

Issue: Group III Written Notice with Termination (removing/damaging State property);  
Hearing Date: 02/11/16; Decision Issued: 03/02/16; Agency: DBHDS; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 10740; Outcome: Full Relief; **Administrative  
Review**: EDR Ruling Request received 03/17/15; EDR Ruling No. 2016-4325  
issued 03/29/16; Outcome: Reversed AHO's decision not to award Attorney's  
Fees; Attorney's Fee Addendum issued 04/11/16 awarding \$4,139.60;  
**Administrative Review**: DHRM Ruling Request received 03/17/15; DHRM letter  
issued 04/11/16 – No policy violation cited; Request denied.



***COMMONWEALTH of VIRGINIA***  
***Department of Human Resource Management***

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 10740**

Hearing Date: February 11, 2016  
Decision Issued: March 2, 2016

**PROCEDURAL HISTORY**

On October 22, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for damaging State property or records.

On November 20, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 15, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 11, 2016, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency's Representative  
Witnesses

**ISSUES**

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

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 action, 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 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 Department of Behavioral Health and Developmental Services employed Grievant as an Administrative and Office Specialist III at one of its facilities. Grievant began working for the Agency in 2004. No evidence of prior active disciplinary action was introduced during the hearing.

On September 22, 2015, Grievant was notified that she would be placed on layoff status. Her employment was scheduled to end October 25, 2015. She worked at the Facility until October 7, 2015 when she was placed on layoff leave.

Grievant reported to Mr. B until he retired in 2013. Mr. B reported to Mr. BI until he left the Agency in 2011. Grievant did not need permission from Mr. B to delete documents. Mr. B believed that Grievant knew which documents to delete and to retain. Ms. W began supervising Grievant in 2014. Ms. W left the Facility in July 2015. Grievant worked independently until the Supervisor was hired.

Grievant received instructions from Ms. W regarding how to organize files. Grievant developed her own system to track which files she had deleted for Ms. W. Rather than deleting a document from the computer system, Grievant would open the document and remove the contents of the document. She would retain the file name so she could identify whether she had modified a document. If she opened the document

at a later date and realized the document's contents had been deleted, she would know the document was obsolete or there was a more recent version of the document elsewhere.

On August 26, 2015, the Agency hired the Supervisor. She received training for the first two weeks of her employment. During this time, Grievant performed her work duties with limited supervision. Grievant provided assistance to the Supervisor. Grievant's responsibilities included "onboarding" and recruiting.

Once Grievant learned she would be laid off, she began to organize her office and organize files. On October 2, 2015, Grievant opened 59 or 60 documents, deleted the contents of those documents, and saved the documents so that the title remained but the document was empty.

Grievant had access to a "shared file" in the computer system. The Supervisor did not have access to this shared file until October 13, 2015. The Supervisor accessed the shared file and opened a "job offer" letter in Grievant's folder. The computer file had a title, but when the file was opened, the document was blank. The Supervisor concluded, "It appears that [Grievant] went through all of her files and totally deleted the contents."<sup>1</sup>

The Agency took disciplinary action while Grievant was an employee of the Agency. The effect of her removal was to disqualify her from layoff severance benefits.

## **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."<sup>2</sup> 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."

Damaging State records is a Group III offense.<sup>3</sup> Grievant's duties included maintaining, editing, and deleting information contained in electronic files. She was authorized to delete the contents of documents as necessary. Only if the Agency can show that Grievant deleted information without reason and that the information deleted was material can it sustain the burden of proving a Group III offense. The Agency has not met that burden of proof. The disciplinary action must be reversed.

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<sup>1</sup> Agency Exhibit 4.

<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

The documents whose contents Grievant deleted were not of material significance to the Agency's operations or record. Several of the documents were form letters and templates. Few if any of these documents were in use by the Agency in October 2015. For example, page 19 of Agency Exhibit 6 shows a form memorandum from Mr. BI to an unspecified person ("blank name") regarding Applicants for Interview. Mr. BI stopped working for the Agency in 2011. Page 23 of Agency Exhibit 6 shows a form memorandum from Mr. B who stopped working for the Agency in 2013. The Agency stopped using these forms once it began using the DHRM online recruitment system. Page 39 of Agency Exhibit 6 shows a letter from Mr. B to an unnamed person regarding the person's background check and scheduled orientation in 2006. Page 59 of Agency Exhibit 6 shows business cards that Grievant developed. The cards show an incorrect address and contact information for Ms. W who left the Facility in July 2015. Pages 94-97 show a position description used to advertise for Direct Service Associates. This document was no longer necessary since the Agency maintained that information on the DHRM recruitment website. Page 107 of Agency Exhibit 6 showed a "generic" "To" and "From" fax cover sheet. It contained no substantive information and could be easily recreated. Page 115 of Agency Exhibit 6 shows a fax transmission cover sheet with the Facility's logo and some identifying contact information. The contact information, however, was for Mr. B who stopped working at the Facility in 2013. There were other examples supporting the conclusion that the information Grievant deleted was not significant or material.

When the facts of this case are taken as a whole, the Hearing Officer cannot conclude that Grievant had any inappropriate motive to sabotage the Agency's operations as claimed by the Agency. The documents she deleted were largely form letters used several years earlier by former employees and no longer used by the Agency. The documents that could have been used by the Agency were easily recreated. There is no basis to support the issuance of disciplinary action with the level of a Group III offense.

There is no basis to reinstate Grievant since she had been placed on lay off status. There is no basis to award attorney's fees since Grievant cannot be reinstated.

## **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **rescinded**. The Agency is ordered to restore Grievant to her status prior to removal. She should receive the benefits she would have received had she not been removed from employment.

## **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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

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

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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>4</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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<sup>4</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**

**DIVISION OF HEARINGS**

**ADDENDUM TO DECISION OF HEARING OFFICER**

In re:

**Case No: 10740-A**

Addendum Issued: April 11, 2016

**DISCUSSION**

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.<sup>5</sup> For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's petition contains a request for 31.6 hours of attorney time devoted to her grievance. At an hourly rate of \$131, this amounts to an award of \$4,139.60.

Grievant included a request for office supplies, copies, and mileage. The statute provides for the award of attorneys' fees, not costs. If the Legislature had intended to include costs, it would have included that term in the statute. Accordingly, the Hearing Officer has no authority to award costs.

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<sup>5</sup> Va. Code § 2.2-3005.1(A).



Grievant included a request for time devoted to a Virginia Employment Commission hearing. Such time is not reimbursable because it does not relate to an employee grievance before the Department of Human Resource Management.

### **AWARD**

Grievant is awarded attorneys' fees in the amount of \$4,139.60. The petition for costs and time related to a VEC appeal is denied.

### **APPEAL RIGHTS**

If neither party petitions the DHRM Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the DHRM Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer