Issue: Group III Written Notice (inappropriate conduct and communication) and Termination; Hearing Date: 07/16/08; Decision Issued: 08/25/08; Agency: Science Museum of Virginia; AHO: Carl Wilson Schmidt, Esq.; Case No. 8882; Outcome: Full Relief; **Administrative Review: AHO Reconsideration Request received 09/09/08; Reconsideration Decision issued 09/15/08; Outcome: Original decision affirmed; Administrative Review: EDR Admin Review request received 09/09/08; Ruling No. 2009-2128 issued 11/06/08; Outcome: Remanded to AHO for clarification; Remanded Decision issued 11/21/08; Outcome: Original decision affirmed; Administrative Review: DHRM Admin Review request received 09/09/08; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8882

Hearing Date: July 16, 2008
Decision Issued: August 25, 2008

PROCEDURAL HISTORY

On February 4, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

> For over a year, [Grievant] has exhibited inappropriate conduct and inappropriate interpersonal communication skills. In an effort to assist him in achieving improvement in these areas, he has been counseled both informally and formally by the SMV Director and Deputy Director on more than one occasion (formal conferences: 9/26/06 - Group II offense, 3/15/07, 3/29/07, 1/4/08, & 1/23/08). Please find record of Grievant's most recent offense in the attached email written by him to SMV's Deputy Director and copied to SMV's Director and several Board Members.

On March 3, 2008, 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 June 10, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 16, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee

Agency Advocate
Witnesses

ISSUES

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

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Science Museum of Virginia employed Grievant as a Director of Finance. The purpose of his position was:

> To plan, organize, and manage all accounting, financial and budgetary activities for the Science Museum of Virginia and its affiliates. Manage and report accurate financial management data for planning, decision making, evaluation of program results, compliance, and determination of resource requirements; continuously improve underlying financial management systems.[1]

[1] Agency Exhibit 5.

He had been employed by the Commonwealth of Virginia for approximately 22 years until his removal effective February 6, 2008. Grievant had received prior active disciplinary action. On September 26, 2006, Grievant received a Group II Written Notice for workplace harassment.[2]

The Agency did not place any restrictions on to whom Grievant could send emails.

On Friday, February 1, 2008 at 7:41 p.m., Grievant sent an email to the Deputy Director with the subject line, "Desperate times call for desperate measures." Grievant sent a copy of the email to the Agency Director, and three members of the Agency's Board of Trustees. Portions of Grievant's email reflected Grievant's intent to notify Board Members of information about the Agency that he believed Agency managers were not providing to the Board Members. Grievant believed that this information reflected improprieties within the Agency's operations. Grievant also discussed his relationship with the Deputy Director and the Agency. The email states, in part:

> You lead me to consider my livelihood and career in jeopardy. Also I have exceeded my capacity for the patronizing, secretive, unsupportive, and sometimes rude behavior I have experienced from you and [Dr. W] since 2006.
>
> In December 2007, I told you I was job hunting. I said this did not reflect a shortcoming in our relationship. While we sometimes disagree as intelligent individuals do, I have supported your positions, described you to others in positive terms, and done my best to promote the best interest of you and the Museum. After [the Director's] repeated requests for honesty, I gave him a SWOT analysis noting your leadership as one of the Museum's strengths.
>
> You have embarrassed me twice during the past week showing that my trust is neither reciprocated nor justified.
>
> You still have my respect and not my trust.
>
> This week, you embarrassed me twice by withholding information. When I called the Fine Arts Museum at [Mr. B's] direction, I learned that they "retired" [Ms. LB] (who left SMV in December) after only two weeks. When I told you, you said that you already knew. Considering how Ms. B damaged the Finance Office's work and credibility over the past two years, you owe me the professional courtesy of sharing this news, the same professional courtesy I offered you. Later, I found that others in SMV already knew this. It is embarrassing to be "the last to know", after Science Education and Guest Services.

[2] Agency Exhibit 6.

That incident seemed an irritating slight until yesterday afternoon.

