your own time. The attached is, again, unprofessional and very disruptive because it provides very little useful information, other than to request that we share copies of [the Secretary of Administration]'s letter ich (*sic*) are not clear.

### 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).

#### Group I

Group I offenses include disruptive behavior.<sup>4</sup> Grievant's actions were disruptive because she sent emails to others not involved in the investigation thereby distracting them from their work. She did so after being instructed not to do so and after being instructed that her attorney would be the point of contact. The Agency has presented sufficient evidence to support its issuance of a Group I Written Notice with removal based on the accumulation of disciplinary action.

#### Group II

"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> Grievant failed to follow the Agency's *Preventing Violence in the Workplace Policy* because she made verbal threats to the Supervisor. This policy prohibits "verbal threats of violence" and "verbal

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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> DHRM Policy 1.60(V)(B)(1)(e).

<sup>5</sup> DHRM § 1.60(V)(B)(2)(a).

intimidation.” Grievant threatened the Supervisor with harm to his home, his family, and his career. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice with removal based on the accumulation of disciplinary action.

### Group III

“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.<sup>6</sup> “Falsifying” is not defined by DHRM Policy 1.60, 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:

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*.

Emails are Agency records. Grievant falsified Ms. G’s reply email because Grievant re-wrote a part of Ms. G’s email to support Grievant’s position and then sent a copy of the revised email to the Secretary of Administration. Grievant did so in order to mislead the Secretary of Administration regarding Ms. G’s initial statements. The Agency has established that Grievant should receive a Group III Written Notice with removal for falsifying a State record.

Based on the accumulation of active disciplinary action and the Group III Written Notice, Grievant’s removal must be upheld.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action with removal for disruptive behavior is **upheld**. The Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with removal for failure to follow established written policy is **upheld**. The Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for falsifying a State record is **upheld**.

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<sup>6</sup> DHRM § 1.60(V)(B)(3)(b).

## 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.<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.

