Issue: III Written Notice of disciplinary (violating safety rules during fire alarm, inadequate or unsatisfactory job performance not responding to fire alarm) and Group II Written Notice (failure to follow supervisor's instructions, perform assigned work, and insubordinate attitude towards supervisor) with termination; Hearing Date: 04/28/03; Decision Issued: 06/02/03; Agency: Dept. of ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5693; **Administrative Review: HO Reconsideration Request received 06/12/03; Reconsideration Decision issued: 06/26/03; Outcome: No newly discovered evidence identified nor incorrect legal conclusions; Administrative Review: EDR Ruling request received 06/12/03; EDR Ruling No. 2003-129 dated 08/12/03; Outcome: HO ordered to modify decision to include explanation of findings of fact on material issues; Clarification Decision issued: 10/10/03**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5693

Hearing Date: April 28, 2003
Decision Issued: June 2, 2003

PROCEDURAL HISTORY

On December 20, 2002, Grievant was issued a Group III Written Notice of disciplinary action for:

> *Violating safety rules during fire alarm*
> *Inadequate or unsatisfactory job performance not responding to fire alarm.*

Grievant was also issued a Group II Written Notice for:

> *Failure to follow a Supervisor's instructions, perform assigned work.*
> *Insubordinate Attitude towards Supervisor during the meeting with [Grievant] on 12-6-02.*

Grievant was removed from employment on January 9, 2003.

On February 6, 2003, 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 he requested a hearing. On April 2, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 28, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Nine witnesses

ISSUES

1. Whether Grievant should receive a Group III Written Notice of disciplinary action for violating safety rules.
2. Whether Grievant should receive a Group II Written Notice for failure to failure to follow a supervisor's instructions and perform assigned work.
3. Whether Grievant received an arbitrary or capricious evaluation.
4. Whether the Agency retaliated against Grievant.

BURDEN OF PROOF

In disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence. 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 Alcohol Beverage Control employed Grievant as a Master Mechanic until his removal on January 9, 2003. He began working for the Agency in November 2001. The purpose of his position was:

> To maintain, troubleshoot, and repair all mechanical/electrical, fire and safety systems. Also to act as a Supervisor in the absence of the Building & Grounds Supervisor B.

On Friday, November 22, 2002 at approximately 4:45 p.m., the Security Sergeant learned that an alarm on the main fire panel had enunciated. He walked to the shop to tell Grievant of the alarm. Grievant walked to the main fire panel and silenced the alarm. Grievant told the Security Sergeant that the alarm was coming from riser #12. Using a two-way radio, Grievant called the Supervisor to inform him of the alarm

regarding riser #12. The Supervisor told Grievant that the Technician was working at riser #12. At approximately 5 p.m., Grievant left the worksite and went home. He left the building without informing the Technician of the alarm or determining whether a fire existed and its location.

After first speaking with Grievant, the Supervisor attempted to call the Technician, but the Technician's cellular telephone line was busy.[1] The Supervisor continued to try to call the Technician and after approximately 15 minutes, the busy signal ended and the Supervisor was able to speak with the Technician. The Supervisor asked the Technician if he knew that an alarm had enunciated. The Technician said he was unaware of any alarm going off.[2] The Supervisor asked the Technician if he had had any contact with Grievant and the Technician said he had not.

On the following Monday, the Supervisor questioned Grievant about his response to the fire alarm. Grievant apologized for not properly responding to the alarm.

On November 30, 2002, Grievant was away from the office when he was called to respond to a "high air" problem inside one of the Agency's older buildings. Completing the procedures necessary to solve the problem should not have taken more than 1.5 hours to complete. Grievant submitted a time accounting showing he devoted 3.5 hours to the project. Grievant had not used the quickest and simplest procedure to complete the project.

On December 6, 2002, Grievant and the Supervisor met to discuss the fire alarm and other issues. The Supervisor asked Grievant why he did not respond to the alarm and why he did not help the Technician during the alarm. Grievant said he thought the Technician had the matter under control. The parties continued their discussion which became heated. The Supervisor attempted to explain to Grievant what procedures he should have followed and Grievant expressed his disagreement with what the Supervisor was saying. At one point, Grievant stood up and asked if the meeting was over so that he could leave. The Supervisor said "no" and Grievant sat back down and continued the meeting.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).[3] Group II offenses "include acts and behavior which are

[1] The Technician called the alarm company at 4:54 p.m. using the telephone located at his desk. He spoke for only one minute and thirty-two seconds.