Yesterday afternoon, [Ms. LS] told me about her lunch with [Ms. DS]. [Ms. LS] said that [Ms. DS] was assigned to work directly with her to investigate my reports of internal control deficiencies. Her face showed surprise when I said I knew nothing about it. In my judgment, your assigning [Ms. DS] to "go behind my back" shows careless disregard for undermining my relationship with my staff. It is amazing and disturbing that you would pick someone with no state compliance background or any audit experience to evaluate my work given [protected comments by Grievant] and my 22 years of diversified state experience, including DOA oversight, state financial operations and system management, and financial systems consulting.

Taken with past events, these two incidents prove that your limited communication style (described as "cryptic" by another director) is not simply reserve. It also reflects deliberate withholding of information and mistrust. I have been completely open and honest with you at all times. I deserve better.

[Several complaints by Grievant regarding personnel decisions, alleged fiscal malfeasance, alleged mishandling of problems, audits findings, audit comments, internal audit controls, and accounting database.]

As a result of your breach of faith, I may not certify compliance with Phase 2 of Comptroller's Directive [number] by the March 2008 deadline. [Protected comments by Grievant].

My relationship with the Science Museum seems damaged beyond repair. My job search has resumed. Due to my age, experience, and income level, the time required for a thoughtful move is long and cannot be predicted. Meanwhile, I must protect my career and reputation until I am able to change jobs.

The following is not intended to be a threat. It is a clear description of my needs and the consequences of my needs not being honored.

In consideration of my employment, I will continue to perform to the very best of my ability and make as many permanent improvements as possible. I will give you a solid operation that is as efficient as state government and resources allow. Retribution would include (but not limited to) any diminishment of compensation, position, or responsibility, or any change in working conditions or support that I would deem "squeezing me out" or "making me miserable". My copy of this message, I

respectfully ask [Board Member C] to consider extending his assurance that no form of retribution will occur.

If I believe that my livelihood or reputation is in any way threatened by retaliation, I will make this information public -- to elected officials, appointed officials, and the media -- in such widespread fashion that it cannot be suppressed. Such publicity should stretch from [location] to [location].

[Comments by Grievant regarding numerous staff and employee turnover].

Except for this message itself, none of this should surprise you.

My dedication to the Science Museum has damaged my health and my marriage.

I sincerely regret the necessity of this message. Let's handled this quietly for the benefit of all. [Agency Director] deserves a clean slate.

I came here to be part of a team. I am not the ball.

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."[3] 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

State Agencies may not take disciplinary action against employees for engaging in protected activities. To permit such disciplinary action would have the effect of retaliating against the employee.

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 Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right **otherwise protected** by law."[4] (Emphasis added).

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

[4] See Grievance Procedures Manual Section 4.1(b)(4) and Virginia Code § 2.2-3004 (A).

One of the EDR Director's duties includes interpreting the Grievance Procedure Manual. Hearing Officers are obligated to comply with the EDR Director's interpretation of the Grievance Procedure Manual and applicable statutes regardless of whether the Hearing Officer agrees or disagrees with that interpretation. In EDR Ruling 2008-1964, 2008-1970, the Director addressed the following allegation:

> The grievant asserts that she asked her supervisor to reconsider her annual performance evaluation. When her supervisor refused to do so, the grievant asked her supervisor's supervisor (the reviewer) to reassess her evaluation. The grievant asserts that shortly after the reviewer modified her evaluation, her supervisor screamed at her on a number of occasions, called her a liar, and threatened to "write her up" (issue formal discipline).

Virginia Code § 2.2-3000(A) states:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The EDR director concluded:

> Under Virginia Code § 2.2-3000, "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Thus, bringing a concern about an annual performance evaluation to a reviewer would appear to be an act "otherwise protected by law."

The EDR Director has broadly interpreted Virginia Code § 2.2.-3000 to define as protected activities (otherwise protected by law) attempts by employees to freely discuss their concerns with Agency management.

