

Issue: Group III Written Notice with Termination (failure to follow policy); Hearing Date: 03/13/19; Decision Issued: 06/24/19; Agency: W&M; AHO: Carl Wilson Schmidt, Esq.; Case No. 11304; Outcome: No Relief – Agency Upheld;  
**Administrative Review Ruling Request received 07/09/19; EDR Ruling No. 2020-4953 issued 08/01/19; Outcome: AHO's decision affirmed.**



# ***COMMONWEALTH of VIRGINIA***

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

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

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

In re:

**Case Number: 11304**

Hearing Date: March 13, 2019

Decision Issued: June 24, 2019

#### **PROCEDURAL HISTORY**

On November 13, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow written policy related to the ethical treatment of animals.

Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 2, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 13, 2019, a hearing was held at the Agency's office.

#### **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?

### **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:

The College of William and Mary employed Grievant as a Marine Scientist I. He began working as a temporary employee for the College in 2012. He became a full time employee in March 2013. Grievant received favorable annual performance evaluations including a rating of Exceptional in 2016. No evidence of prior active disciplinary action was introduced during the hearing.

The College received funding for its Northeast Area Monitoring and Assessment Program (NEAMAP) Inshore Ocean Trawl Survey from the United States Marine Commission. How well the College administered its program affected its ability to continue receiving funding.

The NEAMAP Trawl Survey was designed to monitor late juvenile and adult finfishes inhabiting the coastal ocean of the United States between Cape Hatteras, NC and the western shores of Martha's Vineyard, MA. Data generated by the survey was to be compared with data from other surveys to describe the status of living marine resources along the US Atlantic Coast.

Animal handling protocols proposed for use on the NEAMAP Survey were submitted to the William and Mary Institutional Animal Care and Use Committee (IACUC) for approval. These protocols followed the Guidelines for the Use of Fishes in

Research published by the American Fisheries Society (2014). The William and Mary Animal Care and Use program operated under the Federal National Institutes of Health, Office of Animal Laboratory Welfare, Animal Welfare Assurance.

In September 2012, Grievant received training governing the IACUC protocol and the American Fisheries Society Guidelines for the Use of Fishes in Research.

The Guidelines for the Use of Fishes in Research provide:

In all cases, studies should be designed to use the fewest animals necessary to reliably answer the questions posed. \*\*\* In general, experimental endpoints other than death of the experimental subjects should be developed unless death is required by the study protocol.<sup>1</sup>

Euthanasia is the act of killing animals using methods that cause minimal animal pain, distress, and anxiety prior to rapid loss of consciousness and death. Stingrays are not processed for their biological material and, thus, do not require euthanasia. There is no scientific basis for them to be intentionally injured or killed. Euthanasia of injured fishes was not a common practice during the survey.

On April 10, 2018, Grievant was promoted from the position of Laboratory and Research Specialist II to Marine Scientist I. He was designated as Chief Scientist for the Spring 2018 NEAMAP Survey cruise for the period May 10, 2018 through May 18, 2018. Grievant was responsible for leading a team of six scientists in the collection of field data on the abundance, distribution, and biology of living marine resources.

On May 10, 2018, Grievant was given a Survey Operations Manual containing a copy of the 2018 NEAMAP IACUC protocol. Grievant's cruise was governed by protocol number IACUC-2017-02-02-11789-[name].

Under this protocol, all specimens collected were to be weighted, enumerated, measured, and returned to the water immediately with the exception of those subsampled for additional processing. A representative subsample of each species on a list entitled "Species Selected for Full Processing" could be removed from the catch.

The College used a 90 foot trawler to allow employees to travel for several days along the East coast to catch marine life and measure and record the size, weight, gender, and other factors relating to each catch. Approximately seven employees lived and worked on the boat during the cruise. The Captain and Mate operated the boat. Everyone worked ten or more hours each day. The boat had stations for employees to perform different tasks. Employees wore waterproof boots as they worked. They also wore bib overall pants and gloves as they processed the catch.

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

On May 10, 2018, the boat and crew departed from Hampton to begin a nine day cruise.

A trawl is a net that is dragged along the sea bottom to gather fish or other marine life.

The crew began fishing by placing a trawl net or tow into the water. The tow was kept in the water for approximately 20 minutes. It was pulled onboard the boat and the catch was dumped onto the boat checker. The checker did not hold seawater. It was designed to shed seawater. There was a hose on the boat that could be used to spray salt water into the checker or onto the deck if needed. If endangered species such as sturgeon were in the catch, they were immediately separated from the rest of the catch and returned to the sea. If the catch produced more than ten rays, it was a significant number of rays. Crew would process other marine life except for stingrays. After finishing with a catch, the crew would repeat the process.

Employees working on the cruise were supposed to be familiar with the priority species list. A priority species list was printed out on waterproof paper, put in a paper holder, and taped to the side of a workstation near the sorting area.

Stingrays had sharp barbs that could cause injury to an employee who came into contact with the barb. An employee handling a stingray could remove the barb with his hand or a knife. Once the barb was removed, the stingray was no longer dangerous. The rays were placed in baskets. A stingray's barb eventually grows back.

When stingrays were dropped on the deck of the boat, at least 90 percent were alive. Rays could be returned to the water in approximately ten to fifteen minutes from the time they are brought onboard.

Most catches resulted in the death of some stingrays. Stingrays could suffocate if they were out of the water for too long. The risk of stingray mortality increased during days of high temperatures and for large catches with more stingrays. The team had to work efficiently to minimize the risk of stingray mortality.

Atlantic sturgeon were listed as endangered by the National Oceanographic and Atmospheric Administration. Sturgeons were given priority in returning them to the sea. For example, if the catch included sturgeon, the sturgeon were processed immediately and returned to the sea as quickly as possible to ensure they did not die.

