Issues: Group III Written Notice (falsifying records), Group III Written Notice (criminal conviction), Termination, Retaliation); Hearing Date: 03/07/08; Decision Issued: 03/12/08; Agency: College of W&M; AHO: Carl Wilson Schmidt, Esq.; Case No. 8793; Outcome: No Relief – Agency Upheld In Full; **Administrative Review: HO Reconsideration Request received 03/25/08; Reconsideration Decision issued 04/16/08; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 03/26/08; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8793

Hearing Date: March 7, 2008
Decision Issued: March 12, 2008

PROCEDURAL HISTORY

On November 16, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying State documents. He also received a Group III Written Notice of disciplinary action with removal for a criminal conviction for illegal conduct occurring on or off the job that is clearly related to job performance.

On November 28, 2007, 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 he requested a hearing. On February 4, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 7, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
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:

The College of William & Mary employed Grievant as a Trades Technician III until his removal effective November 16, 2007. He had been employed by the Agency for approximately 7 years. The purpose of this position was to, "provide detailed moving and storage support to customers consisting of Faculty, Students, Alumni, Community Organizations and others. Maintain accurate records of services provided to facility billing."[1] No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On September 1, 1992, Grievant appeared in the Circuit Court with his Attorney and made a motion to rehear a criminal case against him. Upon re-hearing, the Court found Grievant not guilty of possession of cocaine, as charged in the indictment, but guilty of accessory after the fact to possession of cocaine. A Probation Officer of the Court appeared in open court with a written report which was presented to Grievant and Grievant's Attorney. The Court ordered:

> Whereupon the Court taking into consideration all of the evidence in the case, the report of the Probation Officer, the matters brought out on cross-examination of the Probation Officer and such additional facts as were presented by the defendant, and it being deemed of the defendant if anything the defendant had or knew to say why judgment should not be

[1] Grievant Exhibit 7.

> pronounced against a defendant according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the defendant is hereby sentenced to confinement in jail for a term of twelve (12) months and that the defendant pay, and Commonwealth recover, a fine of $500 and costs. The Court suspends the execution of nine (9) months upon the conditions that the defendant keep peace, be of good behavior and violate none of the laws of the Commonwealth or any other jurisdiction for three (3) years and pay the fine and costs and that the defendant submit to alcohol [and/or] drug testing as directed by the Probation Officer and receive alcohol and/or drug counseling and treatment as directed by the Probation Officer. It is Further Ordered that the defendant is placed on probation under the supervision of a Probation Officer of this Court until released by the Probation Officer. As a further condition of probation, the defendant shall remain drug-free during the period of probation.
>
> The Court certifies that all times during the trial of this case the defendant was personally present with the attorney for the defendant.
>
> And the defendant is remanded to jail.

On October 10, 2000, Grievant submitted to the Agency a Commonwealth of Virginia Application for Employment. The application asked:

> Have you ever been convicted for any violation(s) of law, including moving traffic violations? ___ YES ___ NO. If YES, please provide the following: Description of the offense _____.

Grievant checked "YES". He wrote as the descriptions of his offenses, "1991 DUI, SEATBELT VIOLATIONS 2000".

Grievant dated the application and signed his name immediately below the Certification which read:

> I hereby certify that all entries on both sides and attachments are true and complete, and I agree and understand that any falsification of information herein, regardless of time of discovery, may cause forfeiture on my part of any employment in the service of the Commonwealth of a Virginia. I understand that all information on this application is subject to verification and I consent to criminal history background checks. I also consent to references and former employers and educational institutions listed being contacted regarding this application. I further authorize the Commonwealth to rely upon and use, as it sees fit, any information received from such contacts. Information contained on this application may be disseminated to other agencies, nongovernmental organizations or systems on a need-to-know basis for good cause shown as determined by the agency head or designee.

On June 18, 2001, Grievant submitted to the Agency a Commonwealth of Virginia Application for Employment. The application asked:

> Have you ever been convicted for any violation(s) of law, including moving traffic violations? ___ YES ___ NO. If YES, please provide the following: Description of the offense _____.

Grievant checked "YES". He wrote as the descriptions of his offenses, "traffic violations 2001 (fine) [Location]." He also wrote "1991 [Location] concealed weapon, misdemeanor (Fine)."

Grievant dated the application and signed his name immediately below the Certification which read:

> I hereby certify that all entries on both sides and attachments are true and complete, and I agree and understand that any falsification of information herein, regardless of time of discovery, may cause forfeiture on my part of any employment in the service of the Commonwealth of Virginia. I understand that all information on this application is subject to verification and I consent to criminal history background checks. I also consent to references and former employers and educational institutions listed being contacted regarding this application. I further authorize the Commonwealth to rely upon and use, as it sees fit, any information received from such contacts. Information contained on this application may be disseminated to other agencies, nongovernmental organizations or systems on a need-to-know basis for good cause shown as determined by the agency head or designee.

On August 21, 2007, Grievant and Mr. W were moving furniture on behalf of the Agency and during work hours. Grievant was operating a Van rented by the Agency from a rental company. Another employee, Mr. H, observed the Van back into a parked vehicle in front of a Sorority House. Mr. H observed Grievant and a passenger of the Van leave the vehicle, walk around the struck vehicle, look at that vehicle, look around, and then reenter the Van and drive off. The Campus Police investigated the matter and issued Grievant two summons to appear in court.

On October 18, 2007, Grievant appeared with his Attorney in the local General District Court and pled not guilty to the charges against him. Grievant was convicted of failure to stop at the scene of an accident. He was fined $250 plus costs. He also was convicted of improper backing, stopping, or turning. He was fined $30 plus costs.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work

force."[2] Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

Falsification of State Documents

"Falsifying any records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents" constitutes a Group III offense. DHRM § 1.60(V)(B)(3)(b).[3] DHRM § 2.10 states:

> Before an applicant is eligible for employment with the Commonwealth, several records must be reviewed or verified. This information is considered part of the application process and, as with information contained on the application form, if it is later discovered that an applicant falsified any information related to his or her employment, the employee may be terminated.

"Falsifying" is not defined by DHRM § 1.60(V)(B)(3)(b) or DHRM § 2.10, but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) as follows:

> Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as:

> to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice.*

Once an application for employment is submitted to a State agency, it becomes a record of that agency. If Grievant intended to falsify the application for employment, then he would have engaged in behavior rising to the level of a Group III offense.

Grievant falsified the October 10, 2000 and June 18, 2001 applications for employment submitted to the Agency. In 1992, Grievant was convicted of being an accessory after the fact to possession of cocaine. Grievant knew or should have known that this conviction should have been listed as a violation on each application for

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

[3] The Hearing Officer construes this language to include the circumstances where an employee creates a false document and then submits it to an agency where that document becomes a record of the agency.

employment. By failing to list this conviction, Grievant falsified his applications for employment. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency may remove Grievant from employment.

Grievant argued that he did not intend to falsify his applications for employment but rather that his memory was faulty. To some extent, Grievant's assertion that his memory was faulty is supported by the record. For example, in 1991 Grievant received a conviction regarding a concealed weapon. He also was convicted for driving under the influence (DUI). On his October 10, 2000 application he listed the DUI but not the misdemeanor for having a concealed weapon. On his June 18, 2001 application, Grievant listed the misdemeanor conviction for having a concealed weapon, but not the DUI. Nevertheless, the Hearing Officer is not persuaded by Grievant's argument. In 1992, Grievant was indicted for the possession of cocaine. He appeared in court with his attorney. He was sentenced to 12 months in jail with nine-months suspended. He was placed under probation. It is difficult for the Hearing Officer to believe that Grievant failed to remember a conviction resulting in jail time and probation. Being sentenced to jail would be a dramatic event for most people and not one easily forgotten. It is more likely than not that Grievant remembered his 1992 conviction but intentionally failed to list it on his applications for employment.

Grievant argues that the Agency had the opportunity to conduct a criminal background search at the time Grievant was offered employment and, thus, the Agency cannot now complain about his background. There is no State policy to support Grievant's conclusion. Indeed, both applications for employment clearly notified Grievant that any falsification of information might cause him to lose his job regardless of when the information was discovered by the Agency.

Conviction for Offense Occurring on the Job

"Criminal convictions for illegal conduct occurring on or off the job that clearly are related to job performance or are of such a nature that to continue employees in their positions could constitute negligence in regard to agencies' duties to the public or to other state employees" is a Group III offense. On October 18, 2007, Grievant was convicted of failure to stop at the scene of an accident and for improper backing, stopping, or turning. The conviction related to Grievant's operation of a Van during work hours in the course of his customary work duties. Grievant failed to report the accident to the Agency thereby undermining its trust in his ability to properly carry out his duties and keep the Agency informed of difficulties he may encounter. The Agency has an obligation to its students, faculty, and others to ensure that its employees properly operate vehicles and inform the Agency of accidents so that the Agency may properly resolve possible legal claims against it. The Agency has presented sufficient evidence to support the issuance to Grievant of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency may remove Grievant from employment.

Grievant admits that he was operating a rental Van on August 21, 2007 but denies that he backed the Van into another vehicle. He presented evidence showing that Mr. W would exit the Van and serve as a spotter every time Grievant found it

necessary to back the van. He testified that he did not report an accident to the Agency because no accident occurred. Grievant was operating a rental Van. Students, parents, and others often rented vans similar to Grievant's Van and moved furniture from student housing. Grievant argues he was mistaken for another person who backed a van into the student's vehicle.