[2] The Technician was speaking on the telephone when the alarm enunciated.

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

more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

Group III Written Notice

"Violating safety rules where there is a threat of physical harm" is a Group III offense.[4] When the alarm first sounded, Grievant should have: (1) gone to the panel to determine the location of the alarm, (2) then gone to the location of the alarm and (3) determined whether there was any smoke or fire. If there was no smoke or fire, Grievant should have determined the cause of the alarm. Grievant had been informed of this procedure and knew or should have known to comply with the procedure. Instead, Grievant silenced the alarm, assumed the matter was being addressed by the Technician and then left the worksite. The Technician was unaware of the alarm. If the alarm had represented the beginning of an actual emergency, damage to property, panic among staff, and possibly injury to staff could have occurred. The key to preventing the extensive damage caused by fire is the quick identification and suppression of that fire. The Agency believes that Grievant's behavior rises to the level of the Group III Written Notice. The Hearing Officer agrees.

Grievant contends he spoke with the Technician and asked the Technician if he needed any help. The Technician denies this. The Security Sergeant spoke with the Technician but the Security Sergeant did not see Grievant speak with the Technician. The Hearing Officer does not believe Grievant spoke with the Technician.

Group II Written Notice

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was responsible for performing his job in a productive manner such that he did not devote more time than necessary to complete projects assigned to him. On November 30, 2002, Grievant spent 3.5 hours performing a task that should not have required more than 1.5 hours of his time. His actions represented inadequate or unsatisfactory job performance thereby justifying issuance of a Group I Written Notice. The Agency's issuance of a Group II Written Notice must be reduced to a Group I Written Notice. Based on the accumulation of disciplinary action, a sufficient basis exists to support Grievant's removal from employment.

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[4] DHRM § 1.60(V)(B)(3)(g).

The Agency contends Grievant was so insubordinate during the meeting on December 6th that a Group II Written Notice is justified. Based on the evidence presented, however, Grievant was trying to explain this point of view because he did not agree with the Supervisor. The Supervisor construed Grievant's refusal to accept the Supervisor's interpretation of events as reflecting insubordination by the Grievant. When Grievant asked if the meeting was over and if he could leave, the Supervisor told him the meeting was not over. Grievant then sat back down and continued the meeting as instructed by the Supervisor.

Retaliation

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')." To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[5] (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 action because the employee had engaged in the protected activity.

Grievant engaged in a protected activity when he filed a report alleging violation of law. Grievant has suffered an adverse employment action because of his removal from employment. What Grievant has not established is a link between his protected activity and the adverse employment action.

Grievant contends the Supervisor retaliated against Grievant because Grievant filed a report alleging impropriety by the Supervisor. The Supervisor, however, did not know Grievant had made any complaints against him. The disciplinary action taken against Grievant resulted from Grievant's actions. Although the Supervisor did not have a favorable opinion of Grievant, the evidence is insufficient for the Hearing Officer to conclude that the Supervisor targeted Grievant for unnecessary disciplinary action.

Performance Evaluation

State agencies may not conduct arbitrary or capricious performance evaluations of their employees. Arbitrary or capricious is defined as "Unreasonable action in disregard of the facts or without a determining principle." GPM § 9. If a Hearing Officer concludes an evaluation is arbitrary or capricious, the Hearing Officer's authority is limited to ordering the agency to re-evaluate the employee. GPM § 5.9(a)(5).

[5] *See* Va. Code § 2.2-3004(A)(v*)*. Only 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.

Grievant contends his performance evaluation was arbitrary or capricious. On November 4, 2002, Grievant received an evaluation rating his overall performance as below contributor. Grievant did not work from April 25, 2002 to September 29, 2002 and was on short-term disability. He objected to the accuracy of the evaluation and argued it failed to consider his absence from work due to disability. On December 16, 2002, the Agency decided that Grievant would not received an evaluation for the 2001-2002 performance cycle because he was absent from work for a six month period. Grievant's evaluation was nullified and he received a modified "Need Improvement" form effective November 15, 2002.

