Issues: Group II Written Notice (failure to follow instructions), Group II Written Notice (failure to follow instructions), Retaliation and Hostile Work Environment; Hearing Date: 12/19/08; Decision Issued: 12/30/08; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8969, 8970; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 01/08/09; Reconsideration Decision issued 01/09/09; Outcome: Original decision affirmed; Administrative Review: EDR Admin Review Request received 01/08/09; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8969 / 8970

Hearing Date: December 19, 2008
Decision Issued: December 30, 2008

PROCEDURAL HISTORY

On February 11, 2008, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction on January 10, 2008. On February 11, 2008, Grievant received a second Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction on January 17, 2008.

On March 6, 2008, Grievant timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Step for each grievance was not satisfactory to the Grievant and he requested a hearing. On November 3, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 19, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency party Representative
Witnesses

ISSUES

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

2. Whether the behavior constituted misconduct?

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

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

5. Whether the Agency retaliated against Grievant.

6. Whether the Agency created a hostile work environment for Grievant.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. 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:

George Mason University employed Grievant as a Specialist II. The purpose of his position was:

> To provide administrative assistance to the Assistant Deans. To serve as liaison to the adjunct faculty. Assemble and maintain instructional files & related materials. To provide administrative support to the Dean, full time, and adjunct faculty including student evaluation materials/reports, enrollment statistics, and document preparation. Maintain supply inventory. To provide general administrative support to the division.[1]

Grievant reported to the Dean. Adjunct faculty reported to the Dean. Grievant had no supervisory reporting relationship with the adjunct faculty.

An adjunct faculty member, Ms. K, was unable to attend and teach her class on September 6, 2007. Grievant mistakenly believed that it was inappropriate for Ms. K to be paid for a class she did not attend in person. Ms. K reported to the Dean and had made arrangements to ensure that Agency policies were followed.

On September 28, 2007, Grievant sent the Dean an email stating:

[1] Grievant Exhibit 1.

> Is double dipping a crime in the State of Virginia. If someone is being paid to be at one job then goes to another job and is paid for that job at the same time are they committing a fraud? Do adjuncts have an obligation by contract to go to class or make arrangements to have someone cover their class if they cannot?

Grievant sent a copy of his email to Ms. K. Ms. K was offended by Grievant's email because she inferred Grievant was suggesting she had engaged in a crime. Ms. K complained to the Dean and indicated she would not enter the office area where Grievant worked again in order to avoid contact with Grievant.

On October 11, 2007, the Dean met with Grievant to discuss his email to Ms. K. The Dean informed Grievant that he was not responsible for monitoring the leave of adjunct faculty. She told him he should follow the proper chain of command when dealing with faculty. She told him it was not his job to email faculty about his concerns regarding their work. The Dean told Grievant that he should bring his concerns about adjunct faculty directly to her instead of to others in the Agency.

On October 11, 2007, the Dean sent Grievant an email stating:

> I just want to be sure everything is clear from our discussion this morning. First of all, do you agree to comply with the College's policy on computer use and ethics? Secondly, when concerns arise regarding faculty or adjunct faculty, do you agree to go through the property channels by forwarding those concerns directly to me or the appropriate assistant dean?

A few minutes after the Dean sent her email to Grievant, Grievant replied "Yes."

On January 10, 2008, Ms. D, an adjunct faculty member sent Grievant an email stating:

> I have the incomplete grade forms; I'm gathering you need the White copy only, correct? If yes can I scan the forms and email them to you? This would be easier for me. Thanks

Grievant replied:

> We need both copies so that they can [be] properly approved and then an approved copy is [kept] in the office and one in the Records department. Then if you need a copy we can make a copy for you. Since there [have] been so many issues with your students and their grades it is more important that you follow the appropriate procedures and we maintain the proper records. I added [a] return postage paid envelope in the package.

Ms. D was offended by Grievant's email and replied to Grievant with a copy to the Dean:

> OK understand that there has not been "so many issues with my students and grades." 5 students completed the final exam after the term end due date due to the switch in Blackboard[2] and I have been in touch with those students and with the Dean about this issue working overtime to assure these students needs are met despite the technology problems they experienced of which I had no control.
>
> Your email makes it sound like I've had issues with student grades in the past and that these issues are of my doing. This is not accurate and I really don't appreciate that statement. I will send the forms tomorrow. Thank you for your time and help.

The Dean considered Grievant's email to be contrary to her instruction to him to bring first his concerns directly to her.

On January 17, 2008, the Human Resource Director sent Agency staff including Grievant an email regarding "Leave Roll over Announcement." The email stated, in part:

> Please feel free to contact HR via the leave Inquires email address if you have any questions or concerns regarding your leave records. After 1/22/08, human resources will be able to rollover the leave balances to give the provisions for the new leave year, 1/10/2008 – 1/09/2009. These leave balances will be available for view by the end of the month.

Grievant responded:

> Since we have had a few faculty members call in today and cancel their classes and office hours are they required to take leave? Is there a college policy when faculty and staff decided not to work when the college is open and taking leave?

The HR Director replied:

> I suggest you speak with their supervisors, since we do not know what type of arrangement has been made, if any. College policies do state that employees not reporting to work should use leave, however, supervisors have the right to flex employees work hours.

Grievant responded:

> Thanks. I will contact the fraud, waste and abuse hotline and relay your comments and the incidents reported to you for investigation.

The HR Director replied:

[2] Blackboard is an educational software program used by the Agency.

> I don't think you have any information to contact anybody relative to fraud. You asked me a question, and I gave you a general answer, based on policies. I also told you that supervisors had the authority to flex employees' work schedule.
>
> You, therefore, have no knowledge of arrangements that could have been made between employees and their supervisor, so you have no specific information to determine if there is any wrong, much less anything to report. Please do not take it upon yourself to monitor faculty work hours. This is the job of the Deans. If you believe there is something out of place, you need to speak with the Dean.