The Agency did not present evidence relating to the events that occurred on August 21, 2007. The Agency issued its disciplinary action based on Grievant's convictions. Based on the evidence presented to the Hearing Officer, Grievant has asserted that he did not back his van into the student's vehicle and the Agency has not rebutted that assertion. This conclusion, however, is not of significance in this case. Under the Standards of Conduct, it is only necessary for the Agency to show that Grievant received a criminal conviction for illegal conduct. It is not necessary for the Agency to establish the facts establishing the underlying illegal conduct. In this case, the Agency has established a criminal conviction for illegal conduct and, thus, Grievant's assertion, even if true, is not a basis to reverse the disciplinary action.

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

Retaliation

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

[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

the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.[7]

Grievant engaged in protected activities. For example, he filed a complaint with the United States Equal Employment Opportunity Commission in 2005. Grievant also complained to the Agency that he was being harassed. In 2005, he filed a Charge of Discrimination with the Virginia Council on Human Rights. Grievant suffered a materially adverse action because he received disciplinary action and was removed from employment. Grievant has not established, however, that the disciplinary action he received in this case was connected to his protective activities. It is clear that the Agency took disciplinary action against Grievant because the Agency believed Grievant engaged in behavior that should give rise to disciplinary action including removal. Grievant's claim for relief from retaliation must be denied.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for falsification of a State document is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for a criminal conviction for illegal conduct occurring on the job that clearly relates to job performance 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:

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action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

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

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
830 East Main St. STE 400
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: 8793-R

Reconsideration Decision Issued: April 16, 2008

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

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

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

Grievant does not allege the existence of any newly discovered evidence and, thus, newly discovered evidence is not a basis to reopen or reconsider this case.

Grievant has not identified any statute or case law misapplied by the Hearing Officer. Grievant does not cite or rely upon any statute or case law to support his request for reconsideration. Thus, there was no error of law upon which to grant Grievant's request.

Grievant argues that his failure was one of omission rather than reflecting an intent to conceal or mislead. As discussed in the Hearing Decision, this assertion is not credible.

Grievant argued that the Agency has a responsibility to timely verify all employment applications. The State policy, however, does not support this conclusion. The Agency does not have the burden of verifying information that an employment applicant represents to be true.

Grievant argued that the Agency should have engaged in progressive discipline and mitigation to reduce the level of disciplinary action. The Standards of Conduct encourages agencies to engage in progressive discipline but does not require agencies do so. The Agency considered mitigating circumstances under the Standards of Conduct and concluded none existed to justify a reduction in the disciplinary action.[9] The Hearing Officer considered mitigating circumstances within the authority given to him under the Rules for Conducting Grievance Hearings and concluded that no mitigating circumstances existed under the standards set forth in the Rules.

Grievant contends that the Agency attempted to intimidate his witnesses, particularly Mr. W. Although no intimidation was established, the Hearing Officer permitted Grievant to proffer the testimony of Mr. W. The Hearing Officer considered Grievant's proffered testimony when issuing the Hearing Decision. Mr. W's testimony would have not changed the Hearing Officer's finding that Grievant was convicted in a court.

Grievant expressed concern that the "department of "risk management" dealing with insurance exposure was not involved in this alleged accident as it has been in all other accidents dutifully reported by [Grievant]." Whether the Agency's department of risk management is involved in Grievant's case has no bearing on the appropriate level of disciplinary action.

Grievant argues that his October 9, 2007 EEOC complaint was not considered. The Hearing Officer concluded that Grievant had engaged in protected activities. Among those protected activities would have been his October 9, 2007 EEOC complaint. Although Grievant was able to show he engaged in protected activities, he was unable to show that he was retaliated against because of those protected activities. In addition, disciplining employees for falsifying documents and criminal convictions is a legitimate business activity. Grievant had not established that the Agency's legitimate business activity was a pretext for retaliation.

Grievant questioned the impartiality of the Hearing Officer. At the end of closing statements, the Hearing Officer concluded the hearing. The Hearing Officer did not instruct anyone to leave or remain in the hearing room. Grievant and his representative left the hearing room. The Agency's counsel remained.[10] The Hearing Officer disassembled and packed his laptop computer, made copies of the audio recording of the hearing, disassembled and packed the recording equipment and then left the

[9] Grievant points out that the Agency offered him employment in another job at lower pay. This would be consistent with the Agency's attempt at mitigation.

[10] The Hearing Officer does not recall what the Agency Party Designee did following the hearing.

hearing room. The Hearing Officer did not discuss the merits of Grievant's case with anyone from the conclusion of closing arguments to the writing of the Hearing Decision.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. 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