In light of the Agency's nullification of Grievant's performance evaluation, his contention that the evaluation is arbitrary or capricious is moot. No evidence or argument was presented suggesting the Agency's action was arbitrary or capricious or not in accordance with policy.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice. The Agency's removal of Grievant from employment is upheld. Grievant's request for relief from alleged retaliation and an arbitrary or capricious performance evaluation is **denied.**

The Agency did not write in all of the necessary dates in the Written Notices. The Group III Written Notice does not show an inactive date. The Group II Written Notice contains an incorrect date of offense and does not show a date of issuance and a date the notice will become inactive. The Agency is directed to amend these notices to include the appropriate dates.

APPEAL RIGHTS

You may file an administrative review request within **10 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.

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.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-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.[6]

[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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Carl Wilson Schmidt, Esq.
Hearing Officer

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5693-R

Reconsideration Decision Issued: June 26, 2003

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

Grievant contends that the Agency disciplined him as a form of retaliation. An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')." To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[7] (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 action because the employee had engaged in the protected activity.

Grievant has not been able to establish a causal link between his filing of allegations of impropriety and the disciplinary action. The disciplinary action originated from the Supervisor. The Supervisor was unaware of Grievant's allegations at the time the Supervisor initiated disciplinary action.

Grievant argues that since there was no fire, there was no threat of physical harm sufficient to justify issuance of a Group III Written Notice. The evidence showed,

[7] *See* Va. Code § 2.2-3004(A)(v*)*. Only 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.

however, the Grievant did not take action to find out if there was an actual fire. He neither informed the Technician of the alarm nor asked the Technician to find the source of the alarm. His behavior created a risk of physical harm because if there had been an actual fire, the damage to the Agency could have been immeasurable.

Grievant contends that the agency originally disciplined him for failing to respond to a fire alarm on riser number five and changed its evidence to show Grievant failed to respond to a high air alarm on riser number 12. The Written Notice states, "[Grievant] acknowledged and silenced a fire alarm and went to the chiller room, looked over the chillers and saw [Technician] by riser #12 on the phone. [Grievant] went home without informing [Technician] of the fire alarm, finding out if there was a fire and the location of the fire alarm." The Written Notice adequately informs Grievant of the Agency's allegation against him.

Grievant argues that 3.5 hours was an appropriate amount of time to perform his assigned tasks on November 30, 2002 because he was working on the same problem that the Technician worked on for an extensive period of time and because the 3.5 hours included travel time. The evidence was insufficient for the Hearing Officer to conclude that the Technician was performing the same task Grievant performed. In addition, there is no reason to believe that Grievant's travel time was significant. Grievant's argument fails.

Grievant contends that because he qualified for unemployment compensation through the Virginia Employment Commission, this should have a bearing on his employee grievance. The outcome of a VEC decision is not admissible in grievance proceedings.[8]

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Grievant simply restates the arguments and evidence presented at the hearing. For this reason, Grievant's request for reconsideration is **denied.**

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

[8] See, Va. Code § 60.2-623(B).

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5693-R2

Clarification Decision Issued: October 10, 2003

CLARIFICATION DECISION

The EDR Director ordered the Hearing Officer to clarify his decision regarding this grievance. The EDR Director[9] states:

> Importantly, the hearing officer failed to distinguish between the alarms on Risers #5 and #12, a distinction that could materially affect the outcome of the grievant's case. Furthermore, the decision does not discuss the differences between high-air and fire alarms and whether high-air alarms, like fire alarms, are safety concerns. The hearing officer failed to address whether a *fire* alarm, as opposed to a *high-air* alarm, even occurred during the grievant's shift. Moreover, the hearing officer's Reconsideration Decision of June 26 does not clarify these questions of material fact.

Discussion. Grievance hearing decisions are decided based upon the evidence presented to the Hearing Officer. That evidence often includes competing theories of what happened. When the Hearing Officer makes findings of facts, he has weighed the evidence, assessed the credibility of witnesses, and decided what facts occurred. It is impracticable and unnecessary for the Hearing Officer to discuss in the hearing decision each and every fact upon which the parties disagree. By making findings of fact, the Hearing Officer excludes unfounded competing theories of what occurred.

