Issues: Group II (failure to follow instructions), Group II (failure to follow instructions), Termination (due to accumulation) and Retaliation (grievance activity participation); Hearing Date: 09/22/14; Decision Issued: 10/10/14; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10422, 10423, 10447; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 10/25/14; EDR Ruling No. 2015-4027 issued 11/17/14; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 10/25/14; DHRM Ruling issued 11/25/14; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10422 10423 10447

Hearing Date: September 22, 2014
Decision Issued: October 10, 2014

PROCEDURAL HISTORY

On April 17, 2014, Grievant was instructed to participate in a fitness for duty evaluation. He filed a grievance on April 25, 2014 to challenge the Agency's instruction.

On May 28, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failing to follow the instruction to attend a fitness for duty evaluation. Grievant filed a grievance to challenge the Group II Written Notice on June 17, 2014.

On July 14, 2014, Grievant was issued a second Group II Written Notice for failure to follow an instruction to attend a fitness for duty evaluation. He was removed from employment based on the accumulation of disciplinary action. On August 5, 2014, Grievant filed a grievance to challenge the second Group II Written Notice with removal.

The Office of Employment Dispute Resolution issued Ruling Number 2015-3968 to consolidate the three grievances for one hearing. On August 19, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 22, 2014, 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 Notices?

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. Grievant has the burden of proof with respect to his grievance challenging the Agency's instruction. 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 Information Technology Specialist II. Grievant was employed by the Agency for approximately four and a half years prior to his removal effective July 14, 2014. Grievant was one of five employees reporting to the Supervisor.

Grievant's position had seven core responsibilities: (1) Acquire, Apply and Pass on Knowledge, (2) Project Management, (3) TSP Assistant for CBPA Computing Environment, (4) Asset Management and Resource Planning, (5) Technical Support for IT Area Computing Environment for Teaching and Research Purpose, (6) LAN Administration, and (7) Support for Open Learning Environment.

One of Grievant's University/Departmental Objectives was "Customer Relations." A measure of this was:

> Ability to communicate clearly and effectively to provide excellent customer service support with a "can-do attitude" to the Faculty, Staff, and students within the College of Business. Compliance with the ODU Code of Ethics and Service Standards are reflected in all activities related to the performance of assigned work and all interactions with faculty, staff, students, and the public.[1]

In the Fall of 2011, the Supervisor began requiring Grievant and another employee, Mr. B, to send the Supervisor with daily emails indicating arrival and departure times and to provide a list of work projects.

On November 18, 2011, Grievant filed a grievance claiming he received an arbitrary performance evaluation. Grievant filed the grievance because the Supervisor rated him as "Below Contributor" in the core responsibility of Technical Support for IT Area Computing and the departmental competency of Customer Relations.

The Supervisor responded to the grievance by staying, in part:

> Communication is a necessary item in every part of this position's responsibility that requires interaction with others. It is an implicit requirement of this responsibility. Without proper communication between this position and the individuals that this position supports inefficiencies will occur that eventually result in lower support for students, faculty, and other constituents. ***
>
> [Dr. K] who uses the labs heavily for teaching has not communicated with you for a very long time, maybe a year or longer. Every time he needs changes made in the lab he sends the changes to me. I have become an intermediary between him and you, something that I had never done before in my 28 year tenure at ODU, serving as a teaching faculty department chair, and now associate dean.[2]

On January 6, 2012, Grievant filed a grievance alleging "retaliation by immediate supervisor for exercising grievance process and FOIA rights."[3] Grievant attached an email to his grievance as evidence of the grievance. The email showed that on December 20, 2011 Dr. X on behalf of Dr. K submitted a request for software and lab configuration for the Spring 2012 semester. The Supervisor instructed Grievant to notify Dr. K and Dr. X when he had finished the work. Grievant told the Supervisor that the

[1] Grievant Exhibit 5.

[2] Grievant Exhibit 12.

