

Issues: Group II Written Notice (failure to follow instructions), and termination due to accumulation; Hearing Date: 02/20/18; Decision Issued: 08/09/19; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 11137; Outcome: No Relief – Agency Upheld; **Administrative Review request received 08/24/18; EDR Ruling No. 2019-4771 issued 09/25/18; Outcome: AHO's decision affirmed.**



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11137**

Hearing Date:	February 20, 2018
Additional Hearing:	June 5, 2018
Decision Issued:	August 9, 2018

#### **PROCEDURAL HISTORY**

On November 3, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions. Grievant was removed from employment due to accumulation of disciplinary action.

On November 18, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 11, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On February 20, 2018, a hearing was held at the Agency's office and continued until June 5, 2018 for the taking of additional evidence and argument.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Counsel  
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?
5. Whether the Agency retaliated against Grievant.

### **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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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:

Virginia Commonwealth University employed Grievant as a Pre-Award Research Manager/Grant & Clinical Trials Budget Analyst/Regulatory Coordinator. She had been employed by the Agency for over 17 years. She earned a Certificate for Research Administration in December 2008. When Faculty applied for grants, Grievant's Unit helped them obtain funding. Grievant had prior active disciplinary action. On August 25, 2017, Grievant received a Group II Written Notice for failure to follow instructions.

The Supervisor began working for the Agency in June 2015. Eleven divisions were under her supervision. Her Department was responsible for getting and coordinating grants. The Supervisor earned a Certificate for Research Administration in 2016. The Supervisor directly supervised Grievant from August 2016 until November 3, 2017.

Ms. S was the Grant & Fiscal Manager. Ms. S reported to the Supervisor. Ms. S was not Grievant's Supervisor but the Supervisor would delegate responsibilities to Ms. S that would involve giving instructions to employees. When Ms. S needed to have

something done, Ms. S had the Supervisor's authority to act. Grievant was aware she was expected by the Supervisor to comply with Ms. S's instructions.

The Office of Sponsored Programs (OSP) was the University's authority on whether an item should be classified as an Administrative Action or a Continuation Proposal. Grievant worked in the OSP for approximately five years prior to joining the Unit. Grievant developed expertise in determining the proper classification of documents used to process grant requests.

### Administrative Action vs. Continuation Proposal

Ramspot is an electronic database for proposal submission and review. An Administrative Action (AA) is a proposal loaded into Ramspot. A Continuation Proposal (CP) is a proposal loaded into Ramspot but one that requires a new budget.

The Proposal involved several years of work and already had a budget included. The Supervisor asked Ms. S to tell Grievant to process an AA for the Proposal. On September 20, 2017, Ms. S sent Grievant an email stating:

See below and attached for processing for [Dr. S]. It will be AA003 for FP1302.<sup>1</sup>

By adding "003" after the AA, Ms. S indicated that this would be the third administrative action.

On September 22, 2017, Grievant sent Ms. S an email stating:

Please review and approve MOD2 continuation proposal for UTSW U01 subaward under FP00001302\_CP001 [Name] – ALFSG.<sup>2</sup>

By adding "001" after CP, Grievant showed she was submitting the first Continuous Proposal for the Proposal.

On September 25, 2017 at 9:39 a.m., Ms. S sent Grievant an email stating:

This agreement should be an AA, not a CP. Since the budget was included in the original FP, we do not need to extend that FP using a CP. If the original budget was included this time, then we process through an Admin Action just to get the new agreement signed. The previous modification was put through as an AA, which is why I had asked for you

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<sup>1</sup> Agency Exhibit 7.

<sup>2</sup> Agency Exhibit 7.

to process this one as an AA as well. We'll either need to inactivate the CP or see if OSP can convert it to an AA.<sup>3</sup>

On September 25, 2017 at 2:40 p.m., Grievant sent Ms. S an email stating:

U01 Cooperative Agreements with annual budgeting that are subawards to VCU are considered "new" and should be under CP.

They used to be a paper Green Sheet/IAF full proposal packet each year under InfoEd.

I would provide a face page for AOR sign off and the full Progress Report packet for submission to our sponsor, along with our internal budget sheet.

Since we already have the subaward modification, there is no need for a face page or progress report, unless OSP asks for it.

It is the same packet as we were asking our subrecipients to provide us at RPPR/progress report or invoicing.

Has OSP changed the process for this type of continuation award?<sup>4</sup>

On September 25, 2017 at 3:39 p.m., Ms. S sent Grievant an email stating:

The instruction that OSP gave last was that a CP is to be used when the original FP did not request the funds/resources for the year in question. For this project, the original FP identified the resources for all years. The AA would then be used to just process the agreement for each year already identified in the FP.

For projects that we have an FP (possibly under U01), but only put in the first year of the project – we would then enter each additional year as a CP so that the budget could be entered for that year. This will designate the resource that will be needed and the CP will build off of the FP since the FP did not indicate the resources for the year in question.

It can be confusing. Hope this clarifies.<sup>5</sup>

On September 25, 2017, Grievant sent an email to the Assistant Director of OSP stating, in part:

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<sup>3</sup> Agency Exhibit 7.

<sup>4</sup> Agency Exhibit 7.

<sup>5</sup> Agency Exhibit 7.

I need to clarify the process for U01s with annual budgeting where VCU is a subrecipient \*\*\*

[Ms. S] did the ... projects for [Dr. S] ... and I created a CP for it, but she says it should be an AA because the full five years was submitted in the competing renewal. \*\*\*

Should it be an AA or CP?

The Assistant Director of OSP did not respond quickly to Grievant's September 25, 2017 email. On October 2, 2017, Grievant sent the Assistant Director of OSP an email stating, in part:

I sent an email last week asking if the amendments should be CP or AA. \*\*\* Can you tell me which one is correct so I can get these over to you for processing.

On October 9, 2017 at 1:36 p.m., Ms. S sent Grievant an email stating:

It seems that there has been further confusion on when to submit an AA versus a CP for an agreement modification when the new agreement is specifically a modification and not a new agreement). I've attached the guidance from OSP that should be referenced in the future for any questions. Specifically regarding [Dr. S's] projects. I've outlined them below and indicated for easy reference how they should be entered. Please note, the ALFSG FP requested funds for all years. Because of this, we submit using an AA mechanism. Conversely, the ROTEM and ALF-MBT FP did not contain all years and should be submitted through a CP mechanism.

The review of ALFSG and determination that an AA was appropriate is in no way indicated that any other submissions would be required to follow the same path. We would need to evaluate the continuation Mod in relation to the original FP to make this determination for each individual project.\*\*\*<sup>6</sup>

On October 9, 2017 at 3:33 p.m., Grievant sent Ms. S an email stating, "Okay. I will switch the CP for ALFSG to AA and finish up the other two CPs: ROTEM/MBT by tomorrow."<sup>7</sup> Grievant changed the entry from a CP to an AA on October 10, 2017 at 8:51 a.m.

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<sup>6</sup> Agency Exhibit 7.

<sup>7</sup> Agency Exhibit 7.

On October 10, 2017 at 11:19 p.m., the Assistant Director of OSP sent Grievant an email stating:

Sorry for the delay. If the original proposal covered the full project period of 5 years and roughly the correct budget, you shouldn't need to do a CP when continuation years are awarded. Budget revisions that require our signature and subsequent mods can be handled as Administrative Actions. If the budget being awarded is significantly more [than] originally proposed a CP (Supplement) proposal could be required to cover those additional dollars, but that scenario would be more rare, and would generally result from our sponsor awarding us incrementally – rather than awarding a different number [than] was proposed.

If the original proposal only requested one year and we then received a mod for the next year, we'd need a CP to cover the additional time and money then the mod would still be processed as an Administrative Action.<sup>8</sup>

### New Folder Structure

The Agency had a shared computer drive (T drive) accessible to all unit employees including Grievant. Each employee including Grievant had a separate personal drive (U drive) that only the employee had authority to access. Grievant kept her work on her U drive and if other employees needed access to Grievant's work product, they had to request Grievant to send them a copy of a document she kept in her personal drive. This created a delay when other employees needed access to Grievant's work documents.

Agency managers created a New Folder Structure because Grievant kept documents in her personal computer drive that other staff needed to access. Those staff had to contact Grievant to obtain the necessary documents. In order to eliminate the need to contact Grievant to obtain documents, Agency managers decided that Grievant's documents should be contained in a shared drive. Agency managers reviewed the folder structures of other institutions such as the National Institute of Health to determine the best structure for the Agency. Agency managers consulted with Agency research coordinators who would use the new folder structure and with Grievant. Using input provided by Grievant and others, the Agency developed a new folder structure.

Grievant and other employees received training regarding the new folder structure. On July 20, 2017, the Supervisor, Ms. S, Grievant and several other employees met to discuss the new folder structure. Grievant was asked for her input on the completed new folder system. Grievant asked for a regdocs folder to be created. This folder was added to the system.

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<sup>8</sup> Hearing Officer Exhibit C.

On July 24, 2017, the new folder structure was finalized and implemented. As of July 25, 2017, all of the Unit's documents including Grievant's documents were to be placed in the new folder system. Ms. L was responsible for moving documents to the new folder structure.

On August 21, 2017, the Supervisor sent Grievant an email regarding a New Folder Structure:

I am writing in response to your email regarding your concern with the new folder structure. To provide you with training, [Ms. S] will meet with you on Friday August 25, 2017 at 3 p.m. so that you can adhere to the newly established folder structure.

I wanted to provide you with the following information:

The folder structure project was started as the GI coordinators were unable to locate the CT files in the current folder structure and contacted you for many documents. In an effort to reduce the number of queries you were receiving and to help GI research coordinators locate their own study documents we embarked on designing a new folder structure for all clinical trial documents.

A lot of the planning and consideration went into the development of the current folder structure including following the NIH and NCI folder recommendations, input from the research coordinators and input and suggestions from you. This included your suggestion on July 20 of adding a folder called regdocs.

In addition, as the first folder of documents were migrated to the new folder structure final input and recommendations from you were included and [Ms. S], you and [name] met on July 20, 2017 and agreed to move forward with migrating the files.

You are expected to adhere to the new centralized folder structure and not keep duplicate systems.

I understand that using a new system can be challenging and therefore I have arranged training as indicated above. You are expected to participate in the training provided by [Ms. S] on August 25 and use the new centralized folder structure effective immediately.<sup>9</sup>

Grievant responded to the Supervisor's August 21, 2017 email, in part:

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<sup>9</sup> Agency Exhibit 8.



They chose not to use the folders. Wasn't any more difficult than the new structure. This was discussed at every meeting. You can create any folders you want, but I am not a study coordinator, so I have no need for them. My folders are my work resource and product, which I have spent the past 6 years building and working from. \*\*\*

RegsDocs folders are empty and have been totally stripped. Even project still in pre-award have been stripped. Study Coordinators and post award personnel have zero effort in the pre-award stage and the work is entirely different. \*\*\* My files contain the original documents in draft form, which I then edit and/or print for signature. I scan/upload and distribute the partially executed forms to the appropriate central offices for full execution and upload to official systems. My folders contain actionable items which are my responsibility and study coordinators do not need them during preaward. \*\*\* I built my folders based on the work I was doing, out of my own creativity and need over the past six years, substantially longer than you spent building your folders with the help of NIH and NCI recommendations. \*\*\* All my files have or are being stripped, even those that I have repopulated have been stripped again, which is indicated of you either doing it or asking someone else to. Wasting even more time and further demonstrating how much of a bully you are. You are deliberately making it impossible for me to do my work and destroying evidence of work already done and in progress, since you have now discovered how and where it is very easy to seem the multitude of work I have and continue to do and the load I carry. I believe your goal is and has always been to find reason to fire me, but no matter what you do to me, how much you interfere, without information, etc. I have continued to get my work done. \*\*\*

