

Issues: Group II Written Notice (failure to follow policy and abuse of State property), Group II Written Notice (Other Issue – sending inappropriate email), and Termination; Hearing Date: 10/09/08; Decision Issued: 01/22/09; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8951; Outcome: No Relief – Agency Upheld In Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8951

Hearing Date: October 9, 2008
Decision Issued: January 22, 2009

PROCEDURAL HISTORY

On June 20, 2008, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow established written policy and abusing College/State computers and IT equipment. On July 10, 2008, Grievant was issued a Group II Written Notice of disciplinary action with removal for sending an inappropriate email contrary to policy.

On July 21, 2008, 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 September 16, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 9, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary actions, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary 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 Virginia Community College System employed Grievant as an Office Service Specialist II at one of its colleges. The purpose of her position was:

To provide administrative assistance and support to the Facility Manager and to help maintain effective and efficient operation of the Entire Facilities Department.¹

She had been employed by the Agency for approximately five years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On September 25, 2007 at 3:47 p.m., Grievant sent an inappropriate email to approximately 3000 College employees. The email was entitled "SAFETY ISSUE – BE CAREFUL" and stated:

Until I see you again. I'll be back.

WARNING TO YOU ALL!

BE CAREFUL! ALERT! WATCHFUL!

¹ Agency Exhibit F.

NO WEAPON FORMED AGAINST ME SHALL PROSPER IN THE NAME
OF JESUS!

Attached to the email was a document entitled "Trip Ticket.doc". The attachment is best described as ramblings. Grievant describes College employees and an individual she claims to know who are attempting to harm her. For example, Grievant wrote, in part:

On August 7, I had a home inspection, in which I had taken [Mr. AS]² home that morning prior to the inspection and was not to report to work until noon that day, and this was the beginning of what I call this Trip Ticket. After my home inspection, I did arrived at work at approximately 11:30 a.m., and upon entering my office I took a sip of the fountain drink [Mr. AS] had bought me the night before which had sat on my nightstand all night long and of course the ice had melted by now, and was surprised the to taste something awful, and disgusting. I took the lid off my cup with the straw still in [tact] to find a straw paper floating at the bottom in the remaining soda [which] remained and immediately started feeling sick to the stomach. My throat was also immediately [affected]. It had a burning sensation. I ran to the ladies room to stick my finger down my throat to attempt to throw up to no avail and told to call 911 if I passed out and [threw] the straw and cup in his trash which was right in front of him. He saw the whole thing. He said he would. I even mentioned someone had tried to poison me. ****³

As a result of the email, the College received complaints from the employees named in the email, and numerous other College employees. Employees in the Provost's office had to stop working in order to respond to the complaints regarding Grievant's email.

On September 26, 2007, the Associate Director for Compensation told Grievant that her email was inappropriate and that she would discuss the email with Grievant after Grievant returned from her medical leave.⁴

On February 20, 2008, Grievant presented the Agency with a "Fitness to Return to Work Certification" signed by Grievant's Health Care Provider. The document stated, in part:

The employee is able to work a full, regular schedule with no restrictions or accommodations, beginning 2/25/08.⁵

² Mr. AS is not a College employee. Grievant claimed to know Mr. AS. The Hearing Officer will assume Mr. AS is as depicted by the Grievant.

³ Agency Exhibit E. The Hearing Officer has no reason to believe that anyone attempted to poison Grievant.

⁴ Agency managers had some concern regarding Grievant's health.

Grievant returned to work on March 1, 2008. The Agency assigned her for 90-day period to a different campus location in order to permit her time to return to her original position and campus.

On March 7, 2008, the Acting Facilities Manager presented Grievant with a Classified Employee Interim Evaluation stating, in part:

[Grievant] interacted with [College] employees via an inappropriate email in an unprofessional manner, contrary to IT Ethics and utilization of [College] resources. [Grievant] has demonstrated unprofessional behavior which has negatively impacted not only her overall work performance, but distracted her attention from learning, and focusing on her daily work duties, including the AIS conversation and changes in work procedures and processes. ***

To improve performance deficiencies that have been outlined above, the following actions are recommended:

- Effective immediately you will communicate and interact with your co-workers and colleagues in a professional, respectful manner in all written and oral communication. ***⁶

On March 7, 2008, Grievant received and signed an Information Technology Employee Ethics Agreement indicating her obligation to use the Agency's computer systems "in an ethical, professional, and legal manner." She acknowledged her obligation to comply with DHRM Policy 1.75 governing use of the internet and electronic communications.

On May 1, 2008, Grievant received a memo indicating she had completed her 90-day transition. The Agency returned Grievant to her former location and job at the College.

On June 2, 2008, Grievant sent an email to three College employees -- the Associate Director for Compensation, Ms. BM with a copy to Mr. RT. The email stated, in part:

Two weeks ago State employee, [Ms. JH] and a contractor from [Vendor] who I saw back during the period when I sent that e-mail, white men in the ghetto go into [Mr. C's] office. The contractor came out and gave me a smirky smile nodding his head in an up-and-down motion (trying to be intimidating). I remember he wasn't smiling when he came to the [Facility]

⁵ Agency Exhibit F.