Grievant's email reflects his concerns about how Agency employees are treating him. It also reflects his concerns regarding how the Agency is managing certain functions within his area of expertise and for which he may have reporting obligations to external organizations such as the Department of Accounts. The email is directed to

the Deputy Director, Agency Director, and Board Members.[5] Grievant's email is an attempt to discuss his concerns with his immediate supervisors and management.[6] Thus, Grievant's email is a protected activity under the Grievance Procedure Manual. The Agency may not discipline Grievant for engaging in a protected activity. The disciplinary action against Grievant must be reversed.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

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 **reversed**. The Agency is ordered to **reinstate** Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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.

[5] "Management" includes members of the Board of Trustees of the Agency. The Agency's Board has management duties such as appointing the Director of the Museum and prescribing his duties and salary. It also has responsibility for prescribing rules and regulations for the operation of the Museum. See, Virginia Code § 23-250.

[6] It should be noted that many of Grievant's allegations were unsupported by the evidence. Many of his allegations represented his personal opinions which were disputed and refuted by the Agency. The fact that several of Grievant's allegations were of questionable importance does not undermine the conclusion that Grievant's email was a protected activity.

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

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.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8882-R

Reconsideration Decision Issued: September 15, 2008

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.

Finding of Fact

The Agency contends it placed restrictions on Grievant as specified in Grievant Exhibit 13. In the Original Hearing Decision, the Hearing Officer found:

> The Agency did not place any restrictions on to whom Grievant could send emails.

Grievant testified he considered the email in Grievant Exhibit 13 to be a "gag order" issued by the Deputy Director. The Deputy Director testified that he did not prohibit Grievant from sending emails directly to Board Members.

Upon reconsideration, the Hearing Officer will modify the findings of fact in the Original Hearing Decision to delete the words:

> The Agency did not place any restrictions on to whom Grievant could send emails.

The Hearing Officer will insert the words:

> Although the Agency did not specifically prohibit Grievant from sending emails to Board Members, the Deputy Director instructed Grievant to

comply with the protocol of having the Agency Director communicate with Board Members. Grievant interpreted this instruction as a "gag order".

Attorney's Fees

The Agency contends Grievant should not be awarded attorney's fees because he did not substantially prevail on the merits. It is this Hearing Officer's understanding that the EDR Director interprets the phrase "substantially prevailed on the merits of the grievance" to mean those circumstances in which an employee is reinstated. Accordingly, the Agency's request to prohibit the award of attorney's fees 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 15 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.

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.

S/Carl Wilson Schmidt

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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 Number: 8882-R2

Reconsideration Decision Issued: November 21, 2008

SECOND RECONSIDERATION DECISION

On November 6, 2008, the EDR Director issued Ruling 2009-2128 remanding Case No. 8882 to the Hearing Officer for further consideration. In the Original Hearing Decision, the Hearing Officer applied the standard established by the EDR Director regarding what constitutes protected speech under the Grievance Procedure. As part of this appeal, the EDR Director has further refined that standard and now asks the Hearing Officer to consider that refined standard.

In EDR Ruling 2008-1964, 2008-1970, the Director addressed the following allegation:

> The grievant asserts that she asked her supervisor to reconsider her annual performance evaluation. When her supervisor refused to do so, the grievant asked her supervisor's supervisor (the reviewer) to reassess her evaluation. The grievant asserts that shortly after the reviewer modified her evaluation, her supervisor screamed at her on a number of occasions, called her a liar, and threatened to "write her up" (issue formal discipline).

Virginia Code § 2.2-3000(A) states:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance

> procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The EDR director concluded:

> Under Virginia Code § 2.2-3000, "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Thus, bringing a concern about an annual performance evaluation to a reviewer would appear to be an act "otherwise protected by law."

The EDR Director has broadly interpreted Virginia Code § 2.2.-3000 to define as protected activities (otherwise protected by law) attempts by employees to freely discuss their concerns with Agency management.