I will re-create all folders that are in pre-award in hopes that I capture all the details that need my attention. The way the "new folders" are set up make absolutely no sense and are totally inappropriate in some cases, demonstrating a complete lack of understanding of research administration and related documents and systems; i.e. purpose behind and function of. \*\*\*

In order that I perform duties I was hired to do, I need to keep my folder structure for pre-award. \*\*\*

I will keep my folders as pre-award, which is my responsibility and you may create and populate new post award folders for study coordinator and post award use. I must repeat the documents currently in the folders, do not belong there. My working documents can be copied onto whatever folder you feel they belong in for study coordinators to edit and reprint as necessary. These folders are also representative of my effort, my work, my IP, my responsibility. \*\*\*

Post award document should be pulled down from their official system and put into the folders by either the post award personnel at award as part of their post award set up responsibilities or by study coordinators as they receive documents from the sponsor, not for my files. If someone else is assigned some of GI's projects in pre-award, they may do whatever they need to perform their duties, but I have created the folders I used to serve me in the completion of my assigned duties. They are accessible by anyone who needs to look there for any reason, but shall remain my work product and tool as long as I serve in this position.<sup>10</sup>

On August 24, 2017, the Supervisor sent Grievant an email stating:

Thank you for sharing your thoughts regarding the transition to the new filing system. I've considered the information you provided, however, the transition to the new system is necessary. As I informed you, all files have been transferred to the system.

As you are aware I've scheduled training in the use of the new system for use with [Ms. S]. You are required to attend this training on Friday, August 25 at 3 pm and begin using the new folder structure effective immediately.<sup>11</sup>

On August 25, 2017, Grievant met with Ms. S and the Supervisor. Ms. S discussed each folder with Grievant to make sure Grievant understood the system. Grievant indicated she understood the new folder system. The Supervisor agreed Grievant could keep some of the documents in her personal folder as long as she first placed them in the shared folder. Grievant agreed to begin using the regsdoc folders and creating a shadow drive for her copies.

Sometime in September 2017, Grievant spoke with Ms. S and told Ms. S that having to save documents to two different drives caused delays. Grievant told Ms. S because of the delay, Grievant would keep everything on the U drive. Ms. S smiled and said she understood how that would be an issue.

On October 2, 2017 at 3:04 p.m., Ms. S sent Grievant an email stating:

I don't see a file for the [H study] in [name] centralized folder structure. Has one been created yet?

Grievant replied at 3:27 p.m.:

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<sup>10</sup> Agency Exhibit 8.

<sup>11</sup> Agency Exhibit 8.

Yes and some of my folders moved to the U drive are now missing:  
[name]

I will contact IT again to have it restored. There was another one for her that was a potential study as well.

What do you need for [H study]?

Ms. S replied at 3:29 p.m.:

I'm putting the copies of the index request forms in the folders for the study so it can go somewhere off my desktop. I just want to file it.

Make sure everything we need is on the shared drive since we cannot get to your U.<sup>12</sup>

On October 2, 2017 at 3:54 p.m., Grievant sent Ms. S an email regarding the subject "New folder structure issues/questions":

What is it you need? I don't have any of the projects [name] works on in the shared drive folder for GI and I don't see anyone else's work on the shared drive. Only reports or other information when they have been away or left the university.

These are my working folders created by me for me. I put them out there in good faith for others use and asked that the study coordinators put documents in the folders and that post awards put them in the appropriate folders, but no one ever did and now a few folder system has been created for them, which stripped my working folders. If these folders are for them and post award management, then at the hand off juncture between pre-award management and post award is the appropriate time for me to place documents into the new folders.