[3] Grievant Exhibit 13.

request was "essentially a month late which makes it impracticable for the start of the next term. I'm currently working on the other timely request during these last two workdays of this term." The Supervisor told Grievant the request was of higher priority and to work on the request. Grievant questioned why it was a higher priority. The Supervisor replied that he was "not judging the request that faculty makes to be able to do their job. They have asked for it and we need to provide it."[4]

On February 8, 2012, Grievant filed a grievance alleging "retaliation by immediate supervisor for exercising grievance process and FOIA rights."[5] Grievant attached part of the same email he attached to his January 6, 2012 Grievance and added another email showing Grievant presented information to Dr. X. The second email also showed the Supervisor asking Dr. K and Dr. X to "check and let [Grievant] know if the items that are market as completed by [Grievant] meet your specification." Dr. X replied that some of the items were not completed as requested.

Grievant agreed to combine his January and February 2012 grievances. The Provost concluded that the Supervisor acted within the scope of his supervisory responsibilities and that the requests were not retaliatory.

The emails attached to Grievant's January 6, 2012 and February 8, 2012 grievances reveal Grievant's resistance to being supervised. They do not indicate any retaliation by the Supervisor.

On June 14, 2012, Grievant filed a grievance alleging "hostile work environment, condonation and/or collusion by management."[6] Grievant attached emails to support his allegations. The emails showed that Grievant sent an email request to Dr. K on May 14, 2012 asking "[w]ould you please send me a copy of the IT classes schedule, please." When Dr. K did not reply to Grievant, Grievant asked the Supervisor for assistance. The Supervisor asked Dr. X to provide Grievant with the summer teaching schedule. Dr. X replied that based on a previous agreement all lab schedules were to be handled by Dr. K. Grievant sent the Supervisor an email stating:

> In the past, when [Dr. K] would not respond to my e-mail or provide needed information, you would promptly send him [an] e-mail directing him to do so. Why in this case, you send repeated, indirect requests through [Dr. X] is unusual, to say the least. This has begun to smack of collusion and a deliberate effort to interfere with and delay my work in the labs. Must I do more than ask to get information I need to do my work?

The Supervisor replied:

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[4] Grievant Exhibit 13.

[5] Grievant Exhibit 14.

[6] Grievant Exhibit 15.

> As you have noticed from the emails I have been forwarding to you recently, [Dr. K] has been sending his emails to [Dr. X] who in turn has been forwarding [Dr. K's] email to me to forward to you. Because of this, I have forwarded your emails to [Dr. X] to forward to [Dr. K.] This was just a logical pattern that we used. There was no need for you to accuse me or anyone else about a 'smack of collusion and deliberate effort to interfere with and delay (your) work in the labs.' All you needed to do was to send me the same email you sent me below, replacing the last two sentences with a sentence asking me to send the email direct to [Dr. K.]
>
> You definitely made a baseless accusation in your email, below. [7]

On July 13, 2012, Grievant filed a grievance alleging "retaliation and collusion by immediate supervisor for exercising grievance rights."[8] Grievant attached an email from Dr. X dated December 20, 2011 which he had attached to prior grievances. He attached an email dated June 14, 2012 in which the Supervisor asked Grievant about the status of installing new machines in the labs. He also attached an email from Dr. K to the Supervisor regarding Dr. K's software and lab request for the Spring of 2012. The Supervisor forwarded the email to Grievant and asked Grievant to "prepare the image by July 20 to be ready for [Dr. K's] test." Grievant sent the Supervisor an email dated June 15, 2012 stating:

> As we've discussed this in my office, my understanding of our conversation is that you will change the long-established procedures that [Dr. K and Dr. X] have repeatedly ignored. Though those procedures have worked well for all the other departments that use the labs, and for the other IT instructors, as well, you will change them based on complaints from two professors who have demonstrated hostility toward my employment and defied your directives. As I'd delivered the "hostile work environment" grievance to you shortly before you'd sent this message, I'd thought you'd consider this differently.

The Supervisor replied, in part, "As I mentioned to you this morning, I am not changing the procedures. *** As far as I am concerned, there is no relationship between the email I sent you at 12:28 p.m. on June 14, 2012, see below, and the "hostile work environment" grievance document that you gave me on the same day."[9]

On December 3, 2012, Grievant filed a grievance alleging he received an arbitrary performance evaluation. Grievant received an overall rating of "Contributor" but a "Below Contributor" with respect to the Core Responsibility of Project Management. The Supervisor explained that Grievant failed to complete a project assigned to him in

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[7] Grievant Exhibit 15.

[8] Grievant Exhibit 16.

[9] Grievant Exhibit 16.

