Issues: Group III Written Notice (taking leave without authorization) and Group II Written Notice with termination (due to accumulation) (falsifying a monthly status report), retaliation; Hearing Date: 10/18/06; Decision Issued: 10/24/06; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 8427/8428; Outcome: Agency upheld in full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 8427 & 8428

Hearing Date: October 18, 2006
Decision Issued: October 24, 2006

APPEARANCES

Grievant
Attorney for Grievant
Four witnesses for Grievant
Assistant Division Administrator
Representative for Agency
Three witnesses for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Did the agency retaliate against grievant?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group III Written Notice issued for taking leave without proper authorization.[1] He filed a second timely grievance from a Group II Written Notice for falsification of a monthly status report.[2] Following failure of the parties to resolve the grievances at the third resolution step, the agency head qualified the grievances for a hearing.[3] Subsequently, the Director of the Department of Employment Dispute Resolution (EDR) ruled that both grievances should be consolidated into one hearing.[4]

The Virginia Department of Transportation (VDOT) (Hereinafter referred to as "agency") employed grievant as a management analyst[5] for six years. He has no prior disciplinary actions and the agency acknowledges that he has good technical skills and was one of the better employees. Grievant is exempt from the overtime provisions of the Fair Labor Standards Act (FLSA). Since September 2005, grievant's primary responsibility had been the preparation of contractor claims for hearings by the Commissioner. When construction contractors make claims against the agency, their claims are first heard by the agency's chief engineer. If the contractor disagrees with the chief engineer's award, the contractor may request a hearing before the agency's Commissioner. Grievant's job was to thoroughly review the claim, prepare all relevant documentation for the Commissioner, and schedule a hearing date agreeable to the participants. He was expected to have his draft analysis completed one week prior to the hearing date so that the Commissioner and others could review it prior to the hearing.

State policy provides that, if the time requested for a leave of absence conflicts with agency operations, the agency has the discretion to approve the employee's request for an alternate time.[6] If the agency does not approve an employee's request for leave, but the employee still takes the time off from work, the employee may be subject to having the time designated as unauthorized, not being paid for the time, withholding of leave time accrual, and disciplinary action. The agency has the discretion to use some or all of these sanctions.

During the summer of 2005, grievant mentioned to his then supervisor that he wanted to take some time to go to New York City in 2006. The supervisor responded that 2006 was a long time off and that specifics could be discussed at a later time.[7] However, grievant never made a written request or even a formal

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[1] Agency Exhibit 13. Group III Written Notice, issued March 23, 2006.
[2] Agency Exhibit 20. Group II Written Notice, issued April 24, 2006.
[3] Agency Exhibit 16, Grievance Form A, filed April 19, 2006 and, Agency Exhibit 22, Grievance Form A, filed May 24, 2006.
[4] Grievant Exhibit 31. EDR *Compliance and Consolidation Ruling of Director*, Numbers 2007-1411 and 2007-1439, September 11, 2006.
[5] Agency Exhibit 3. Grievant's Employee Work Profile (EWP), effective January 1, 2005.
[6] Agency Exhibit 15. Department of Human Resource Management (DHRM) Policy 4.30, *Leave Policies – General Provisions,* updated April 2004.
[7] Grievant did not request that this previous supervisor testify to corroborate grievant's assertion.

verbal request for specific dates of leave in 2006. When a new supervisor was assigned in November 2005, grievant did not make a request for leave in March 2006 at that time or at any time, until February 23, 2006.

On February 23, 2006, grievant submitted an electronic form requesting four days of annual leave from March 14-17, 2006.[8] Grievant's supervisor had previously demonstrated his willingness to accommodate grievant on his leave requests.[9] Although grievant did not receive a response to his request, he nevertheless made commitments (presumably hotel reservations, etc.) over the next several days. On March 7, 2006, grievant met with his supervisor and the assistant division administrator to discuss a large ($5 million) and complex (18 items) claim on which grievant had been working. The claim had been assigned to grievant on February 7, 2006 but he did not begin working on it until February 23rd. Grievant scheduled the Commissioner's hearing for this claim for March 18, 2006. The purpose of the March 7th meeting was to determine the status of the claim and determine whether grievant's request for leave could be approved. Grievant stated that he had completed only two of 18 claim items in the past two weeks and did not expect the remaining claim items to be resolved at a faster pace. When asked by his supervisor whether he could commit to substantially completing the draft claim work before the hearing, grievant said that he could not. The supervisor then advised grievant that his leave request could not be approved. Grievant said he had already made commitments and would take the leave whether it was approved or not. On March 13, 2006, grievant's supervisor reminded him via e-mail that his leave request was denied and that he would be subject to disciplinary action if he took the leave.[10] Grievant was absent from work from March 14-17; during that time, he took his family to New York City for a short vacation.

Before March 7th, grievant had made a request to the Commissioner to postpone the scheduled March 18th hearing. However, his supervisor and the assistant division administrator were unaware of this and grievant did not mention it to them during the March 7th meeting.[11] Grievant's supervisor learned of the postponement on March 8th when he received a copy of the Commissioner's letter.[12]

On March 15, 2006, grievant filed a grievance asserting that he should have received a new Employee Work Profile (EWP) Work Description following assignment of new duties on September 5, 2005.[13] This grievance was not

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[8] Agency Exhibit 10. E-mail with copy of grievant's initial request for leave, February 23, 2006.
[9] Grievant Exhibit 3. E-mail from supervisor to grievant, December 14, 2005. *See also* Grievant Exhibit 22. E-mail from supervisor to grievant, April 11, 2006.
[10] Agency Exhibit 11. E-mail from supervisor to grievant, March 13, 2006. (Also, Grievant Exhibit 15)
[11] Grievant Exhibit 19. Notes of assistant division administrator regarding March 7th meeting.
[12] Grievant Exhibit 9. Letter from acting commissioner to contractor, March 7, 2006.
[13] Grievant Exhibit 14. Grievance Form A, filed March 15, 2006. [NOTE: Grievant prepared his grievance on Sunday, March 12, 2006 and mailed it to the agency via the U.S. Postal Service.]

qualified for this hearing and, therefore, is not an issue to be decided in this hearing.

The supervisor consulted with his manager and with human resources and then disciplined grievant on March 23, 2006 with a Group III Written Notice for taking leave without proper authorization but did not remove him from employment because he had no prior disciplinary actions. In lieu of termination the agency could have imposed a suspension but did not do so because grievant was needed at work to complete the claim.

Grievant's supervisor requires grievant to maintain a running status report of the claims he works on, and submit it to the supervisor monthly.[14] The document lists, *inter alia*: contractor name, target date, end date, and comments. Grievant and his supervisor are the only two people who use the report. The March 31, 2006 report includes the large, complex claim discussed, *supra*. In the comment section, grievant had written: "Re-arranged @ Attorney General's Behest"[15] (The word "re-arranged" meant that the hearing had been *postponed* from March 18th to April 28th). Although the supervisor had been in his position for only four months, he was suspicious about this statement because he did not believe that the Office of Attorney General had authority to direct VDOT activities. He called the Senior Assistant Attorney General (SAAG) who is liaison to VDOT for construction claim issues. The SAAG stated that he had not directed grievant nor anyone else to postpone the hearing, and further, that he did not have authority to do so. He related that grievant had contacted him to discuss the claim, and had indicated that he was unable to prepare the case in time for the March 18th hearing. The SAAG *suggested* to grievant that, if grievant was unprepared, requesting a postponement might be a good idea.[16]

Grievant's supervisor believed that grievant's statement on the status report was meant to mislead him into believing that the hearing was postponed because the SAAG had directed him to do so. Since the supervisor promptly investigated and learned the truth, the immediate impact of grievant's statement was minimal. However, when the supervisor learned that the SAAG had only made a suggestion, he felt that he could no longer trust grievant to be truthful in his reporting. He was also concerned that the incident would create a problem of trust between VDOT and the SAAG. Accordingly, the supervisor issued a Group II Written Notice rather than a Group III – the appropriate level of discipline for falsification of a state document. The decision to remove grievant from employment was made after consultation with management and human resources because of the accumulation of active disciplinary actions.