As GI Pre-Award Research Manager and Regulatory Coordinator, I can provide documents, if IM needs them.

Coordinators should not be sending regulatory documents to sponsors before the appropriate time i.e. OSP has reviewed and approved the project, so I don't think they need to be there until after that point in time.

If you can provide me with guidelines for my responsibilities within the new folders structure, I would appreciate it.

As previously stated, I only have some regulatory documents provided by sponsor, which coordinator also receive, and only the ancillary agreements are fully executed.

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<sup>12</sup> Grievant Exhibit 40.

Given that, I would say I can put my working documents in the new folder, as well as fully executed regulatory documents once OSP has reviewed/approved and they are released to the sponsor.

There are usually additions/corrections to the regulatory documents, so the question of do you want all or only the final approved versions in the new folders needs to be addressed.

I can place the signed ancillaries in the new folders as I receive them and return them to SOMCT and service areas.

I can place the regulatory documents received from the sponsor in the folders: RegDocs that were stripped bare in the new folder structure from this point forward, copying from those on my U drive.

Otherwise, I do not use the new folders. I would only be placing finalized documents there for post award management. Documents other than those mentioned are not within my purview as pre-award manager.<sup>13</sup>

On October 3, 2017, the Supervisor learned that Grievant was moving all the pre-award grant files to her U drive and the files were not visible to the research administration team. Grievant was using the shadow folder to do her daily work. She would then copy documents from the shadow folder to the shared drive.

On October 4, 2017, the Supervisor, [Ms. S], and Grievant met to discuss Grievant's failure to use the new folder structure. The Supervisor said they needed to talk about Grievant not using the new folder structure and the problems that were caused by Grievant using the U drive. Grievant was removing documents from the shared drive and placing them in her U drive. Grievant said that her work was her personal property and nobody was entitled to access one's personal property. Grievant said she would use her personal drive since they took away her work by converting it to the new folder structure. Grievant said that she was protecting her personal property i.e. the pre-award document she worked on for the grants to VCU by putting all the items on her U drive and would manage who gets them from there. Grievant discussed the difficulty of keeping track of what files were on the shared drive and what files were on the U drive. Grievant said she did not keep track of where she was putting things and had to compare them side by side to see what documents were where and keep them both up to date. Grievant said she had difficulty working out of two systems. The Supervisor agreed that it was difficult to work out of two systems and said that was why Grievant needed to be working primarily out of the shared drive folder structure.

Grievant was informed that her job would be to start the folders on the shared drive when she received documents from the sponsor. Grievant claimed that the

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<sup>13</sup> Grievant Exhibit 40.

coordinators receive them at the same time and they should create the folders. The Supervisor instructed that Grievant would be expected to put all documents in the shared drive as the primary place. If Grievant chose to copy them into another folder for her to work on, that was fine; but all documents were to be in the shared drive first and foremost. Towards the end of the October 4, 2017 meeting, Grievant agreed to use the new folder system. Ms. S, however, was not sure Grievant had agreed to do so.

After the October 4, 2017 meeting, the Supervisor observed that Grievant was not exclusively using the new folder system.

On October 11, 2017 at 12:20 p.m., the Supervisor sent Grievant an email stating:

Please ensure all [Dr. S's] U01 proposal documents are stored on the shared drive under Pre award by 3 p.m. today. Please send me an email to confirm where they are located on the shared drive when this is complete.<sup>14</sup>

On October 11, 2017 at 1 p.m., Grievant sent a Systems Analyst an email stating:

Can you copy the entire ACTIVE Projects folder from my U drive ... back to the [Unit] Share drive ....

It will be much faster that way. [The Supervisor] stripped many of them, so I moved them to my U drive to project my work.

