Issue: Group III Written Notice with Termination (threatening a coworker); Hearing Date: 05/09/11; Decision Issued: 05/10/11; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9571; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 05/25/11; Reconsideration Decision issued 05/31/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 05/25/11; EDR Ruling No. 2011-2997 issued 07/29/11; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 05/25/11; DHRM form letter mailed 05/31/11 – declined to review.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9571

Hearing Date: May 9, 2011
Decision Issued: May 10, 2011

PROCEDURAL HISTORY

On February 22, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for threatening a coworker.

On March 2, 2011, 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 18, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 9, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Witnesses

ISSUES

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

2. Whether the behavior constituted misconduct?

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

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

BURDEN OF PROOF

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

Old Dominion University employed Grievant as an Administrative Assistant. She had been employed by the Agency for approximately 13 years. Except with respect to the facts giving rise to this grievance, Grievant's work performance was otherwise satisfactory to the Agency. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to the Supervisor. On February 3, 2011, Professor B sent the Supervisor an email stating "Something has been brought to my attention that I think I need to bring to your attention, may I speak privately with you tomorrow before or after the faculty meeting?" Professor B sent the Supervisor copies of some emails between Grievant and several Graduate Assistants studying at the Agency.

On February 4, 2011, the Supervisor met with Professor B. Professor B told the Supervisor that the Graduate Assistants were greatly troubled by Grievant's interference with their work. On the prior day, one of the Graduate Assistants left work in tears because she could not handle the pressure caused by Grievant anymore. The Supervisor communicated with several Graduate Assistants who confirmed their concerns as reported by Professor B. The Supervisor sent an email to Grievant asking her to arrange a meeting to discuss the concerns of the Graduate Assistants. Grievant went to the Supervisor's office and said that she did not like the idea of a meeting with the Graduate Assistants and said that she would not attend such a meeting. The meeting was scheduled for Tuesday, February 8, 2011.

On February 7, 2011, Grievant went to the Supervisor's office. Grievant said that she was in a bad mood. She asked the Supervisor how he was going to run the meeting, and suggested the way the meeting should be run. When the Supervisor told her that he did not need her advice on how to run a meeting, Grievant became upset. She said that she felt that she was going to be "beaten up" in that meeting. She said that she does not understand why people should not bring guns on campus when they feel that they need to protect themselves; she talked about her collection of guns and how good she was at guns. Grievant said that her handgun is always loaded, just in case she needs to protect herself. She told the Supervisor "I just want to help you. I do not want you and I to have an adversarial relationship. But it looks like that you do not need my help. I do not think you need my help; you are an intelligent man; you do not need my help." Grievant "stormed out" the Supervisor's office.

On February 8, 2011, the Supervisor met with the Graduate Assistants. Grievant attended the meeting. Several Graduate Assistants expressed concern about how Grievant had been interfering with their work. Grievant and several faculty members also spoke during the meeting. The Supervisor concluded that the meeting went well. The Supervisor assured the students that the Agency was committed to providing them with the best educational experience possible and that he would follow up on their expressed concerns.

On February 8, 2011 and approximately 3:30 p.m., the Supervisor called Grievant into his office to discuss the meeting. He told Grievant that he expected her not to interfere with the Graduate Assistants work anymore. Grievant said that sometimes in the Supervisor's interactions with her, she feels the need to protect herself. Grievant also said that she is a big girl and that she can protect herself. The Supervisor told her that what she had just said was very troubling and that he will have to report it to be Dean and Human Resources. The Supervisor later reported Grievant's comments to the Dean and to Human Resource staff.

After meeting with Grievant, the Supervisor pondered Grievant's comments and concluded that by referring to guns and the need to protect herself she was threatening him. He worked from his home for four days instead of working in the office because he feared Grievant. He asked the Agency Police to have a police officer stationed outside of his home for several days.

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."[1] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include

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

acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"[T]hreatening others" is a Group III offense. The context of Grievant's comments shows that she threatened the Supervisor. The Supervisor was speaking to Grievant regarding her interaction with the Graduate Assistants. The Supervisor did not address the issue of Grievant possessing guns or the Agency's policy regarding possession of guns on campus. The Supervisor did not make any statements that would have triggered a discussion of guns. Grievant stated that based on her interactions with the Supervisor, sometimes she felt the need to protect herself. Grievant talked about possessing guns and said that she was able to handle guns. Grievant said that she did not understand why people should not bring guns on campus when they feel the need to protect themselves. Although not expressly articulated, the message that Grievant conveyed to the Supervisor was that she was capable of using guns and that she considered it appropriate to bring a gun on campus when she felt the need to protect herself from the Supervisor. The Supervisor reasonably construed Grievant's comments as a threat. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action for threatening another employee.[2] Upon the issuance of a Group III Written Notice, an Agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that she did not discuss guns during her conversation with the Supervisor. She argued that the only discussion of guns occurred several weeks earlier during a faculty meeting to discuss the Agency's policy prohibiting individuals from bringing guns on campus. Although Grievant called other witnesses, she did not testify. The Supervisor testified regarding Grievant's comments during their meeting. His testimony was credible. There exists sufficient evidence to support the Agency's assertion that Grievant threatened the Supervisor.[3]

Grievant argued that the Agency failed to protect her from the Supervisor. When Agency staff asked her why she felt she needed protection from the Supervisor, she stated she had witnessed the Supervisor become angry with her while she was near him and she did not know what he might do. No credible evidence was presented to support the accuracy of Grievant's opinion that she needed protection from the Supervisor. To the extent her opinion was accurate, threatening the Supervisor was not an appropriate response.

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[2] One could argue that Grievant's expression of her concerns to her supervisor was protected speech. To the extent Grievant's discussion with the Supervisor was protected speech not subject to disciplinary action, it was not protected with respect to the threat she made to the Supervisor.

[3] Grievant sought certain documents from the Agency's threat assessment team. The Hearing Officer issued a revised order of production and the Agency complied with that order. There is no reason to believe that the Agency has withheld any documents that would have formed a basis to reverse or reduce the disciplinary action.

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

Grievant presented evidence that on February 15, 2011, Professor S told Professor Z that she did not feel safe and would take measures to protect herself. Grievant argued that because Professor S was not removed from employment, Grievant should not have been removed from employment. The key difference between the behavior of Grievant and the behavior of Professor S is that Professor S did not mention guns or indicate that she intended to take any unlawful or unreasonable measures to protect herself. Guns are weapons. Professor S did not mention the need to use a gun to protect herself from another employee.

In light of the standard set forth in the Rules, 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

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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.

causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.[7]

The Hearing Officer will assume for the sake of argument that Grievant engaged in protective activity. Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established a causal link between her protective activity and the disciplinary action. Grievant did not receive disciplinary action for engaging in protective activity; she received disciplinary action for threatening the Supervisor.

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

[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).

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: 9571-R

Reconsideration Decision Issued: May 31, 2011

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.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Grievant has not provided copies of any documents that she considers to be new evidence. The requesting party simply restates the arguments and evidence presented at the hearing. For this reason, the 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 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

May 31, 2011

[Grievant]

RE: **Grievance of [Grievant] v. Old Dominion University**
Case No. 9571

Dear [Grievant]:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to 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.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In our opinion, your request does not identify any such policy. Rather, the policy you identified is §5.8 of the Grievance Procedure Manual, Rules for Conducting Grievance Hearings. The Department of Employment Dispute Resolution administers the Grievance Procedure. As such, the Department of Human Resource Management has no authority to review the issues you raise and therefore must respectfully decline to honor your request.

Sincerely,

Ernest G. Spratley