Issue: Group III Written Notice with Termination (failure to follow instructions); Hearing Date: 08/28/13; Decision Issued: 09/12/13; Agency: GMU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10142; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 09/27/13; EDR Ruling No. 2014-3722 issued 10/22/13; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 09/27/13; DHRM Ruling issued 10/30/13; Outcome: Remanded to AHO; Remand Decision issued 10/31/13; Outcome: Reduced discipline and employee reinstated.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10142

Hearing Date: August 28, 2013
Decision Issued: September 12, 2013

PROCEDURAL HISTORY

On June 24, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for a serious offense.

On July 5, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 29, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 28, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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?

5. Whether the Agency retaliated against 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 an HVAC Senior Technician. The purpose of his position was:

> Under minimal supervision, the employees perform journey level work on University HVAC systems and equipment. This work includes the installation, modification, maintenance, and repair as required. Work is done using necessary hand tools and testing equipment. Employees analyze HVAC systems and controls to determine problems and initiates repairs as directed by supervisor. This position will serve as primary or backup (for after hours coverage) HVAC Technician for the Biomedical Research Laboratory and must meet all conditions of employment per BRL requirements.[1]

[1] Agency Exhibit 10.

Grievant had been employed by the Agency for approximately three years prior to his removal. No evidence of prior active disciplinary action was introduced during the hearing.

The Biomedical Research Laboratory (BRL) is a building containing laboratories designed to enable researchers to conduct tests involving highly toxic and dangerous pathogens. The building is surrounded by a fence. Entry into the building is restricted and closely monitored. The building has steam boilers, fan systems, humidifiers, and air handlers similar to those found in many hospitals. It is essential to the Agency that the HVAC equipment in the building works properly. If HVAC equipment is not working properly, the organisms being tested could escape the laboratories and harm others. In order to work in the BRL, an employee must receive training and then be certified in the Select Agent Program.

Under the Agency's Policy DOC# 6.004 policy governing Enrollment in the Select Agent Program:

> All personnel who work in the containment suite of the BRL are considered to have access or the potential to access select agents and toxins. Therefore, these individuals must be enrolled in George Mason University's Select Agency Program and have approval from the Department of Health and Human Services upon completion of a Security Risk Assessment (SRA) conducted by the Department of Justice or be escorted at all times within the containment suite by an SRA Approved individual.[2]

On October 5, 2011, Grievant sought enrollment in the Select Agent Program. Grievant completed the required training. On November 9, 2011, the U.S. Department of Health and Human Services granted its approval for Grievant's access to select agents and/or toxins.

Grievant's work assignments were divided between the Agency's academic buildings and the BRL. Approximately 50% of Grievant's time was to be devoted to completing assignments at the BRL. To complete his assignments at the BRL, Grievant had to pass through the secured fence and doors to the BRL.

Grievant was provided several keys to open doors as part of his work duties. One of those keys could be used to open doors at the BRL. Grievant was provided with two badges. One of the badges related to his duties as an employee of George Mason University. The second badge enabled Grievant to enter the BRL building by swiping the badge at the appropriate secured door.

On January 30, 2013, Grievant signed the BRL Code of Conduct for Personnel Enrolled in the Select Agent Program. The Code enumerated several responsibilities

[2] Agency Exhibit 14.

for employees enrolled in the program including, "Comply with requirements of the Select Agent Program and Personnel Suitability Program."[3]

On February 18, 2013, Grievant sent an email to Mr. O regarding the BRL Code of Conduct. Grievant said he "signed it under duress" because he was told by a supervisor that if he did not comply he would not have a job. The Biosafety Manager with the Agency's Environmental Health & Safety Office became concerned about Grievant's demeanor that could affect his job performance. She and the BRL Facility Director agreed that the BRL Facility Director would monitor Grievant over the next several weeks and report any issues or concerns about Grievant to the Biosafety Manager.

On April 15, 2013, Grievant entered the BRL and approached the BRL Facility Director. Grievant gave the BRL Facility Director his key for use in the BRL and his badge enabling him access to the BRL. Grievant told the BRL Facility Director that he was no longer going to work at the BRL. Grievant did not intend to resign from the Agency. He retained his keys to other buildings on the Agency's campus and retained his badge giving him access to parts of the campus other than the BRL.[4] Grievant left the BRL and began working on projects in the other part of the Agency's campus.