⁶ Agency Exhibit G.

to install/remove software mentioned also in the e-mail on [Mr. RD's] computer, which I sent out to the campuses right before I went out on sick leave.

[Ms. CM] had the nerve to walk up to my desk and tell me I was filing my fingernails at my desk (she saw me take a fingernail file to the bathroom with me, where I sat on the toilet and filed my fingernail. God, do they have cameras in there, too? She hated to see [Mr. WF] and I talking, as if I was going out with him. A brand-new employee came up to my desk on the last day and told me, "did you hear they are replacing you with some girl [Mr. WF] likes[?] When I first got there, she said to me, [Grievant], [Mr. RT] is a good man", as if I was going with him. I know that, that's why I asked him for help in the first place. They started playing mind tricks ([name] included; walking around talking to herself, like I do when no one else will talk to me, I talk to the machine sometimes, etc.) as if they can change my mind.

I'M STANDING ON GOD'S WORD.

Anyway, I didn't expect the welcoming committee, and this e-mail is mainly for my records, and while I don't care to bother you, I need to let you know what's going on here. If they're going to do this to me, they've done it before and will continue to do it (HARASSMENT/INTIMIDATION). I see clearly what's going on. I wish it was paranoia which could explain things. After three psychiatrists (professionals), still nagging headaches, and being intimidated from several State employees, I believe it's some kind of organized crime. High officials, too, just like I mentioned in my e-mail,) [Ms. PS] said it too.

God shows me things every day and no matter how they try to blind me, I can see what's going on clearly. You would think I was a threat or something. Why else would they want to get rid of me. I Got A Right To Be Here!

God hasn't given me a spirit of fear, but of love, power, and a sound mind.

Grievant attached the document "Trip Ticket" to her June 2, 2008 email. The recipients of the email felt that their work was disrupted.

On June 30, 2008, the Sergeant was leaving a building on campus, when Grievant gestured for him to come into her office. When the Sergeant approached Grievant, she asked him to listen to a voice message on her cell phone. The Sergeant could not recognize any of the voices. Grievant told the Sergeant she thought her cell phone was being tapped. The Sergeant asked her how she concluded that her phone was being tapped. Grievant was not able to give a "good answer." The Sergeant suggested going through the cell phone history to see who the caller was. Grievant said

that the cell phone company or police had blocked the call. The Sergeant asked Grievant what she wanted him to do and Grievant said for the police department to look into who was tapping her cell phone.

On June 30, 2008 at 2:51 p.m., Grievant sent the Sergeant an e-mail stating:

I spoke to you briefly this morning regarding the message in preparation on my cell phone in which I could clearly identify you questioning [Mr. AS] as to a date last June, and how someone was calling the Credit Union every day, he was working for [Vendor] getting paid \$30 an hour and how I was lucky to be okay, and that [name] is okay, etc. I told you directly I did not create, neither does [Cell Phone Company] have the capability of creating this message in preparation nor have they heard it. I'M GETTING THERE I feel led to inform you there is another, even worst alias-at-large, [Mr. WiCh]. He has not called me lately, but last year on a regular basis and prior to that since I broke up with him well over three or four years ago. [Sergeant], you have seen him driving the little white car I used to have. He is black, really dark with a Jerry curl. He came here to the [Facility] once with an older, smelly, dirty, street, Caucasian man in my car, perhaps you remember that. You were in the garage when he picked me up, if you saw that. Anyway, when I would receive [Mr. WiCh's] calls, I would never answer. ***

Conclusion: I don't like to see innocent people die or harmed in any way. The way I was drawn, pulled, influenced, and obsessed led me to begin asking questions. I knew then it was unholy. Who cursed me? If you wonder, perhaps what either of these two guys have (I know I questioned it certainly looking back today at any of them) that make women react the way they do which is a phenomenon; it is in the spirit of Anti-Christ. Fallen Angels. I knew beginning in 2003 with [Mr. RG], that he was the one, too.

Whoever blesses me, will be blessed. Whoever curses me, will be cursed. No demon, hec, voodoo, Santeria, witchcraft, nothing can separate me from the power of His love.⁷

On July 1, 2008, the Sergeant sent the Associate Director for Employee Relations an email stating:

Good morning, by now you have received the e-mail that I forwarded to you from [Grievant]. This e-mail was received at approximately 1450 on 30 June, 2008 as I was leaving [Court].

You will note the e-mail states that [Grievant] stopped me, and [waved] me into her office, yesterday morning to advise me that her cell phone was

⁷ Agency Exhibit P.

being tapped. During this conversation, [Grievant] played a message from her cell phone, in which she claimed to be able to hear my voice. I did not recognize the voice on the machine as being my own, and when I asked [Grievant] to show me what number the call had emanated from, she stated that the number did not show up on the phone because when the call came in she was already on her cell phone, and because the Police have the ability to block all phone calls.