December 2011. Grievant should have completed the project by the Spring of 2012 but it had yet to be completed. Grievant submitted a second step rebuttal stating, in part:

> As has been his pattern, apparently condoned, the [Supervisor] presents no facts pursuant to his fact-finding responsibilities as 2nd step respondent. *** Obviously [Dean Y] won't be bothered to ascertain the truth in these matters. Nonetheless, I won't be deterred from documenting their dishonorable shenanigans.[10]

The Provost denied Grievant relief because the Supervisor provided "clear reasons for his evaluation" of Grievant's work performance.[11]

On September 12, 2013, Grievant filed a grievance alleging "daily work brief, clock-in/out required of no other subordinates." Grievant was challenging the Supervisor's decision to require that Grievant submit daily work reports and notify the Supervisor of Grievant's arrival and departure times. Although the Supervisor had required, Mr. B, another of his subordinates to follow the same practice, Grievant did not believe this. Grievant did not check the box on the Grievance Form A to claim "Discrimination or Retaliation by immediate Supervisor" in order to avoid presenting the grievance to the Supervisor. In the Supervisor's First Step response, he wrote, "Clock-in/out and daily work brief is required from both of the employees who support faculty, students, staff with technology needs. Offices of both of these employees are outside of the Dean's suite and very close to one another."[12] Grievant sought documents regarding the other employee's actions. Grievant presented the HR Director with a letter on September 12, 2013 stating:

> This is a request under section 2.5 of the Grievance Procedure Manual.
>
> I request a copy of the following documents:
>
> a) Each and every daily work report, regardless of form, submitted to [Supervisor] by any of his subordinates, myself included, from 8 October 2011 to 12 September 2013.
> b) Any other communication, regardless of form, to/from [Supervisor] pertaining to daily work report during that period.
> c) Each and every time-clock event i.e. e-mail sent to [Supervisor] to inform him of the arrival/departure to/from work by any of his subordinates, myself excluded, during that period.

[10] Grievant Exhibit 18.

[11] Grievant Exhibit 18.

[12] Grievant Exhibit 17.

> The GPM entitles me to obtain these documents in conjunction with my active grievance. Your assistance is appreciated.[13]

The Agency refused to produce the documents. On October 18, 2013, EDR upheld the Agency's refusal because Grievant's request was unduly burdensome and the Agency had already provided conclusive information that answered the question raised by the grievance. Grievant modified his request and on October 29, 2013 and EDR again upheld the Agency's refusal to produce the documents because it remained unduly burdensome, intrusive, and would cause delays in the resolution of the grievance and the work of the Agency.

On October 20, 2013, the Supervisor evaluated Grievant's work performance and concluded, "Overall, [Grievant] has performed his responsibilities." Grievant received an overall rating of "Contributor."[14]

On November 19, 2013, Dean Y denied relief for the September 12, 2013 grievance and concluded:

> Based on supporting information, much of which by previous administrative ruling is not available to [Grievant], my records audit and independent investigation indicates [Grievant's] assertion that a "daily work brief, clock-in/out required of no other subordinate" is not correct. There are two Information Technology Specialists in the College and they serve the IT needs of their customers who are our students, faculty and staff. Both are required to clock in/out daily and file a daily work brief; in the case of both IT specialists this requirement has been applied consistently. For the purpose of effective supervision and customer service both IT employees are required to file, and do file, daily reports because unlike other dean's office classified employees, their offices are physically located outside the dean's office and their jobs, which are customer oriented, require that they are able to freely move around Constant Hall, and in some instances around campus, as their customer service load and effective service provision demands.[15]

On December 2, 2013, the Provost denied relief for the September 12, 2013 grievance and concluded it had no merit. She wrote:

> The two classified employee who report to [the Supervisor] and who do not have their offices within the Dean's suite are each required to complete time sheets and daily duty reports. This is a consistent requirement applied equally to both employees. The University is not

[13] Agency Exhibit A p. 79.

[14] Grievant Exhibit 5.

[15] Grievant Exhibit 17.

obligated to share the time sheets or duty documents of any other classified employee with [Grievant].[16]

On December 9, 2013, Grievant filed a grievance alleging violation DHRM policies 1.60 and 2.30 by Dean Y. Grievant sought relief of "commensurate statutory discipline." Grievant sought copies of documents relating to the daily work reports and emails to the Supervisor establishing arrival/departure times of the Supervisor's subordinates other than Grievant. Grievant's request for documents was not materially different from the request he made as part of his September 12, 2013 grievance. Grievant later withdrew the December 9, 2013 grievance.