She is now demanding that I put them back on the shared drive by 3 p.m. today. I just received her email.<sup>15</sup>

The Systems Analyst replied at 1:47 p.m.:

I will start this copy in a few minutes.  
I am going to create a folder named [name].  
Since it is a ton of files, it may take a bit to copy over.  
I'll let you know when it's finished.<sup>16</sup>

On October 11, 2017 at 5:28 p.m., the Supervisor sent Grievant an email stating:

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<sup>14</sup> Grievant Exhibit 47.

<sup>15</sup> Grievant Exhibit 45.

<sup>16</sup> Grievant Exhibit 45.

Just a reminder please make sure that you have put [Dr. S's] UO1 proposal documents on the shared drive and let me know where they are located so [Ms. S] can review the documents.<sup>17</sup>

On October 12, 2017, Grievant sent the Supervisor an email informing her that she had the Systems Analyst copy the Active Project folders back to the T drive.

## **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>18</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.”

Failure to follow instructions is a Group II offense.<sup>19</sup>

### Administrative Action vs. Continuation Proposal

On September 20, 2017, Ms. S sent Grievant an email indicating that the Proposal “will be” an Administrative Action. On September 22, 2017, Grievant notified Ms. S that she classified the Proposal as a Continuation Proposal. On October 9, 2017, Grievant changed the classification from CP to AA as Ms. S had requested.

The Agency alleged that Grievant failed to comply with a supervisor’s instruction because she failed to classify the proposal as an AA instead of a CP as directed by Ms. S. The Agency’s allegation is not supported by the evidence for several reasons. First, Ms. S’s directive reflected her opinion regarding the proper classification for the proposal. Second, Grievant had sufficient knowledge and expertise to form an opinion regarding whether the classification should be an AA or a CP. Grievant exercised her discretion to classify the proposal as a CP. Third, Ms. S conceded in an email that there existed “further confusion on when to submit an AA versus a CP.” Fourth, once Ms. S rejected Grievant’s classification on September 25, 2017, Grievant immediately sought clarification from the Assistant Director of the OSP. Grievant’s objective was to identify the correct classification and not to defy Ms. S. Fifth, Grievant ultimately changed the classification to AA when she realized AA was the proper classification. Thus, Grievant complied with Ms. S’s directive after realizing Ms. S’s directive was correct. Sixth, the Agency alleged Grievant caused a delay in payments and impacted

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<sup>17</sup> Grievant Exhibit 46.

<sup>18</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>19</sup> See, Attachment A, DHRM Policy 1.60.

others in the Agency. The delay between the date Ms. S directed the classification be AA and the date Grievant changed the classification from CP to AA was not Grievant's fault. The delay resulted from the OSP Assistant Director's failure to timely respond to Grievant's initial request for clarification (September 25, 2017) and second request for clarification (October 2, 2017).

The interaction between Grievant and Ms. S is better described as a discussion of two logical opinions regarding how the proposal was to be classified rather than a subordinate's refusal to comply with a supervisor's instructions.

### New Folder Structure

The Supervisor repeatedly told Grievant to use the new folder system to keep her work documents on the shared computer drive.

On August 21, 2017, the Supervisor instructed Grievant:

You are expected to adhere to the new centralized folder structure and not keep duplicate systems. \*\*\* You are expected to participate in the training provided by [Ms. S] on August 25 and use the new centralized folder structure effective immediately

On August 24, 2017, the Supervisor instructed Grievant:

As you are aware I've scheduled training in the use of the new system for you with [Ms. S]. You are required to attend this training on Friday, August 25 at 3 pm and begin using the new folder structure effective immediately

On August 25, 2017, the Supervisor said Grievant could keep some of the documents in her personal folder as long as she first placed them in the shared folder. Grievant agreed to begin using the regsdoc folders and creating a shadow drive for her copies.

On October 2, 2017, Ms. S reminded Grievant, [m]ake sure everything we need is on the shared drive since we cannot get to your U."