During the hearing, Grievant argued that the Agency was trying to discipline him regarding events surrounding riser #5 for which he was not responsible. The Agency

[9] Footnote 7 of the Ruling ends in mid-sentence. The Hearing Officer will not speculate on what additional comments the EDR Director intended to make and how they related to the comments appearing in footnote 7. Accordingly, the Hearing Officer will disregard footnote 7 in its entirety.

presented evidence showing that it was disciplining Grievant for events surrounding riser #12. The Hearing Officer made findings of fact as follows:

> On Friday, November 22, 2002 at approximately 4:45 p.m., the Security Sergeant learned that an alarm on the main fire panel had enunciated. He walked to the shop to tell Grievant of the alarm. Grievant walked to the main fire panel and silenced the alarm. Grievant told the Security Sergeant that the alarm was coming from riser #12. Using a two-way radio, Grievant called the Supervisor to inform him of the alarm regarding riser #12. The Supervisor told Grievant that the Technician was working at riser #12. At approximately 5 p.m., Grievant left the worksite and went home. He left the building without informing the Technician of the alarm or determining whether a fire existed and its location.

In the Reconsideration Decision, the Hearing Officer stated:

> Grievant contends that the agency originally disciplined him for failing to respond to a fire alarm on riser number five and changed its evidence to show Grievant failed to respond to a high air alarm on riser number 12. The Written Notice states, "[Grievant] acknowledged and silenced a fire alarm and went to the chiller room, looked over the chillers and saw [Technician] by riser #12 on the phone. [Grievant] went home without informing [Technician] of the fire alarm, finding out if there was a fire and the location of the fire alarm." The Written Notice adequately informs Grievant of the Agency's allegation against him.

When the Hearing Officer made findings of fact citing riser #12, the Hearing Officer had rejected Grievant's argument that the Agency had tried to discipline him for events relating to riser #5. Grievant again raised his argument regarding riser #5 while seeking reconsideration. The Hearing Officer again rejected his argument. Grievant has now raised his argument with the EDR Director and she has asked for clarification. Accordingly, the Hearing Officer restates that Grievant was not disciplined for events surrounding riser #5, he was disciplined for events surrounding riser #12 as stated in the Agency's Written Notice. Grievant's assertion that he was disciplined regarding riser #5 is unfounded and contrary to the evidence.

Grievant argues that there is a crystal-clear distinction between a high air alarm and a fire alarm. The EDR Director appears to have adopted Grievant's opinion. The evidence showed, however, that the distinction between a high air alarm and a fire alarm is not so crystal-clear. The Written Notice refers to a fire alarm. The attachment to the Notice states that "[Grievant] called me (the Supervisor) around 4:45 p.m. on the two-way (radio) and told me that there was a fire alarm." When discussing what happened regarding riser #12, the Supervisor described a fire alarm occurring. A high air alarm and a fire alarm may be different, or they may be the same. The Technician testified that he was working on riser #12 by "bleeding air off of it … to get the air down for the weekend so they wouldn't get a high-air alarm on the system." He added that he

thought he may have "made the clapper move … just enough to send a fire alarm." In short, Grievant described what happened as a high air alarm that could not be called a fire alarm. The Agency described what happened as a fire alarm that could also be described as a high air alarm.

The EDR Director states the "hearing officer failed to address whether a *fire* alarm, as opposed to a *high-air* alarm, even occurred during the grievant's shift." The EDR Director's statement presupposes the Grievant's interpretation that a high air alarm and a fire alarm are mutually exclusive. They are not.

The best way to define the facts of this case is to avoid unnecessary word distinctions and focus on what happened. The best way to described what happened is the description in the hearing decision; namely, that an alarm on the main fire panel had enunciated. At the time the alarm sounded it could have been caused by a high air problem or by a fire. Part of the problem with Grievant's behavior is that he assumed that the alarm was a high air alarm without the possibility of fire existing, and that the Technician would figure out the problem existed and resolve the problem. If the alarm had resulted from a fire, no one would have known that fact because Grievant silenced the alarm without investigating the alarm. Grievant jeopardized the safety of Agency employees and property because, had there been a fire, the fire would have had additional time to spread before being noticed. The alarm that occurred during Grievant's shift and for which he silenced the fire panel was a safety concern for the Agency.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

3. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.
Hearing Officer