The Dean considered Grievant's email to the HR Director to be contrary to her instruction because Grievant was raising his concerns about faculty leave with an employee other than the Dean.

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."[3] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Failure to follow a supervisor's instruction is a Group II offense. On January 10, 2008, Grievant sent an email to an adjunct faculty member, Ms. D, expressing his opinion that she had many issues regarding her students and their grades. His email offended Ms. D and was contrary to the Dean's instruction to him to bring his concerns with faculty directly to her rather than to the faculty members. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice regarding Grievant's January 10, 2008 email.

On January 17, 2008, the HR Director invited questions from employees about their leave. Instead of asking about his own leave, Grievant asked the HR Director about whether faculty who have cancelled classes must take leave. He indicated his concerns related to fraud and abuse by faculty members. Grievant acted contrary to the Dean's instruction because he had a concern about faculty leave practices and brought his concern to the HR Director rather than first to the Dean. The HR Director was not the Agency's investigator. She had no Agency responsibilities that would have overridden the Dean's instruction. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice regarding his January 17, 2008 email to the HR Director.

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

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…."[4] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[5] (2) suffered a materially adverse action[6]; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.[7]

Grievant engaged in protected activities by contacting the State Fraud, Waste and Abuse Hotline. He suffered a materially adverse action because he received disciplinary action. Grievant, however, has not established that the disciplinary action taken against him was the result of his protected activity. When the Dean decided to issue the first written notice, she was not aware Grievant had contacted the State Fraud, Waste and Abuse Hotline. When she decided to issue the second written notice

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[4] *Va. Code § 2.2-3005.*

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

[6] On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

[7] This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

she did so because Grievant had again disregarded her instructions. The Agency did not retaliate against Grievant.

Grievant contends he was subject to a hostile work environment. DHRM Policy 2.30 governs Workplace Harassment. It defines a hostile work environment as:

> **Hostile environment** – A form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

Grievant has presented no credible evidence to support his assertion that the Agency created a hostile work environment for him or that the Agency's disciplinary action against him.

Grievant contends his email to the HR Director was part of his investigation into fraud which he had reported to the State Employee Fraud, Waste and Abuse Hotline. He contends his activities were protected by General Order 12. General Order 12 prohibits retaliation against callers to the Hotline, it does not authorize employees to conduct their own investigations into fraud and disregard a supervisor's instructions.

Grievant resigned from his position subsequent to the issuance of the two written notices. He seeks reinstatement. The Department of Employment Dispute Resolution assigned two grievance cases to the Hearing Officer. Neither of those grievances involved his reinstatement from a resignation. The Hearing Officer does not have jurisdiction to address Grievant's resignation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of two Group II Written Notices of disciplinary action 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
600 East Main St. STE 301
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.[8]

[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

[8] 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: 8969 / 8970-R

Reconsideration Decision Issued: January 9, 2009

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.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant raises the same arguments he raised during the hearing as part of his request for reconsideration. Grievant argues the first act of retaliation was when he contacted Ms. K. The evidence showed that the Dean did not take disciplinary action regarding Grievant's email to Ms. K. She only gave him an instruction after his offensive email to Ms. K. The Dean was authorized by her position to instruct Grievant regarding his use of email.

Grievant argues the Dean testified her intent was to prevent Grievant from reporting information to the State Fraud, Waste and Abuse Hotline. The Hearing Officer finds that the Dean did not testify as Grievant contends. There is no credible evidence

to believe the Dean took action against Grievant in order to discourage him from filing claims with the State Fraud, Waste and Abuse Hotline.

Grievant argues he sent his email to the HR Director in order to report fraud and abuse to her. The HR Director had no responsibility for investigating fraud. There is nothing in the HR Director's email to Grievant and other staff suggesting she was soliciting information about fraud at the University. Grievant did not report any specific instances of fraud to the HR Director. The most appropriate interpretation of Grievant's email is that he was informing the HR Director of his intent to report fraud to the State Fraud, Waste and Abuse Hotline.[9] It was unnecessary for Grievant to inform the HR Director that he was reporting fraud to the State Fraud, Waste and Abuse Hotline. In short, Grievant was letting someone outside of his chain of command know that he had unspecified concerns about fraud at the Agency.

The Dean testified that she did not issue the disciplinary action in order to retaliate against Grievant for engaging in any protected activity. The Hearing Officer finds her testimony credible. She took disciplinary action against Grievant because she gave him an instruction and he violated that instruction on two occasions. The Agency did not retaliate against Grievant.

Grievant contends the Agency engaged in workplace harassment.[10] DHRM Policy 2.30 defines workplace harassment as being based on race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability. Grievant has presented no credible evidence to show that the Agency took action against him because of his race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability. Grievant alleged that several other employees treated him poorly. He did not allege or show that what he considered poor treatment resulted from a protected status. The Agency did not engage in workplace harassment.

The Hearing Officer has no authority to grant relief for an issue not qualified for hearing. Grievant's resignation was not an issue qualified for hearing.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied.**

APPEAL RIGHTS

[9] Indeed, letting the HR Director know that Grievant was reporting fraud to the State Fraud, Waste and Abuse Hotline seems counter to Grievant's claim that he was concerned about Agency retaliation. Someone who feared Agency retaliation would not normally go out of his way to announce his protected activities.

[10] This claim appears to be directed towards the reasons for his resignation. Grievant's resignation was not an issue qualified as an issue before the Hearing Officer.

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.

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Carl Wilson Schmidt, Esq.
Hearing Officer