Upon learning that Grievant had refused to work at the BRL, the Agency's Suitability Committee reviewed Grievant's actions and concluded Grievant's enrollment in the Select Agency Program was no longer appropriate. On April 25, 2013, the Executive Director of the National Centers for Biodefense and Infectious Diseases and the Biosafety Manager drafted a memorandum to the Associate Director of Personnel and Administration advising the Agency that Grievant "is no longer eligible to participate in the Select Agency Program at the BRL and his access to the BRL is restricted."[5]

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."[6] 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."

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[3] Agency Exhibit 20.

[4] Grievant's objective was to force the Agency to address his safety concerns.

[5] Agency Exhibit 23.

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

Failure to follow a supervisor's instructions and leaving work without permission are Group II offenses. On April 15, 2013 and thereafter, Grievant's work location was the BRL building depending on the Agency's needs. Grievant took his BRL key and BRL badge and gave them to the BRL Facility Director. Grievant announced that he would no longer work at the BRL. Grievant had been instructed by a supervisor to work in the BRL to complete maintenance assignments. The effect of Grievant's action was to leave his assigned work place and disregard a supervisor's instructions regarding where he was expected to work. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Attachment A, DHRM Policy 1.60 provides, in part:

> [I]n certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.)

When Grievant refused to work in the BRL, the Agency experienced a unique impact sufficient to elevate the Group II offense to a Group III offense. Because of Grievant's actions, the Agency's Suitability Committee recommended and the Executive Director for the National Centers for Biodefense and Infectious Diseases and the Biosafety Manager approved Grievant's removal from the Select Agency Program. Even if Grievant changed his mind and agreed to resume working at the BRL, Grievant could not do so. In the event Grievant were reinstated, he would not be able perform approximately 50 percent of his job assignments. This would create a significant impact on the Agency's operations.

Although it is possible that the Suitability Committee, Executive Director, and Biosafety Manager could agree to restore Grievant's enrolment in the Select Agent Program, this outcome is not a foregone conclusion.[7] The decision to remove Grievant from the program is understandable. An employee who does not wish to work in the BRL may pose a greater risk of causing an incident in the BRL than an employee who has no objection to working in the BRL.

Grievant's position was created in part because of the Agency's construction of the BRL. Grievant had been working a portion of his day at the BRL for several years. The Agency had the authority to determine where Grievant worked on the Agency's

[7] Grievant pointed out that the committee did not speak with him prior to concluding he was no longer eligible. Grievant did not present a policy that would require the committee to speak with an individual prior to removing his enrollment. Section 3.2 of Document 6.016 provides that the Responsible Official "[m]akes decisions to enroll, disenroll, or terminate access for individuals in consultation with the Director, the Sustainability Committee, and the [Certifying Official.]". See Agency Exhibit 15.

campus. Grievant did not have the right to reject the Agency's instruction that he work at the BRL.[8]

Grievant argued that working at the BRL was unsafe because he lacked the appropriate training and equipment. The evidence showed that on February 28, 2013 Grievant asked for certain safety equipment. The Agency ordered the equipment on March 8, 2013 and made available to Grievant a few weeks later. The evidence also showed that Grievant was a licensed Master HVAC Mechanic and possessed the required knowledge, skills, and abilities to perform safely his assignments in the BRL.[9] To the extent, Grievant may have had questions about boilers and other mechanical equipment, the BRL Facility Director had ample experience and knowledge that he could share with Grievant. Grievant pointed to a January 11, 2013 review of the BRL by the Facility Safety Coordinator in which he observed safety problems. The Agency showed that it addressed those problems promptly and appropriately. Grievant has not established that working in the BRL posed an unreasonable risk to his safety such that he could reject the Agency's instruction that he work at the BRL.

Grievant argued that the Agency failed to provide him with due process of law. Grievant complained that the Agency failed to provide him with proper notice of why he was being issued a Group III Written Notice with removal. He argued that the Agency failed to provide him with a proper hearing prior to his removal.

Procedural due process is not measured solely at the point in time when the Agency took disciplinary action. Once Grievant appealed his removal, he had the opportunity to present any relevant documents or witness testimony to the Hearing Officer for consideration. He was free to present information to the Hearing Officer that was otherwise rejected by the Agency to the extent it failed to provide procedural due process. In short, the hearing process has cured any defect in the procedural due process afforded to the Grievant by the Agency.

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 Human Resource Management …."[10] 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

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8 Grievant argued that the Agency changed his Employee Work Profile without his consent. State policy does not require an agency obtain the permission of an employee before changing that employee's work profile.