Mr. H worked was a Research Lab Specialist I. He was one of the employees working on the May 10, 2018 cruise. It was his first cruise. He worked at Station 3 which was close to the stern of the boat. Mr. H had been told how to handle stingrays to avoid being injured by the stingray's barb.

Mr. H felt working on the cruise was a “hard environment to get adjusted to” because of the long work hours and having to work every day of the week. Mr. H wore latex gloves and blue deck gloves.

On May 16, 2018, a catch resulted in 16 stingrays and three sturgeons being brought on board the ship. Mr. J and Mr. T immediately began processing the sturgeon.

Mr. H grabbed a ray to remove its barb. He lost his grasp of the ray’s tail and the barb swung backwards and forwards and lodged itself into his hand. The barb was as sharp as a knife and cut his hand. The injury was not severe, but Mr. H’s hand was bleeding.

Mr. H said loudly that he was barbed by a ray. Grievant heard Mr. H. Grievant became upset. It was an “injury on his watch.” Grievant considered safety his number one priority. Grievant had instructed Mr. H regarding how to safely remove barbs from the stingrays, but Mr. H was not following Grievant’s instructions. Grievant instructed Mr. H to quickly take off his work gear and go to the galley and submerge his thumb in very warm water.

Grievant told the Specialist Senior to “back up” because he would “take care of it”, referring to the stingrays. Grievant pointed to the back of the file of the catch. Grievant assumed responsibility for the rays. As Mr. H began to leave the deck, Grievant began killing rays. Grievant killed rays using a mallet and a knife. Grievant was angry as he killed the rays.

Grievant separated rays from the other species, sliced off their barbs, and cut down into the heads to kill them. He would stab the rays and slice down their backbones to kill them. Grievant was “swinging” but not “wildly swinging” the knife to kill the rays. He was killing rays with more aggression than other fish would be euthanized. The Specialist Senior did not believe Grievant’s killing of rays was necessary because they did not “process rays.” She recognized that Grievant was “pretty angry” and knew it was “better to walk away than to have a conversation” with Grievant.

Grievant killed between six and 12 rays out of the 16 rays brought aboard the ship as part of the catch. He tried to kill larger rays because they posed a greater risk of harm. By killing the rays, Grievant caused additional blood to be spilled on the deck that would not otherwise have been spilled.

Grievant’s method of killing the rays was different from how other fish were euthanized. Grievant was more aggressive and displayed his frustration as he did so.

The Captain went to the galley and told Mr. H to heat up water with salt and disinfect the wound. After about 7 to 10 minutes, Mr. H finished soaking and wrapping the wound. He returned to work.

Grievant told Mr. H, "You're not allowed to touch rays anymore." Grievant was expressing his anger that Mr. H had been hurt by the ray.

Mr. H later expressed to Agency managers his displeasure with how Grievant treated the stingrays.

## **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."

DHRM Policy 1.60 lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section."

Grievant was in charge of a marine life survey on May 16, 2018. When an employee became injured by a stingray, Grievant became angry and began killing stingrays. Stingrays were not authorized to be killed by the study protocols. Stingrays were not to be euthanized, but Grievant chose to kill several stingrays. By taking the lives of stingrays without a reasoned basis to do so, Grievant acted contrary to the College's ethics, principles, and policies prohibiting the taking of marine life except when necessary. The College presented substantial evidence showing that an employee who unnecessarily killed marine life could place its reputation and program at risk from unwanted criticism from its governing authorities. The College has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued he had to kill the stingrays as a safety precaution. Grievant argued his staff available to work on the catch dropped from six to four when two of the staff began processing the sturgeon and from four to three when Mr. H injured his hand. He argued that he was too "short staffed" to debarb the stingrays quickly. He claimed he had to kill them for safe handling. The evidence is clear that Grievant killed the stingrays out of anger and not for safety reasons.

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<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.

Grievant argued that because of the length of time the rays were out of the water, they would have died of suffocation even if Grievant had not killed them. Although it is true that some of the rays might have died anyway, it is not clear that all of them that Grievant killed would have died from suffocation.

Grievant argues his actions were consistent with the Guidelines for the Use of Fishes in Research:

Marine fish surveys conducted at sea present a special set of conditions with respect to euthanasia. We capture methods tend to collect substantial numbers of specimens at one time. Information on sex, maturity state, and stomach contents may be taken from individual fish that are not dead when processed. Decapitation or pithing of individual fish for otolith removal may be used on such surveys, but these techniques are not suited to processing large numbers of fish. The largest possible portion of the catch must be worked up in the shortest possible time to get the maximum amount of data within the time allotted for each station or sampling event. Euthanasia of individual fish could result in a significant compromise in the amount of data collected. With the exception of certain shark species ... or threatened species such as sea turtles ... and sturgeon ... the entire catch may be treated as sampling without replacement. Under such conditions, the constraints of time and the cost of shift time, researchers and agencies should be granted exceptions from standard practices for euthanasia.<sup>3</sup>

The catch was not so large as to require the entire catch to be treated as sampling without replacement. Grievant's killing of stingrays was unnecessary.

This case is unfortunate. Grievant's evaluations show he was highly regarded for his work performance but on one day he behaved poorly. The College could have selected a lesser level of disciplinary action and effectively corrected Grievant's behavior. Instead, the College chose to remove Grievant from employment. Once an agency presents sufficient evidence to support its decision to discipline and remove an employee, the Hearing Officer cannot substitute his decision or preference for a different level of disciplinary action.

*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>4</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

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<sup>3</sup> Agency Exhibit 5.

<sup>4</sup> *Va. Code § 2.2-3005.*



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.

## DECISION

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

## APPEAL RIGHTS

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

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 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 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 EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR 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 EDR before filing a notice of appeal.