Issues: Group III Written Notice (violating safety rule where there is threat of bodily harm) and Termination; Hearing Date: 05/07/07; Decision Issued: 05/10/07; Agency: DGS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8602; Outcome: Agency upheld in full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8602

Hearing Date: May 7, 2007
Decision Issued: May 10, 2007

PROCEDURAL HISTORY

On February 16, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating a safety rule and willfully imposing a threat of bodily harm.

On February 18, 2007, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On April 16, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 7, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUE

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 General Services employed Grievant as a Scientist I at one of its Facilities until her removal effective February 16, 2007. She had been employed by the Agency for approximately 17 years. The purpose of her position was:

> Performs moderately and highly complex testing and may train others. Performs some method adaptation and validation. Confers with customers and gives technical guidance to others.[1]

Grievant received class training and on-the-job training regarding how to receive and store potentially infectious samples. Grievant's work performance had been acceptable to the Agency. She was well-respected and regarded by her co-workers. In 2003, Grievant received the 2003 Governor's Award for Teamwork.[2]

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[1] Grievant Exhibit 3.

[2] Grievant Exhibit 7.

The Facility has a break room where employees take their breaks during the day. The break room has microwaves, a refrigerator, a coffee pot, and a place for employees to keep their homemade lunches until mealtime. Employees often leave food to share with other employees. For example, during the summer months, employees with extra vegetables may leave them out on a counter with a note indicating the vegetables are being shared. There is a general trust among employees that food left out by employees is safe to eat by other employees.

Facility employees regularly test products, items and materials that may be contaminated with unknown and harmful bacteria, etc. Employees wear lab coats and goggles to protect them in the event a harmful substance falls onto to them while they are conducting their tests. Employees wishing to enter the break room may not wear their lab coats into the break room because the lab coats may contain harmful substances and those substances may come into contact with food in the break room. The entrance to the break room has a sign saying, "No Lab coats". If harmful substances mix with food and an employee consumes the food, that employee may become ill.[3]

Salmonella is an acute gastroenteritis, acute infectious disease with sudden onset of abdominal pain, diarrhea, nausea and vomiting. Dehydration can be severe in infants and the elderly. Deaths are uncommon from Salmonella except in the very young or very old. Salmonella is a food-borne disease that invades the bloodstream and causes life-threatening infections.

On approximately February 14, 2007, the U.S. Food and Drug Administration announced that certain jars of Peter Pan peanut butter having a product code beginning with 2111 could contain Salmonella, a bacterium that causes food-borne illness. Grievant heard media reports of the FDA warning. Grievant and her elderly mother discussed the peanut butter because they had purchased a jar and the product code began with 2111. The FDA instructed consumers to discard the possibly contaminated jars, but Grievant did not know of that instruction from the media reports. Grievant only knew that the FDA believed some of the jars could contain contaminated peanut butter. Grievant's elderly mother and family had eaten peanut butter from the jar but none had suffered any ill effects. Grievant believed the peanut butter was not one of the contaminated jars.

Grievant decided to return the jar to the store for a refund the next time she went shopping. She placed the jar in her bag and expected to return the jar after work on the following day.

On February 16, 2007, Grievant arrived to work in the morning and placed the possibly contaminated peanut butter jar in an area where other employees would notice the jar and realize it was to be shared. She wrote a note on a paper towel saying, "Help yourself" and placed a smiley face on the towel.

[3] Grievant abided by this rule. When she entered the break room, she would not wear a lab coat.

Grievant left the break room to start her lab equipment. She intended to immediately return but was delayed because of some unexpected problems with the equipment. At least two other employees entered the break room during Grievant's absence. One employee noticed the jar and checked the label and realized that the jar may have been one of the contaminated jars. That employee was concerned about why the jar was in the break room. Another employee, Ms. H, was aware of the FDA warning. She entered the break room and noticed the peanut butter and that its product code began with 2111. She recognized the peanut butter as possibly being contaminated. She questioned who and why would someone place the peanut butter out for other employees to eat. She thought that if it was a joke, it was not a funny joke but rather inconsiderate. Ms. H decided to remove the peanut butter and towel and take it to the Deputy Director. She took it to the Deputy Director because her immediate supervisor had not yet arrived at work.

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).[4] Group II offenses "include acts and behavior which are 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).

"Violating safety rules where there is a threat of physical harm" is a Group III offense.[5] The Agency's safety rule was to prohibit items that may be contaminated with dangerous substances from entering the break room where employees kept and consumed food. The Agency also had numerous other rules defining how possibly contaminated materials should be handled. None of those rules would have permitted an employee to take a possibly contaminated item into the Agency's break room. Grievant was aware she was not supposed to bring contaminated items into the break room. Grievant violated the Agency's safety rule because she took possibly contaminated peanut butter into the break room and offered it to other employees. Grievant created a threat of physical harm because the FDA had identified the product as among those with a risk of contamination with Salmonella. If another employee had eaten the peanut butter and the peanut butter contained Salmonella, that employee would likely have become ill and possibly been exposed to some risk of death. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group

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

[5] DHRM Policy 1.60(V)(B)(3)(g).

III Written Notice. Upon the issuance of a Group III Written Notice, an Agency may remove an employee from employment.

Grievant argues the Agency should have tested the peanut butter to determine whether it contained Salmonella. Grievant argues the peanut butter could not have contained Salmonella because Grievant's elderly mother and family consumed the peanut butter but did not experience any symptoms. These arguments fail. Salmonella may appear in a jar of peanut butter in one particular area, but not in another. The Salmonella could appear in layers of the peanut butter. If a person consumes one portion of a jar of contaminated peanut butter but does not become ill, it does not reveal whether the remaining portions of the peanut butter contain Salmonella. In addition, a person could consume Salmonella but not be affected by it. The Deputy Director testified that in order to test the peanut butter, the proper procedure would have been to insert straws into the peanut butter in order to get a sample of the peanut butter at different layers in the jar. A negative test result for Salmonella would not mean Salmonella was not present in the jar; it would only mean the sample did not extract the Salmonella from the jar. He asserted that testing the entire contents of a jar of peanut butter would be unduly burdensome in light of the needed staff time and resources.

This case is unfortunate. It is clear that Grievant did not intend to harm anyone. She intended to make a joke. She is not the type of person who would pose a threat to her co-workers. She is sorry for and embarrassed by her actions. Grievant was honest and did not attempt to hide what she had done. In every respect, this appears to be an isolated incident of poor judgment in an otherwise extraordinary career. With this said, the risk Grievant created was intolerable in State government. If an employee unaware of the FDA warning had consumed the peanut butter and then been informed that it may be contaminated, the effect on that employee may have been devastating regardless of whether the employee actually later experienced the symptoms of Salmonella. Grievant's absence of a specific intent to harm is not material in this case. Grievant's reckless disregard of the possible consequences of her actions is sufficient to show the necessary intent to establish a Group III level offense.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[6] 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

[6] *Va. Code § 2.2-3005.*

consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because of her length of service (17 years) and satisfactory work performance. Length of service and satisfactory work performance are mitigating circumstances for agencies to consider under DHRM Policy 1.60. Length of service and satisfactory work performance are not mitigating circumstances under the EDR Director's *Rules.* Accordingly, 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 file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

   Director
   Department of Employment Dispute Resolution
   830 East Main St. STE 400
   Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[7]

[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

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