Issue: Administrative Review of Hearing Officer's Decision in Case No. 10142; Ruling Date: October 22, 2013; Ruling No. 2014-3722; Agency: George Mason University; Outcome: Hearing Officer in Compliance.

COMMONWEALTH of VIRGINIA

Department of Human Resources Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of George Mason University
Ruling Number 2014-3722
October 22, 2013

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 10142. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 10142 are as follows:[1]

> George Mason University employed Grievant as an HVAC Senior Technician. The purpose of his position was:
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> > 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.
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> 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.
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> 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

[1] Decision of Hearing Officer, Case No. 10142, ("Hearing Decision"), September 12, 2013, at 2-4 (internal footnotes have been omitted).

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.

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

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.
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> 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. Grievant left the BRL and began working on projects in the other part of the Agency's campus.
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> 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."

On June 24, 2013, the grievant was issued a Group III Written Notice with removal.[2] He initiated a grievance challenging the disciplinary action, and on September 12, 2013, following a hearing, the hearing officer issued a decision upholding the disciplinary action.[3] The grievant has sought administrative review of the hearing officer's decision.[4]

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions … on all matters related to procedural compliance with the grievance procedure."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

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[2] *Id.* at 1.
[3] *Id.* at 1, 7.
[4] In its response to the grievant's request for administrative review, the University asserts that the grievant's request was untimely, as it was e-mailed to EDR after the close of business on the 15th day after the issuance of the hearing decision. In determining whether an e-mailed request was timely under the grievance procedure, EDR applies a calendar day standard, rather than a business day standard. As the grievant's request in this case was delivered to EDR prior to the expiration of the 15th calendar day, it was timely.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).

Inconsistency with State and/or Agency Policy

The grievant argues that the hearing officer erred by finding that the conduct in which the grievant engaged rose to the level of a Group III offense under DHRM Policy 1.60, *Standards of Conduct*. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The grievant has requested such a review. Accordingly, EDR will not address this claim further in this ruling.

Characterization of Disciplinary Action

The grievant also asserts that the hearing officer erred in analyzing the Written Notice as a Group II warranting elevation to a Group III. Attachment A to DHRM Policy 1.60, *Standards of Conduct*, allows an agency to elevate an offense normally designated as a Group II offense to the Group III level in "certain extreme circumstances," but cautions that management will bear the burden of establishing "its legitimate, material business reason(s) for elevating the discipline . . . ."[8] The grievant alleges that the University argued that the conduct for which he was disciplined "is actually a Group III Violation," and that the hearing officer improperly "made the elevation argument for the [University]."

In assessing whether a grieved disciplinary action was warranted and appropriate under the facts and circumstances, a hearing officer is required to assess whether the action was consistent with the *Standards of Conduct*.[9] In making this determination, the hearing officer should consider an agency's stated grounds for selecting the level of disciplinary action taken. In this case, the hearing officer did not address in his decision the University's argument that the grievant's conduct constituted a Group III offense in its own right, instead of a Group II warranting a Group III because of elevation.[10] However, while error, this does not constitute a basis on which to remand the hearing decision in this case.

The ultimate issue raised by the grievant is whether the hearing officer's conclusion, clearly articulated or not, is correct under the *Standards of Conduct*. This determination is a matter of policy interpretation for DHRM, not EDR, to decide. If DHRM's policy review finds no basis for remand, a remand by EDR to consider the Group III offense as issued would not affect the outcome of this case and only serve to unnecessarily prolong the hearings review process.[11]

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[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[8] DHRM Policy 1.60, *Standards of Conduct*, at Attachment A.
[9] *See Rules for Conducting Grievance Hearings* § VI(B)(1).
[10] *See* Hearing Decision at 4-5.
[11] Should the DHRM policy review direct the hearing officer to reconsider any matters on remand, the hearing officer is also directed to consider whether the charged offense could warrant a Group III on its own. We note that the list of examples of Group III conduct provided in Attachment A to the *Standards of Conduct* is not exclusive, and that an employees's refusal to perform approximately 50% of his job functions could arguably be considered of a sufficiently severe and disruptive nature so as to warrant termination. DHRM's policy review on such a question is ultimately the final say as an interpretation of policy.

The grievant further argues that "because the [University] did not argue that the offense should be elevated," the hearing officer failed to comply with the grievance procedure by upholding the grieved disciplinary action on this basis. We do not agree. While the question of whether the facts, as found by the hearing officer, constituted a sufficient basis to elevate the disciplinary action under the *Standards of Conduct* is a matter for DHRM to decide, the grievance procedure did not preclude the hearing officer from analyzing whether the Group III could be sustained under an elevation theory, even if that was not necessarily the basis advanced by the University. Accordingly, we will not disturb the hearing officer's decision on this basis.

CONCLUSION AND APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[12] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[13] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[14]

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[12] *Grievance Procedure Manual* § 7.2(d).
[13] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[14] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).