On December 11, 2013, Grievant presented the Employee Relations Consultant a letters stating:

> This is a request under section 2.5 of the Grievance Procedure Manual.
>
> I request a copy of the following documents:
>
> a) Each and every daily work report, regardless of form, submitted to [Supervisor] by any of his subordinates, myself included, from 12 June 2013 to 12 September 2013.
> b) Any other communication, regardless of form, to/from [Supervisor] pertaining to daily work report during that period.
> c) Each and every time-clock event i.e. e-mail sent to [Supervisor] to inform him of the arrival/departure to/from work by any of his subordinates, myself excluded, during that period.
>
> The GPM entitles me to obtain these documents in conjunction with my active grievance. Your assistance is appreciated.[17]

On December 12, 2013, Grievant filed a grievance regarding the Agency's "failure to issue written notice in attempt to cover-up policy violations." Grievant sought relief of "formal, written discipline and mandatory hearing." On December 12, 2013, the Supervisor sent Grievant an email indicating he had not received Grievant's daily reports since December 2, 2013. Grievant replied:

> I've been awaiting an e-mail from you regarding this. I have declined to send the time-clock e-mails (which you did not mention) and the work synopsis, combined as the issue in a current grievance, as an act of "civil disobedience", if you will, for these reasons:

[16] Grievant Exhibit 17.

[17] Agency Exhibit A p. 88.

1. I don't believe I've been treated fairly – disparate treatment effected upon me.
2. I don't trust you based on your past acts which are in the record.
3. Management hasn't acted in good faith to resolve this and previous issues, making this necessary.

I demand immediate formal, written discipline so I may be the opportunity to present my case to resolve these issues.[18]

The Agency administratively closed the grievance because the "matter is not grievable."[19]

On December 13, 2013, the Agency Head qualified Grievant's September 12, 2013 grievance for hearing before a Hearing Officer. The Agency believed Grievant might find resolution if the matter was resolved before a Hearing Officer.

On December 16, 2013, Grievant sent an email to the Vice President asking that the HR Director[20] be relieved of her duties because "she was operating under a conflict of interest that should be readily apparent. While she is trying to win the HR Director position, she cannot be relied upon to act as ombudsman(person) for grievants."[21]

On December 18, 2013, Grievant presented the HR Director with a letter stating:

This is a request under section 8.2 of the Grievance Procedure Manual.

I request a copy of the following documents:

a) Each and every daily work report, regardless of form, submitted to [Supervisor] by any of his subordinates, myself included, from 8 October 2011 to 12 September 2013.
b) Any other communication, regardless of form, to/from [Supervisor] pertaining to daily work report during that period.
c) Each and every time-clock event i.e. e-mail sent to [Supervisor] to inform him of the arrival/departure to/from work by any of his subordinates, myself excluded, during that period.

The GPM entitles me to obtain these documents in conjunction with my active grievance. Your assistance is appreciated.

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[18] Grievant Exhibit 20.

[19] Grievant Exhibit 20.

[20] The HR Director worked as an Employee Relations Manager at that time.

[21] Agency Exhibit A p. 76.

On February 2, 2014, Grievant filed a grievance alleging "retaliation/collusion/harassment for exercising grievance rights." Grievant wrote, in part:

> [the Supervisor] and [Dr. K] have colluded yet again to interfere with my work. Again and deliberately, they have withheld software requirements until the 11th hour with the intent to harass me, create crisis, and then disparage my work. It has caused rework, wasting taxpayer funds. These are the same shenanigans as before, documented in a retaliation grievance two years ago.[22]
>
> Grievant sent a letter dated February 6, 2014 to the HR Director stating:
>
> This is a request under Title 2.2, Chapter 37 of the Code of Virginia – the Freedom of Information Act.
>
> I request a copy of the following documents:
>
> 1. Each and every daily work synopsis, regardless of form, submitted to [Supervisor] by any of his subordinates, myself included, from 8 October 2011 to 12 September 2013.
> 2. Each and every time-clock event i.e. e-mail sent to [Supervisor] to inform him of the arrival/departure to/from work by any of his subordinates, myself excluded, during that period.
>
> This is to be a freestanding FOIA, unassociated with any grievance and not, therefore, folded into any grievance process. This is intended as a seed document for civil action, if necessary, to obtain the requested documents. ***[23]
>
> Grievant sent the HR Director a letter dated February 7, 2014 stating:
>
> This is a request under section 2.5 of the Grievance Procedure Manual.
>
> I request a copy of the metadata, <u>not the content</u> following documents:
>
> a) Each and every daily work-synopsis e-mail sent from [Mr. B] to [the Supervisor] from 12 June 2013 to 12 September 2013.
> b) Each and every time-clock e-mail sent from [Mr. B] to [Grievant] to inform of his arrival/departure to/from work, for 12 June 2013 to 12 September 2013.