[14] Agency Exhibit 5. E-mail from supervisor to grievant, January 12, 2006.
[15] Agency Exhibit 22. Status report, March 31, 2006. (Also, Grievant Exhibit 24)
[16] *See* Agency Exhibit 19, E-mail from SAAG to grievant, April 17, 2006, in which the SAAG suggested a second postponement when it appeared that grievant would not have his report completed in time for the rescheduled hearing date of April 18, 2006.

Grievant's supervisor had previously attempted to assure that other employees would not distract grievant so that grievant could devote all his time to working on the claims function.[17]

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as a claim of retaliation, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[18]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated *Standards of Conduct* Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Policy No. 1.60

[17] Grievant Exhibit 4. E-mail from supervisor to subordinates, January 27, 2006.
[18] § 5.8, Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, Effective August 30, 2004.

provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence should warrant removal from employment.[19] An absence in excess of three days without proper authorization or a satisfactory reason is a Group III offense. Group II offenses include acts and behavior that are more severe than Group I offenses and are such that an accumulation of two Group II offenses normally should warrant removal from employment. Falsification of any records including reports is a Group III offense.

Grievant offered the testimony of a witness who had only received counseling as a corrective action when he took part of a day off without receiving prior supervisory approval. Grievant infers that his own discipline constitutes disparate treatment from that of the witness. However, grievant's case was significantly different from the witness' case. The other employee had only been employed with the agency for a short time while grievant has been employed with the agency for six years and is knowledgeable about the leave request process. The other employee's supervisor was not present on the day he took the afternoon off. In contrast, grievant's supervisor specifically told him that his leave request was denied. When told that, grievant insubordinately stated that he intended to take the time off with or without permission. Then, with full knowledge that his request was denied, grievant nonetheless deliberately did not report to work for four days.

Grievant argues that his leave request could have been granted after his supervisor learned that the hearing was postponed. While this was a possibility, grievant had insubordinately said that he was going to take the leave with or without permission and, the supervisor had told him what the consequences would be if he did that. If grievant believed he had a reasonable case for taking leave once the postponement was granted, it was incumbent upon grievant to appeal the supervisor's decision up the chain of command to the assistant administrator or, to the division administrator. Rather than follow this standard procedure, grievant was flagrantly insubordinate and took the leave without permission. The agency has demonstrated, by a preponderance of evidence, that grievant was absent in excess of three days and neither received proper authorization nor had a satisfactory reason to disobey the direct instructions of a supervisor. This constitutes a Group III offense.

Grievant argues that the status report is not an official state document. This argument is without merit. First, any document created for the purpose of conducting state business is an official state document. Second, the prohibition of falsification specifically mentions reports. The fact that the report is only used by two employees is not relevant. What is relevant is that the supervisor relies on the report to be accurate in order to correctly assess the status of work for which he has supervisory responsibility.

[19] Agency Exhibit 23. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

Grievant wrote in the report that the hearing was postponed at the "behest" of the Office of Attorney General. The primary meaning of "behest" is "an authoritative order or command," while a secondary meaning is "an urgent prompting."[20] Based on the unequivocal testimony of the SAAG, as well as grievant's own testimony, it is concluded that the SAAG did not order, command, or urgently prompt grievant to postpone the hearing. At most he suggested to grievant that he could ask for a postponement if grievant felt he could not complete his report in time for the hearing. Thus, grievant's use of the word behest was intended to mislead the supervisor into believing that the postponement request was not grievant's idea. Had grievant truthfully stated that the postponement was requested because it was impossible to complete such a large report on time, he would not have been disciplined for falsification.

Does the use of the word behest constitute a *falsification* given the circumstances of this case? *Black's Law Dictionary* defines "falsify" as, "To counterfeit or forge; to make something false; to give a false appearance to anything." The word "falsify" means being intentionally or knowingly untrue. The agency has borne the burden of proof to show that grievant knowingly gave a false appearance regarding the true reason for the postponement. Grievant contends that the agency has not shown intent to falsify. The element of intent may be inferred when a misrepresentation is made with reckless disregard for the truth.[21]

Grievant asserts that he did not understand the difference between a suggestion of the SAAG and a directive from the SAAG. Given grievant's education, responsible job position, and obvious ability, his assertion is simply not credible. As one who prepares a detailed report directly for the Commissioner's use in defending such a huge state agency, grievant is knowledgeable enough to know the distinction between a suggestion and a directive.

Having concluded that the status report is a state document, and that grievant's use of the word behest was a falsification, one must consider the impact of the offense. Although the immediate impact was determined to be minimal, the agency was especially concerned about the long-term impact of a loss of trust between supervisor and grievant, and between agency and SAAG. Given these considerations, the agency felt that the offense was not sufficiently severe to be a Group III offense but did constitute a Group II Written Notice. The hearing officer concurs that grievant's offense was not so severe as to constitute a Group III offense. However, there is no doubt that grievant did not pull the word behest out of thin air; he used that word with full understanding of its meaning and with the intent of misleading his supervisor. At the very least, grievant's offense would have to be considered unsatisfactory work performance – a Group I offense. However, even if the hearing officer were to reduce this written notice from a Group II to a Group I, the overall outcome in this case would

[20] *Merriam-Webster's Collegiate Dictionary*, Tenth Edition.
[21] *Haebe v. Department of Justice,* 288 F.3d 1288, 1306 Fn. 35 (Fed. Cir. 2002).

be unchanged because the cumulative effect of a Group III Written Notice and a Group I Written Notice is removal from employment.

Retaliation

Grievant alleges that the disciplinary action was issued in retaliation for his filing of his March 15th grievance. Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.[22] To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity; (ii) he suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Grievant satisfies the first two prongs of this test because he filed a grievance (protected activity) and was disciplined (adverse employment action). In order to establish retaliation, grievant must show a nexus between the grievance and the disciplinary action. Grievant has not established any such connection between the two events.

In this case, the disciplinary action was issued only eight days after the filing of the grievance. Such close proximity between the two events raises a question as to whether the discipline was retaliatory. However, grievant has offered no direct evidence or testimony to demonstrate any other linkage between the two events. Moreover, the agency has established a nonretaliatory reason (absence in excess of three days without proper authorization) for the discipline. That reason was also in close proximity to the discipline. Grievant has not shown that the agency's reason for discipline was pretextual in nature. Therefore, grievant has not borne the burden of proof to show retaliation.

Mitigation

The normal disciplinary action for a Group III offense is a Written Notice and removal from employment. The normal disciplinary action for any level of discipline action following a Group III Written Notice is removal from employment. The *Standards of Conduct* policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has a moderate length of state service and an otherwise satisfactory work record. The agency took these factors into consideration but determined that removal was warranted given the circumstances in this case. After carefully reviewing the circumstances of this case, it is concluded that the agency correctly applied the mitigation provision.

[22] EDR *Grievance Procedure Manual*, p.24

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice issued on March 23, 2006 is hereby UPHELD.

The Group II Written Notice, and removal from employment, effective April 24, 2006, are hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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 15 calendar days of the date the decision was issued. You must give one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute

Resolution. The hearing officer's **decision becomes final** when the 15-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.[23] 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.[24] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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/David J. Latham

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David J. Latham, Esq.
Hearing Officer

[23] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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