9 Grievant asked for training such as a D.C. Third license training. That license was not required in Virginia for Grievant to perform his duties. It was not essential training for Grievant to perform his duties.

10 Va. Code § 2.2-3005.

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 contends the disciplinary action should be mitigated based on the inconsistent application of disciplinary action. Grievant has not established this allegation. The evidence showed that another employee working in the BRL wanted to be transferred out of the BRL and his transfer was granted. The reason the transfer was granted was because another employee wanted a transfer to the BRL to be closer to her home. The Agency decided to let the employees switch positions. The first employee did not refuse to work at the BRL and turn in his key and badge as did Grievant. Grievant and the first employee are not similarly situated. The Agency did not apply disciplinary action inconsistently. 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;[11] (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 employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment 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.[12]

Grievant argued that he was involved in grievances in which he took positions that were objected to by several of his supervisors. Grievant has not established a connection between his protected behavior and the Agency's disciplinary action. Grievant's decision to turn in his keys and badge was his own and not at the initiative of any Agency employee. The level of disciplinary action appears to have been determined primarily by the Associate Director of Personnel and Administration who was not involved in objecting to any of Grievant's protected activity. The Agency did not retaliate against Grievant.

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[11] 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.

[12] 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).

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 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

   or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

   Office of Employment Dispute Resolution
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

   or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.[13]

[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

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

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

RECONSIDERATION DECISION OF HEARING OFFICER

In re:

Case No: 10142-R

Reconsideration Decision Issued: October 31, 2013

The Department of Human Resource Management issued a Policy Ruling on October 30, 2013 remanding the decision to the Hearing Officer because:

> It is unclear, however, if and how his refusing to work in the BRL had any "unique impact" on the agency's ability to carry out its overall mission. This is especially true because he performed other HVAC duties before and after he worked in the BRL. This Agency cannot determine if the evidence supports that the grievant refusing to work in the BRL rises to the level of a Group III Written Notice with dismissal. We therefore remand this case to the hearing officer and request a more thorough explanation as to how the evidence supports that the grievant's behavior has such a "unique impact" on the agency in executing its mission that it warranted a Group III Written Notice with dismissal.

As part of the Original Hearing Decision, the Hearing Officer explained that the unique impact was:

> When Grievant refused to work in the BRL, the Agency experienced a unique impact sufficient to elevate the Group II offense to a Group III offense. Because of Grievant's actions, the Agency's Suitability Committee recommended and the Executive Director for the National Centers for Biodefense and Infectious Diseases and the Biosafety Manager approved Grievant's removal from the Select Agency Program. Even if Grievant changed his mind and agreed to resume working at the BRL, Grievant could not do so. In the event Grievant were reinstated, he would not be able perform approximately 50 percent of his job assignments. This would create a significant impact on the Agency's operations.

There is no more thorough description of the unique impact to provide than what was written above. The Hearing Officer construes the DHRM Policy Ruling to mean that the description provided is not sufficient to establish a unique impact on the Agency. There is no basis to elevate the Group II Written Notice to a Group III Written Notice. Accordingly, the Group III Written Notice must be reduced to a Group II Written Notice. It is likely the Agency would have issued a suspension had the Agency chose to issue a Group II Written Notice and, thus, the Hearing Officer will impose a ten workday suspension.

For the purpose of clarification,[14] the Hearing Officer will address why the Group III was not a Group III as alleged by the Agency (without considering elevation). DHRM Policy 1.60 lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section." The Agency initially chose to issue a Group III Written Notice based on the severity of the offense. Failure to follow a supervisor's instructions[15] and leaving work without permission are enumerated offenses and are enumerated as Group II offenses. Because Grievant's behavior constituted enumerated Group II offenses, it was not appropriate to designate his behavior as a Group III offense under the "not all-inclusive" provision of the Standards of Conduct.

ORDER

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group II Written Notice with a ten workday suspension. The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent 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. The Agency may account for the ten workday suspension when determining the appropriate amount of back pay.[16]

APPEAL RIGHTS

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

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[14] See footnote 11 of EDR Ruling No. 2014-3722.

[15] Grievant's behavior can also be described as insubordination which is enumerated as a Group II offense.

[16] Grievant was represented by an attorney but not one who is licensed in Virginia. Accordingly, the Hearing Officer will not award attorney's fees.

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 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