[22] Grievant Exhibit 21.

[23] Agency Exhibit A p. 91.

> The metadata (example enclosed) should include, but not be limited to, the complete e-mail headers with {from, to, subject, date, time} and corresponding sent/receive date-timestamp records from the server message tracking logs.
>
> The GPM entitles me to obtain these documents in conjunction with the 09 December grievance re [Dean Y].[24]
>
> Grievant presented a letter dated February 12, 2014 to the HR Director stating:
>
> This is a request under section 2.5 of the Grievance Procedure Manual.
>
> I request a copy of the following:
>
> 1. Any and all documents, regardless of form, to/from the University Records Manager pertaining to the e-mail sought in the attached 11 December request for information.
> 2. A copy of the records management internal/specific procedures referred to in ODU policy 3700, section F, paragraph 7.
>
> The GPM entitled me to obtain these documents in conjunction with the 09 December grievance re [Dean Y]. Your assistance is appreciated.[25]

Grievant initiated a Summons for Hearing in the local General District Court to compel the Agency to produce documents. The Summons was served on the Agency's Records Manager with a hearing date of March 6, 2014. The General District Court denied Grievant's request because the documents requested were personnel records exempt under the FOIA. The Court entered judgment for the Agency and dismissed the case.

Within a few hours of losing his case in General District Court, Grievant presented the HR Director with a letter stating:

> This is a request under Title 2.2, Chapter 37 of the Code of Virginia – the Freedom of Information Act.
>
> I request the University provide a copy of the metadata, <u>not the content</u> following:
>
> a) Each and every daily work-synopsis e-mail sent from [Mr. B] to [the Supervisor] from 08 October 2011 to 12 September 2013.

[24] Agency Exhibit A p. 92.

[25] Agency Exhibit A p. 93.

b) Each and every time-clock e-mail sent from [Mr. B] to [Grievant] to inform of his arrival/departure to/from work, for 08 October 2011 to 12 September 2013.

The metadata (example enclosed) should include, but not be limited to, the complete e-mail headers with {from, to, subject, date, time, etc} along with its corresponding sent/receive date-timestamp records from the server message tracking logs.

This is to be a freestanding FOIA, unassociated with any grievance and not, therefore, folded into any grievance process. This is intended as a seed document for civil action, if necessary, to obtain the requested documents. ***[26]

Grievant explained at the hearing that his rational for requesting the email metadata was so that the Agency would not be required to produce personnel records.

The Agency allowed the September 12, 2013 grievance to proceed to hearing with the hope that doing so would bring resolution of Grievant's issues. Grievant presented a Hearing Officer[27] with a letter dated March 4, 2014 stating:

This is a request for documents in the referenced matter:

I request the University provide a copy of the **metadata**, not the content of the following:

a) Each and every daily work-synopsis e-mail sent from [Mr. B] to [the Supervisor] from 12 September 2012 to 12 September 2013.
b) Each and every time-clock e-mail sent from [Mr. B] to [Grievant] to inform of his arrival/departure to/from work, for 12 September 2012 to 12 September 2013.

The metadata (example enclosed) should include, but not be limited to, the complete e-mail headers with {from, to, subject, date, time, etc} along with its corresponding sent/receive date-timestamp records from the server message tracking logs.[28]

The Agency provided the requested documents to Grievant pursuant to the Hearing Officer's order. Grievant asserted that the Agency had not complied with the Hearing Officer's order. The Hearing Officer concluded, "The Hearing Officer has

[26] Agency Exhibit A p. 95.

[27] The Hearing Officer was Ms. L.

[28] Agency Exhibit A p. 154.

determined that Grievant received his discovery and it is not appropriate to extend the hearing date. Thus, it remains scheduled for 10:00 a.m. on Friday March 21, 2014."[29]

On March 20, 2014, Grievant elected to withdraw his grievance scheduled before the Hearing Officer.

On March 24, 2014, the Office of EDR denied Grievant's request for a retaliation investigation. The EDR Director wrote, [w]hile participating in a grievance process is clearly a protected activity, the actions of your supervisor and faculty member as described by you do not rise to the level of materially adverse action warranting further review by EDR."

At some point in 2014, the Agency assembled its threat assessment team to evaluate whether Grievant presented a threat of violence. The team concluded that as long as Grievant was using the grievance process constructively, he did not pose a threat of violence to himself or others at the Agency.[30]

For many reasons including Grievant's inability to communicate with his Supervisor, Grievant's excessive and irrational use of the grievance procedure, and withdrawal of his September 12, 2013 grievance before the Hearing Officer, the Agency concluded it would be necessary to obtain a fitness for duty evaluation of Grievant. The Human Resource Director sent Dr. S, an Occupational Health Specialist, a letter dated April 11, 2014 stating, in part:

> I am writing on behalf of the Old Dominion University regarding [Grievant] our employee, who we have referred to you for an evaluation for fitness for duty. Based on behavior that I will describe, the University is concerned about [Grievant's] well-being. We are requesting a full, forensic psychological evaluation including evaluation of the potential for "escalating violence." As an Occupational Health Specialist, we anticipate that after your initial assessment that [Grievant] will be referred to a mental health provider for completion of the evaluation.

The Provost sent Grievant a memorandum dated April 17, 2014 stating:

> This memorandum is to advise you that, effective immediately, you are being placed on administrative leave with pay pending the outcome of a mandatory Fitness for Duty evaluation. This action is being initiated by the University based on your recent behavior, as evidenced by repeated demands for the same information as part of multiple grievances and/or hearing activity events related to the same topic, without any indication

[29] Agency Exhibit A p. 156.

[30] Although the Supervisor was fearful of Grievant, there is insufficient evidence to show that Grievant posed a direct threat to anyone else. Thus, it is unnecessary to consider whether the Agency could order a fitness for duty examination based on a claim that Grievant presented a direct threat.

> that these requests will cease or lead to a resolution. These repeated requests for the same information amount to a misuse of the University's grievance system. Additional concerns include your filing of an FOIA request 90 minutes after a judge had denied you the materials in an identical request, and your ability to work with others or to interact in a constructive way with supervisors.
>
> The University is concerned for your well-being and believes that this action is taken in your best interest as well as the best interests of the University. You will receive full pay for the days that you are on Administrative Leave. Attached you will find information specifying the date, time and location of your appointment. Expenses related to the evaluation for fitness for duty will be paid by the University.

Grievant's fitness for duty evaluation was scheduled for April 22, 2014 at 9:45 a.m. with Dr. S. Grievant indicated he was unable to report on that date. A second appointment was made for April 29, 2014. On April 25, 2014, Grievant proposed an alternative plan for the assessment. On April 28, 2014, Grievant was notified that he was expected to keep the appointment. Grievant did not attend the appointment on April 29, 2014. On May 1, 2014, Grievant was notified that the Agency would permit him to schedule the appointment again. He scheduled the appointment with Dr. S for May 20, 2014. Grievant did not appear at the appointment. Dr. S would not permit a third appointment to be set up because Grievant had not reported to the two prior appointments and because when Grievant called to make the third appointment Grievant notified the scheduler that Grievant would be recording the assessment meeting.

On May 30, 2014, the Provost sent Grievant an email stating, "[t]he University requires you to both schedule an appointment AND keep that appointment in order to avoid additional discipline."[31]

On June 4, 2014, Grievant sent the HR Director an email stating:

> Again, I could use the military hospital, as I'd offered before. Also, I have identified some providers in my area, much nearer to my home if you would like a suggestion or two.
>
> Be advised, however, that whomever is selected will be apprised of the retaliation context. By that, I mean the letter that University sent to [Dr. S] and the falsehoods within it showing the University's true intent.[32]

[31] Agency Exhibit A p. 66.

[32] Agency Exhibit A p. 65.

The Agency contacted Provider P to conduct the fitness for duty evaluation. Provider P was closer than Dr. S to Grievant's home. Grievant was notified of an appointment date of June 26, 2014 at 1 p.m. On June 23, 2014, the appointment date and time were confirmed with Grievant. Grievant did not report to the appointment.

As part of its request for an assessment by Provider P, the HR Director wrote:

> We are concerned that when [Grievant] has exhausted all formal processes to pursue his complaints about his supervisor/work, that his behavior could escalate to violence/set him on a pathway to violence. What is your assessment?
>
> We are concerned that given his IT position and skill that [Grievant] could, out of frustration, cause significant harm to University IT system causing considerable disruption to university operations. What is your assessment?[33]

A fitness for duty examination would involve Grievant meeting with a medical professional who would seek to obtain information about Grievant's health that would otherwise be private to Grievant. Although the information collected by the medical professional would not be shared with the Agency, the medical professional's conclusions based on Grievant's private medical information would be shared with the Agency. The Agency could then use the medical professional's conclusions to affect Grievant's terms and conditions of employment if it chose to do so.

The Supervisor was able to manage and communicate with Grievant without considering the grievances Grievant filed against the Supervisor. The demeanor shown by the Supervisor during the hearing revealed that he was a respectful, reserved and mild-mannered supervisor not prone to incite conflict with his coworkers. Grievant did not yell or curse at the Supervisor, however, Grievant was not able to separate his hostile feelings towards the Supervisor and his grievances from his working relationship with the Supervisor. When the Supervisor met with Grievant to coach him, Grievant would be tense and begin sweating and display behavior that the Supervisor did not consider to be normal during coaching. The Supervisor became afraid of Grievant. He expressed his fear to several other Agency managers. After September 2013, most communication between Grievant and the Supervisor was limited. Grievant began insisting that any meetings he had with the Supervisor were recorded. Grievant wanted to ensure that the Supervisor could not "collude" with Dr. K.

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

[33] Agency Exhibit A p. 59.

disciplinary action."[34] 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."

Group II offenses include failure to follow a supervisor's instructions.[35] Not every instruction of a supervisor provides a basis for disciplinary action if an employee fails to follow that instruction. The instruction must be lawful, ethical, and consistent with State policy. If a supervisor's instruction does not meet this standard, an employee may disregard that instruction without consequence.

Agency Had Authority to Require a Fitness for Duty Examination.

The Department of Human Resource Management and the Old Dominion University do not have policies government employee fitness for duty examination. In the absence of such a policy, the question becomes whether the Agency has the authority to order an employee to complete a fitness for duty examination. In Virginia Department of Taxation v. Daugherty, 250 Va. 542 (1995), the Agency required the employee to undergo a mental health evaluation to certify her "readiness for duty" prior to reporting for work. The Agency did not have a policy governing employee mental health evaluations. The Court held at page 548:

> Given the serious nature of Daughtry's threats, the evidence of her apparently unstable mental condition, and the Department's responsibility for the safety of the supervisors and employees in the Richmond office, we think that the Department was justified in requiring Daughtry to establish her fitness to return to work. Nor, under the circumstances of this case, do we think that the Department was required to have adopted a written policy giving it such a right, as Daughtry urges.

Based on the Virginia Supreme Court's holding, the Hearing Officer concludes that Old Dominion University had the authority to order an employee to undergo a fitness for duty mental health evaluation without having first written a policy governing the process and placing employees on notice of the Agency's authority and expectation.

Agency's Authority Subject to the Americans with Disabilities Act.

The Agency's authority to require an employee to undergo a fitness for duty evaluation is not without limit. The Americans with Disabilities Act and Federal regulations govern an employer's authority to require fitness for duty evaluations.

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

[35] See, Attachment A, DHRM Policy 1.60.

29 CFR § 1630.13(b) provides, "[e]xcept as permitted in §1630.14, it is unlawful for a covered entity to require a medical examination of an employee …." A covered entity "means an employer"[36] "who has 15 or more employees …."[37] 29 CFR 1630.14(c) states, "[a] covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions."

Appendix to Part 1630 provides Interpretive Guidance on Title I of the Americans with Disabilities Act. Under this Guidance, the purpose of Section 1630.13(b) "is to prevent the administration to employees of medical tests or inquires that do not serve a legitimate business purpose." Section 1630.14(c) "permits employers to make inquiries or require medical examinations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job."

29 CFR § 1630.2(n) addresses essential functions:

> **(1)** ***In general.*** The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.
> **(2)** A job function may be considered essential for any of several reasons, including but not limited to the following:
> **(i)** The function may be essential because the reason the position exists is to perform that function;
> **(ii)** The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
> **(iii)** The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.
> **(3)** Evidence of whether a particular function is essential includes, but is not limited to:
> **(i)** The employer's judgment as to which functions are essential;
> **(ii)** Written job descriptions prepared before advertising or interviewing applicants for the job;
> **(iii)** The amount of time spent on the job performing the function;
> **(iv)** The consequences of not requiring the incumbent to perform the function;
> **(v)** The terms of a collective bargaining agreement;
> **(vi)** The work experience of past incumbents in the job; and/or

[36] 29 CFR 1630.2(b).

[37] 29 CFR 1630.2(e).

(vii) The current work experience of incumbents in similar jobs.

Agency Had Justification to Require Fitness for Duty Evaluation.

Grievant's ability to communicate verbally and in writing was a fundamental job duty of his position and, thus, an essential function. Grievant's position description addressed the importance of communication in customer relations. The Supervisor explained the importance of communication as part of his response to Grievant's November 2011 grievance.

Sometime in September 2013, Grievant's ability to communicate with the Supervisor changed from being poor to being severely limited and restricted. Grievant displayed his contempt and distrust for the Supervisor through his grievances and by requiring that his meetings with the Supervisor be recorded. To some extent, Grievant's misuse of the grievance procedure became his preferred method of communicating with his Supervisor.

The Agency has established a business necessity to require Grievant to take a fitness for duty evaluation. The Agency qualified Grievant's September 12, 2013 grievance for hearing in order to permit Grievant to have resolution of his grievance by someone other than Agency employees. The Agency hoped that once the matter was resolved, Grievant might be able to resume normal communication with his Supervisor. Instead of seeking to resolve his grievance before the Hearing Officer, Grievant withdrew it the day before the hearing. It was reasonable for the Agency to be concerned that Grievant no longer viewed his participation in the grievance process to be constructive and that Grievant wish to continue his combative relationship with the Supervisor and the Agency. It was reasonable and necessary for the Agency to determine Grievant's "ability to work with others or to interact in a constructive way with supervisors" to ensure that Grievant was able to perform an essential function of his job.

First Group II Written Notice

Grievant was instructed by a supervisor on April 17, 2014 to report to Dr. S for a fitness for duty examination. He failed to do so thereby justifying the issuance of a Group II Written Notice.

Second Group II Written Notice

Grievant undermined his appointment with Dr. S by missing his first two appointments and telling Dr. S's scheduler that he would be recording his meeting with Dr. S. The Agency scheduled an appointment with Provider P. On May 30, 2014, the Provost sent Grievant an email stating, "[t]he University requires you to both schedule an appointment AND keep that appointment in order to avoid additional discipline."[38]

[38] Agency Exhibit A p. 66. Grievant argued that there was only one instruction given and, thus, only one Written Notice should have been issued. This argument fails because the instruction was repeated to Grievant after he failed to meet with Dr. S.

Grievant did not appear at the appointment with Provider P thereby justifying the Agency's issuance of a second Group II Written Notice. Upon the issuance of two Group II Written Notices, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Mitigation

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 …."[39] 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.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[40] (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.[41]

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[39] Va. Code § 2.2-3005.

[40] 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.

[41] 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).

Grievant engaged in protected activity by filing grievances. Grievant suffered an adverse employment action because he received disciplinary action. Grievant has not established a connection between his protected activity and the adverse employment action. The Agency required Grievant to submit to a fitness for duty evaluation for a legitimate business purpose. The Agency did not require Grievant to submit to a fitness for duty evaluation as a form of retaliation. The Agency took disciplinary action because Grievant failed to comply with a supervisor's instructions. The Agency did not take disciplinary action against Grievant as a form of retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow an instruction is **upheld**. The Agency's issuance to the Grievant of a second Group II Written Notice of disciplinary action with removal for failure to follow an instruction is **upheld**. Grievant's request for relief from the requirement to submit to a fitness for duty evaluation is **denied**.

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.[42]

[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

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