The Agency provided Grievant with adequate training to enable her to use the new folder structure without using her personal drive. On August 25, 2017, Grievant met with Ms. S to discuss the new folder structure. Grievant had the opportunity to ask questions about the new system and her responsibilities to keep her work documents on the shared drive.

Grievant did not see any merit in using the new folder structure. She repeatedly rejected the new folder structure. She repeatedly questioned the need for the new folder structure. She repeatedly stated that her work product belonged to her and other

employees could contact her if they needed any information. Grievant repeatedly complained that her documents were being “stripped” by someone (including the Supervisor). The Agency attempted to accommodate her concerns by allowing her to keep copies on a shadow drive of the work she performed on the shared drive. Instead of doing her work on the shared drive and keeping copies on the U drive, Grievant resumed her practice of keeping her work on the U drive and putting copies on the shared drive.

Grievant did not comply with the Supervisor’s instruction to keep her work on the shared drive. Grievant did not keep all of her work on the shared drive after the new folder system was implemented on July 25, 2017. On August 21, 2017, Grievant wrote an email stating:

I have created the folders I use to serve me in the completion of my assigned duties. They are accessible by anyone who needs to look there for any reason, but shall remain my work product and tool as long as I serve in this position.

Sometime in September 2017, Grievant told Ms. S that she was keeping her work documents in the U drive.

On October 4, 2017, the Agency realized Grievant was not following the new folder structure. Grievant was removing documents from the shared drive and putting them on her personal drive. Grievant admitted she began doing her daily work in the shadow folder and then copying it to the shared drive. Sometimes she would save the document to her U drive instead of the shared folder. She did not always realize when this happened.

On October 11, 2017, Grievant asked the Systems Analyst to copy all of ACTIVE Projects folder on her U drive to the T drive. The Systems Analyst referred to this as copying “a ton of files.”

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow instruction.

Grievant argued that she was not properly trained on the new folder structure and did not understand her responsibilities under the new folder structure. For example, Grievant sent an email to Ms. S on October 3, 2017 asking, “if you can provide me with guidelines for my responsibilities within the new folder structure ....” The evidence is overwhelming that the Agency took numerous steps to include Grievant in the creation of the new folder structure, provide Grievant with training and re-training regarding the new folder structure, and allow Grievant to ask questions and obtain any information she felt necessary regarding the new folder structure. Grievant knew or should have known her responsibilities within the new folders structure including the Agency’s expectation that she work on documents in the shared drive so that her documents could be available to other employees.



Grievant argued that the other employees were “stripping” her files from the shared drive. The evidence showed that the Agency attempted to accommodate her concerns by permitting her to copy documents from the shared drive to a shadow drive so that she would have a copy of her completed work. Nevertheless, Grievant performed her work on computer drives other than the shared drive and then copied that work to the shared drive instead of copying work from the shared drive.

### Accumulation of Disciplinary Action

Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. Grievant had a prior active Group II Written Notice. With the issuance of the disciplinary action in this case, Grievant has accumulated two Group II Written Notices. The Agency’s decision to remove Grievant must be upheld.

### Mitigation

*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 Human Resource Management ....”<sup>20</sup> 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.

### Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>21</sup> (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected

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<sup>20</sup> *Va. Code § 2.2-3005.*

<sup>21</sup> See *Va. Code § 2.2-3004(A)(v)* and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Ultimately, to support a finding of retaliation, the Hearing Officer must find that the protected activity was a "but-for"<sup>22</sup> cause of the alleged adverse action by the employer.<sup>23</sup>

Grievant engaged in protected activity because she filed a grievance to challenge a prior reduction in her pay band. Grievant suffered an adverse employment action because she received disciplinary action. Grievant has not presented sufficient credible evidence to show a causal link between Grievant's protected activity and the disciplinary action. The Agency's discipline in this case was not a pretext for retaliation.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing

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<sup>22</sup> This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

<sup>23</sup> See, Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).

decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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>[1]</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.