The phone message [Grievant] played was disjointed, and I was unable to understand anything that was being said.

The statements in [Grievant's] e-mail regarding my interviewing [Mr. AS] are completely false, and very disruptive to my work schedule.⁸

The Sergeant testified credibly during the hearing. He confirmed the contents of his email.

The Associate Director for Employee Relations investigated Grievant's claim that her cell phone was being tapped and that Mr. AS had been paid by Mr. BB and others on the campus to cause her bodily harm. She spoke with Mr. BB who said he had not talked to Grievant in months and denied paying Mr. AS to harm Grievant. Mr. BB testified credibly at the hearing that he did not attempt to hire Mr. AS to harm Grievant.⁹ The Associate Director for Employee Relations spoke with the Sergeant. She concluded the Sergeant listened to the cell phone call and found the message unintelligible and that he denied knowing Mr. AS. The Associate Director for Employee Relations spoke with the Supervisor. The Supervisor listened to the cell phone message and did not recognize any of the voices and said he did not know Mr. AS. The Associate Director for Employee Relations concluded Grievant's allegations were unfounded. The Agency investigated Grievant's other complaints and concluded they were unfounded as well.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."¹⁰ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

⁸ Agency Exhibit P.

⁹ No credible evidence was presented to suggest anyone was trying to harm Grievant.

¹⁰ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

DHRM Policy 1.75, Use of the Internet and Electronic Communications Systems,¹¹ provides:

Personal use means use that is not job-related. In general, incidental and occasional personal use of the Commonwealth's Internet access or electronic communication systems is permitted; however, personal use is prohibited if it:

- interferes with the user's productivity or work performance, or with any other employee's productivity or work performance;
- adversely affects the efficient operation of the computer system;
- violates any provision of this policy, any supplemental policy adopted by the agency supplying the Internet or electronic communication systems, or any other policy, regulation, law or guideline as set forth by local, State or Federal law. (See Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001.)

Certain activities are prohibited when using the Internet or electronic communications. These include, but are not limited to: ***

- downloading or transmitting fraudulent, threatening, obscene, intimidating, defamatory, harassing, discriminatory, or otherwise unlawful messages or images; ***
- any other activities designated as prohibited by the agency.

Failure to comply with established written policy is a Group II offense under DHRM Policy 1.60.

Grievant was informed by the Associate Director of Compensation and the Acting Facilities Manager and several other College employees that the Trip Ticket email she sent on September 25, 2007 was inappropriate and that it upset many College employees because of her accusations. She was advised that such emails were contrary to Agency policy governing the use of electronic communications. On June 2, 2008, Grievant sent three employees another email and attached the Trip Ticket document to that email. Grievant's email falsely accused other employees of improper behavior thereby diminishing their reputations. Sending the Trip Ticket email was an activity prohibited by the Agency. Grievant's actions were contrary to DHRM Policy 1.75 and contrary to a supervisor's instructions. The Agency has presented sufficient evidence to support the issuance of the June 20, 2008 Group II Written Notice.

¹¹ The Agency has a similar policy. See, Agency Exhibit V.

On June 30, 2008, Grievant sent an email to the Sergeant falsely stating that her cell phone voice mail recorded a conversation of him questioning Mr. AS. Her email upset the Sergeant and interfered with his work duties. Grievant knew or should have known that the Sergeant's voice was not part of the voice message on her cell phone. By accusing the Sergeant through her email, she interfered with his work performance. The Agency has presented sufficient evidence to support the issuance of the July 10, 2008 Group II Written Notice. Upon the issuance of a second Group II Written Notice, the Agency was authorized by DHRM Policy 1.60 to remove Grievant from employment. That decision must be upheld.

Many aspects of Grievant's behavior are unusual and irrational. The Hearing Officer did not receive testimony from any medical provider regarding Grievant. The only evidence from a medical provider was the fitness for duty certification indicating Grievant was free to return to work without restrictions. Accordingly, the Hearing Officer must analyze the facts of this case assuming no impediments exist to Grievant's health.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution...."¹² Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant alleged that she was being coerced by State employees who intended to terminate her employment and that she was placed at risk of malicious wounding and psychological abuse from individuals employed by or associated with the Agency. No credible evidence whatsoever was presented to support these allegations. Grievant's assertions are, at most, speculation.¹³

DECISION

¹² *Va. Code § 2.2-3005.*

¹³ The Agency investigated Grievant's allegations. The Agency's conclusions are consistent with the Hearing Officer's finding that Grievant's allegations are without merit.

For the reasons stated herein, the Agency's issuance on June 20, 2008 to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance on July 10, 2008 to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's removal from employment is **upheld** based on the accumulation of disciplinary action.

APPEAL RIGHTS

You may file an administrative review request within **15 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 14th St., 12th 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:

Director
Department of Employment Dispute Resolution
600 East Main St. STE 301
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 a copy of all of your appeals to the other party and to the EDR Director. 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. 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.¹⁴

[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/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.