> In EDR Ruling 2009-2128, the EDR Director narrowed the protection as follows:
>
> This protection, however, is not without exception. For instance, an employee might still be disciplined for raising workplace concerns with management if the manner in which such concerns are expressed is unlawful (for instance, a threat of violence to life or property) or otherwise exceeds the limits of reasonableness.[8] The limited exceptions to the general protection of employees who raise workplace concerns can only be determined on a case-by-case basis.[9] Further, under analogous Title VII retaliation case law, it is important to note that:
>
> > [a]lmost every form of 'opposition to an unlawful employment practice' [the "protected act" under Title VII] is in some sense 'disloyal' to the employer, since it entails a disagreement with the employer's views and a challenge to the employer's

[8] *Cf.* Equal Employment Opportunity Commission (EEOC) Compliance Manual, Section 8, "Retaliation," at 8-7, at http://www.eeoc.gov/policy/docs/retal.html (protected acts under Title VII must be "reasonable" for the anti-retaliation provisions to apply). While Title VII is not at issue in this case, its retaliation analysis is analogous to other "protected act" retaliation claims.

[9] The agency appears to argue that the Grievant's e-mail was misconduct because it circumvented a "communication protocol" by communicating directly with the Board. Regardless of whether this conduct was actually charged on the Written Notice, the hearing officer found that the Board was part of agency management. Consequently, communication to the Board is conduct generally protected by Va. Code § 2.2-3000 ("employees shall be able to discuss freely, and without retaliation, their concerns with . . . management"). As such, an employee's failure to comply with an agency "communication protocol" barring complaints to management does not constitute "misconduct" and thus would not justify discipline, unless the employee's communication was somehow unlawful or otherwise exceeded the limits of reasonableness.

> policies. Otherwise the conduct would not be 'opposition.' If discharge or other disciplinary sanctions may be imposed simply on 'disloyal' conduct, it is difficult to see what opposition would remain protected.[10]
>
> The same can be said for the ability of an employee to raise their workplace concerns with management, which the General Assembly has protected in Virginia Code § 2.2-3000.

Grievant's email does not threaten or suggest Grievant intended to engage in violence to communicate his concerns or impress upon the Agency the importance of his concerns. The fact that Grievant may have demonstrated a temper and yelled at other staff is not sufficient evidence to show that his email was a precursor to violence. By sending an email, Grievant did not engage in any unlawful behavior. The manner by which Grievant complained to the Board was not beyond the limits of reasonableness. There is no basis to amend the Original Hearing Decision based on the EDR Director's revised standard for protected activity.

The Agency alleges that the Hearing Officer failed to include consideration of the Deputy Director's testimony that the Grievant "was entitled to make reports, such as the ones contained in his e-mail, even if the reports were false."[11] The Agency claims this is a "crucial" fact and if the fact is true, it proves the Agency's termination of the Grievant was not in retaliation for his having engaged in protected activity.

The Agency's assertion is unsupported by the evidence. Grievant was terminated because of the contents of his email. If the Agency had permitted him to send false emails to Board Members, it would not have removed him from employment.

The Agency also appears to argue that the Hearing Officer erred by focusing only on the email and not discussing other alleged prior incidents referenced in the Written Notice for which the Agency states it was also disciplining the Grievant.

Agencies are expected to timely issue disciplinary action following an employee's inappropriate behavior. Agencies may not accumulate separate offensive behavior occurring on different dates into one written notice and then elevate the level of discipline in that one notice because of the accumulation of offensive behavior.[12] The Agency's Written Notice refers to behavior occurring in a time period of over a year. Even if the Hearing Officer were to consider separately the inappropriate conduct and

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[10] Dea v. Wash. Suburban Sanitary Comm'n, 11 F. App'x 352, 363 (4th Cir. 2001) (quoting EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1014 (9th Cir. 1983)).

[11] This language is quoted from the agency's request for administrative review and is not meant to indicate a quote of hearing testimony.

[12] This is not to be confused with situations where agencies may use the accumulation of active written notices to elevate the sanction resulting from the last in the series of written notices.

inappropriate interpersonal skills demonstrated by Grievant over a period of a year, none of them separately rise to the level of a Group III offense.

Upon reconsideration, there is no basis to alter the Original Hearing Decision.

APPEAL RIGHTS

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

1. The 15 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.

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.

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer