

Issues: Group III Written Notice with Termination (falsifying a State application), and Retaliation (other protected right); Hearing Date: 11/09/11; Decision Issued: 12/08/11; Agency: DBHDS; AHO: Sondra K. Alan, Esq.; Case No. 9701; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 12/23/11; Reconsideration Decision issued 01/18/12; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 12/23/11; EDR Ruling No. 2012-3213 issued 01/31/12; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 12/23/11; DHRM Ruling issued 02/22/12; Outcome: AHO’s decision affirmed; Judicial Appeal: Appealed to Smyth County Circuit Court on 03/01/12; Outcome pending.**

DECISION OF HEARING OFFICER
IN RE:
CASE NO. 9701
APPOINTMENT DATE: October 11, 2011
PRE-HEARING CONFERENCE: October 19, 2011
FIRST HEARING DATE: November 9, 2011
SECOND HEARING DATE: November 21, 2011
DECISION ISSUED: December 8, 2011

PROCEDURAL HISTORY

On July 25, 2011, Grievant was issued a letter of intent by Agency to issue a Group III disciplinary with termination for falsifying records, that is, falsifying her employment application. The Grievant responded on July 26, 2011 and on the same date a Written Notice was issued. On August 19, 2011, the Grievant filed an expedited grievance. The second step resolution response was issued on September 1, 2011. On September 22, 2011, the Commissioner qualified the matter for Hearing. A Hearing Officer was appointed on October 11, 2011. A Pre-Hearing Conference commenced October 19, 2011. At Counsels' requests there were two hearing dates, the matter of disciplinary action was heard on November 9, 2011 and the Retaliation Claim was heard November 21, 2011.

APPEARANCES
(Total for both hearing dates)

Agency Representative, Witness

Agency Counsel

Six (6) Additional Agency Witnesses

Grievant, Witness

Grievant's Counsel

Three (3) Additional Grievant Witnesses

ISSUES

- 1) Was Grievant properly dismissed pursuant to a Group III Written Notice regarding falsification of her employment application?
- 2) Was this discipline a retaliatory action actually related to Grievant complaint about Agency to her State Representative?

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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 is to be proved is more probable than not. GPM § 9. It is incumbent on Grievant to show that the relief sought by Grievant is applicable to Grievant's case. GPM § 5.9(a). Also, Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §4.1(b).

APPLICABLE LAW

Agency relies on Standard of Conduct Policy 1.60 effective revised date June 1, 2011 and the Offense Code: 74 in order to issue a Group II discipline.¹ Agency considered Section 3, mitigation.² Grievant relies on Rules for Conducting a Grievant Hearing³ for her Retaliation Claim.

¹ Agency Exhibit 10 Standards of Conduct Policy 6-1-11, Section B2c, Attachment Group III, falsifying records.

² Agency Exhibit 10 Standards of Conduct Policy 6-1-11, Section 3, mitigation.

³ GPM §4, 1 (b) 4.

FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

In early 2011 issues arose with one of Grievant's subordinates. The person was dealt with by Grievant's superiors. Grievant was upset about being passed by and not included in the discipline of her employee⁴. Soon thereafter, statements were made that caused Agency to question some of Grievant's actions and behaviors. An investigation of Grievant commenced. Grievant took exception with the methods of investigations and the exclusion of her Attorney at meetings of herself and Agency.⁵ At the conclusion of the investigation, rather than being issued a Written Notice, Grievant was made subject to a Performance Improvement Plan (PIP). Grievant was of the belief that she could not grieve the disciplinary action because it was not a Written Notice, nor could she grieve what she considered work place harassment.⁶ However, it appears she might have been able to qualify under GPM§4.1(b) 1or the last paragraph of that section.

Nonetheless, Grievant did not file a grievance and, unknown to Agency, contacted her State Representative. It is clear Grievant had an absolute right to contact her State Representative. It is also clear that this did not put Agency on noticed of any claim of Grievant.

After Grievant was made aware of the discipline (PIP) from the first investigation, additional information came to light about Grievant having falsified her employment application. It was investigated as a new matter. It appeared that Grievant had not been forthcoming regarding her previous employment with State Facilities as well as claiming educational degrees that she did not possess. During the time the second investigation was ongoing, a State Official

⁴ Grievant Testimony, Grievant Exhibit 18.

⁵ Grievant Testimony, Grievant Exhibit 18.

⁶ Grievant Testimony, Grievant Exhibit 18.

who had received information from Grievant's State Representative, made Agency aware of Grievant's complaints regarding her first investigation. After obtaining what Agency believed was sufficiency evidence of Grievant's falsification of records/employment application, Agency issued a Group III Written Notice with termination to the Grievant. Grievant complains that this Written Notice was retaliatory in nature.

The specific timeline of events is listed below all occurring in 2011.

- 03/05/11: Investigation #1 commenced.⁷
- 05/16/11: Conclusion of #1 Investigation.⁸
- 05/23/11: Grievant receives Notice of Discipline.⁹ (PIP) regarding investigation #1
- 05/23/11: Agency Human Resource person reports to Grievant's Superior possible inconsistencies in Grievant's employment application.¹⁰
- 05/23/11: Second Investigation starts.¹¹
- 06/06/11: Grievant sends complaints to her State Representative regarding Investigation #1.¹²
- 06/13/11: Grievant's supervisor talked to other Agency that had employed Grievant about Grievant's past employment¹³ regarding investigation #2.
- 06/15/11: Grievant's complaint regarding Investigation #1 sent to Governor's Office.¹⁴
- 06/17/11: Human Resources request personnel file of Grievant from sister Agency¹⁵ regarding Investigation #2.
- 06/21/11: Grievant's information regarding Investigation #1 sent to additional Agencies in Richmond.¹⁶

⁷ Grievant Exhibit 16.

⁸ Agency Exhibit 3.

⁹ Grievant Exhibit 17.

¹⁰ Agency Exhibit 3.

¹¹ Agency Exhibit 3.

¹² Grievant Exhibit 18.

¹³ Agency Exhibit 3.

¹⁴ Grievant Exhibit 18.

¹⁵ Grievant Exhibit 24.

¹⁶ Grievant Exhibit 18.

- 06/23/11: PIP issued to Grievant regarding Investigation #1.¹⁷
- 06/28/11: Email from State Agency in Richmond informing Agency of Grievant's complaint.¹⁸
- 06/29/11: Grievant's 76 page complaints regarding Investigation #1 sent to Agency.¹⁹
- 07/25/11: Letter of Intent to issue a Written Notice regarding Investigation #2 given to Grievant.²⁰
- 07/26/11: Grievant's Notice of Group III discipline with termination given to Grievant.²¹

CONCLUSION 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." 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."²²

In order to find that retaliation has occurred a casual link must exist between the adverse action and the protected activity. If the Agency presents a non-retaliatory business reason for the adverse action, the burden is on the Grievant to prove Agency's stated reason was a pretext.²³

OPINION

Agency complains they would not have hired Grievant had they known of her false application. There was considerable testimony that numerous committees review a perspective employee's application before a person is approved for employment.²⁴ A basic point at the first

¹⁷ Grievant Exhibit 19.

¹⁸ Grievant Exhibit 18.

¹⁹ Grievant Exhibit 18.

²⁰ Grievant Exhibit 20.

²¹ Grievant Exhibit 14.

²² Agency Exhibit 10, Standards of Conduct.

²³ EEOC v Navy Fed Credit Union. 424 F. 3d397, 405 (4th cir. 2005).

²⁴ Agency Testimony, November 9, 2011 Hearing.

level of scrutiny was missed. Grievant claimed to have been continuously employed from April of 2004 through February of 2006 with one employer. If Agency had called to confirm these employment dates, Agency would have immediately recognized the first falsehood. Thereafter, Agency could have commenced questioning Grievant where she had actually been employed during the 2004 through 2006 time frame. However, Agency's failure to carefully verify the information does not lessen Grievant's intentional action of falsifying her employment application. The Grievant's application had several questionable statements.²⁵ Of the several alleged falsehoods, two were actually proven. Grievant did not hold a Bachelor of Arts Degree from any Institution and the Grievant omitted or concealed at least one previous employment. The Grievant admitted to both of these errors in testimony and by letter of August 19th, 2011 to her superior.²⁶ Grievant was unable to offer any evidence to contradict the above allegations other than they were mistakes on her part when drafting the application. Also of concern was Grievant's possession of a Bachelor of Science Degree from a non-accredited college and holding certificates that require a Master's level education.²⁷ However, no conclusive proof of these additional allegations were offered.

Grievant repeatedly testified that the application had not contained false information, but only erroneously submitted information in an electronic format.²⁸ As to the Bachelor of Arts Degree, this explanation was completely incredible as Grievant continued to use the "BA" certification on numerous correspondences.²⁹

Grievant stated she believed the Agency was aware of her employment at another State Facility during the April of 2004 through February of 2006 time period. She proffered as

²⁵ Agency Exhibit 1.

²⁶ Agency Exhibit 12.

²⁷ Agency Exhibit 11.

²⁸ Grievant Testimony of November 9, 2011 hearing.

²⁹ Agency Exhibit 9.

evidence the email from a Clerk in Human Resources, stating Grievant's prior service with State Facilities, which qualified her for service credit time.³⁰ This document included the correct work history as to State employment of Grievant. The Clerk was not a part of the Selection Committee and it was never stated or denied that Clerk was aware that this created inconsistencies with the employment application. Grievant contends that since the email was copied to other Human Resource personnel, they should have seen the errors and acted accordingly.³¹ Again, whether the error was acknowledged or not, it was not Agency's duty to correct the application.

Grievant believed Agency should have considered mitigation of the discipline based on her good employment record.³² The Agency stated mitigation was considered and acknowledged that the employee had indeed made contributions during employment. However, the breach of trust was too overwhelming and consistent to consider her continued employment.³³

The Hearing Officer's conclusion is that Grievant did intentionally falsify her employment application to [the facility].

The allegations have been proven and are consistent with Standards of Conduct, Policy: 1.60, Effective Date: 04/16/08,³⁴ and the offense "falsification of records" of Code: 74 are consistent with discharge of a Group III Offense nature. Code: 74; Falsifying of Records was attached to Grievant's written notice.³⁵ Mitigation was considered and rejected by Agency.³⁶

Grievant then stated her claim of Retaliation. Grievant believed the Written Notice and termination was due to her reporting her complaints of Agency to her State Representative. Grievant further believed Agency had no right to obtain her personnel records from her previous

³⁰ Grievant Exhibit 1.

³¹ Grievant Exhibit 1.

³² Grievant Exhibit 3, 4, 5, 6, 7, and 8.

³³ Grievant Exhibit 9.

³⁴ Agency Exhibit 10.

³⁵ Exhibit 11.

³⁶ Agency Exhibit 11.

State employer.³⁷ The Grievant gave considerable evidence about her complaints regarding her first investigation³⁸ and is of the opinion these complaints were pertinent to the retaliation claim. The 76 pages of complaints/notes³⁹ all regarded the first investigation. The first investigation was not grieved and not a part of this hearing. The notes have no relevance to this hearing other than being the content of the report to her State Representative. The timeline of events show the second investigation of Grievant was commenced well before Agency had knowledge of Grievant's complaints to her State Representative. The Grievant has shown no connection between her contact with her State Official and the Agency's investigation resulting in a discipline decision. The basis for which the Group III Written Notice is issued is a sound and proven basis. Whether or not the Agency should have received Grievant's employment records is not pertinent to this hearing as it was clearly allowable for the Agency to report employment dates, which then established that Grievant had not been truthful on her previous employment application.

The conclusion is that there is no nexus on which to base retaliation and no abuse of discretion in issuing a Group III Written Notice regarding falsification of records.

DECISION

For the above stated reasons the Group III disciplinary action is **upheld** and the retaliation claim is **denied**.

APPEAL RIGHTS

³⁷ Grievant Exhibit 23, revised 07-1-05.

³⁸ Grievant Testimony, Grievant Exhibit 18.

³⁹ Grievant Exhibit 18.

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three (3) types of administrative reviews, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.
2. A challenge that the hearing decision is inconsistent with state policy or Agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or Agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to:

Director, Department of Human Resources Management
101 N. 14th Street, 12th Floor
Richmond, VA 23219

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to:

Director, Department of Employment Dispute Resolution
600 East Main Street, Suite 301
Richmond, VA 23219

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with issuance of the decision, not receipt of the decision. However, the date the decision is rendered

does not count as one of the 15 days following the issuance of the decision). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of 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 grievance arose.⁴⁰ You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

Sondra K. Alan, Hearing Officer

DECISION OF HEARING OFFICER
IN RE: CASE NO. 9701
APPOINTMENT DATE: October 11, 2011
PRE-HEARING DATE: October 19, 2011
FIRST HEARING DATE: November 9, 2011
SECOND HEARING DATE: November 21, 2011
DECISION ISSUED: December 8, 2011
RECONSIDERATION ISSUED: January 18, 2012

RECONSIDERATION DECISION

Grievant filed a request for reconsideration of the December 8th, 2011 decision in this case regarding two issues.

- 1) Was the decision inconsistent with Agency Policy 6.05?
- 2) Did Agency employee's improper correspondence of November 23, 2011 affect the outcome of the Hearing Officer's decision?

Additionally, Grievant's counsel made several other assertions which this Hearing Officer gave no weight in the decision process or were irrelevant to the issues at hand. Specifically, Grievant again brings up actions which occurred prior to her receiving a Performance Improvement Plan, which actions (presumably characterized by Grievant as work place harassment) were never grieved and not a part of the Group III Disciplinary Action which was being grieved.

Grievant believed Policy 6.05, which protects disclosure of employee's records was breached. The only information pertinent to the Grievant's matter was whether or not Grievant was employed by a sister agency during the time that Grievant did not reveal on her employment application record that she was employed by the sister agency. These dates are clearly public information. Whether or not additional information was inappropriately shared between the agencies may be an issue, but is not an issue or even a consideration in the Hearing Officer's decision of this matter.

The Grievant further relies on Policy 6.05 which permits employees to correct inaccurate information in their files. This Policy is clearly not meant to extend to false information that Grievant, herself, caused to be put in her file.

While the action of the Administrator of the Agency of sending the Hearing Office evidence after the hearing was closed was clearly wrong, it had no impact whatsoever on the Hearing Officer's decision. Further, the Hearing Officer has no power issue sanctions as requested by Grievant's counsel.

Grievant has made no valid complaints that relate to the issue of the hearing, they being:

- 3) Was Grievant properly dismissed pursuant to a Group III Written Notice regarding falsification of her employment application?
- 4) Was this discipline a retaliatory action related to Grievant complaint about Agency to her State Representative?

In a nutshell, it was found that Grievant did falsify her employment records. A Group III Disciplinary Action for falsifying records was appropriate. Grievant failed to show any causal relationship to being terminated for falsifying records other than she had, in fact, falsified records.

The December 8th, 2011 decision of the Hearing Office is **upheld**.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three (3) types of administrative reviews, depending upon the nature of the alleged defect of the decision:

4. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.

5. A challenge that the hearing decision is inconsistent with state policy or Agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or Agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to:

Director, Department of Human Resources Management
101 N. 14th Street, 12th Floor
Richmond, VA 23219

6. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to:

Director, Department of Employment Dispute Resolution
600 East Main Street, Suite 301
Richmond, VA 23219

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days following the issuance of the decision). A copy of each appeal must be provided to the other party.

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

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,

4. 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 grievance arose.⁴¹ You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

Sondra K. Alan, Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

The Department of Behavioral Health
and Developmental Services

February 22, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9701. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review. For the reasons stated below, we have determined there are no bases to intercede in the application of this hearing decision.

According to the hearing officer's PROCEDURAL HISTORY, the following occurred:

On July 25, 2011, Grievant was issued a letter of intent by Agency to issue a Group III disciplinary with termination for falsifying records, that is, falsifying her employment application. The Grievant responded on July 26, 2011 and on the same date a Written Notice was issued. On August 19, 2011, the Grievant filed an expedited grievance. The second step resolution response was issued on September 1, 2011. On September 22, 2011, the Commissioner qualified the matter for Hearing. A Hearing Officer was appointed on October 11, 2011. A Pre-Hearing Conference commenced October 19, 2011. At Counsels' requests there were two hearing dates, the matter of disciplinary action was heard on November 9, 2011 and the Retaliation Claim was heard November 21, 2011.

The hearing officer listed the following as APPLICABLE LAW in this case:

Agency relies on Standard of Conduct Policy 1.60, effective revised date June 1, 2011 and the Offense Code: 74 in order to issue a Group II discipline. Agency considered Section 3, mitigation. Grievant relies on Rules for Conducting a Grievant Hearing for her Retaliation Claim.

The relevant facts from the hearing officer's FINDING OF FACTS are as follows:

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

In early 2011 issues arose with one of Grievant's subordinates. The person was dealt with by Grievant's superiors. Grievant was upset about being passed by and not included in the discipline of her employee. Soon thereafter, statements were made that caused Agency to question some of Grievant's actions and behaviors. An investigation of Grievant commenced. Grievant took exception with the methods of investigations and the exclusion of her Attorney at meetings of herself and Agency. At the

conclusion of the investigation, rather than being issued a Written Notice, Grievant was made subject to a Performance Improvement Plan (PIP). Grievant was of the belief that she could not grieve the disciplinary action because it was not a Written Notice, nor could she grieve what she considered work place harassment. However, it appears she might have been able to qualify under GPM§4.1(b) 1 or the last paragraph of that section.

Nonetheless, Grievant did not file a grievance and, unknown to Agency, contacted her State Representative. It is clear Grievant had an absolute right to contact her State Representative. It is also clear that this did not put Agency on noticed of any claim of Grievant.

After Grievant was made aware of the discipline (PIP) from the first investigation, additional information came to light about Grievant having falsified her employment application. It was investigated as a new matter. It appeared that Grievant had not been forthcoming regarding her previous employment with State Facilities as well as claiming educational degrees that she did not possess. During the time the second investigation was ongoing, a State Official who had received information from Grievant's State Representative, made Agency aware of Grievant's complaints regarding her first investigation. After obtaining what Agency believed was sufficiency evidence of Grievant's falsification of records/employment application, Agency issued a Group III Written Notice with termination to the Grievant. Grievant complains that this Written Notice was retaliatory in nature.

The specific timeline of events is listed below, all occurring in 2011.

- 03/05/11: Investigation #1 commenced.
- 05/16/11: Conclusion of # 1 Investigation.
- 05/23/11: Grievant receives Notice of Discipline, (PIP) regarding investigation #1.
- 05/23/11: Agency Human Resource person reports to Grievant's Superior possible inconsistencies in Grievant's employment application.
- 05/23/11: Second Investigation starts.
- 06/06/11: Grievant sends complaints to her State Representative regarding Investigation # 1.
- 06/13/11: Grievant's supervisor talked to other Agency that had employed Grievant about Grievant's past employment regarding investigation #2.
- 06/15/11: Grievant's complaint regarding Investigation #1 sent to Governor's Office.
- 06/17/11: Human Resources request personnel file of Grievant from sister Agency regarding Investigation #2.
- 06/21/11: Grievant's information regarding Investigation #1 sent to additional Agencies in Richmond.
- 06/23/11: PIP issued to Grievant regarding Investigation #1.
- 06/28/11: Email from State Agency in Richmond informing Agency of Grievant's complaint.
- 06/29/11: Grievant's 76 page complaints regarding Investigation #1 sent to Agency.

07/25/11: Letter of Intent to issue a Written Notice regarding Investigation #2 given to Grievant.

07/26/11: Grievant's Notice of Group **III** discipline with termination given to Grievant.

The hearing officer wrote the following in her CONCLUSION 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." 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."

In order to find that retaliation has occurred, a causal link must exist between the adverse action and the protected activity. If the Agency presents a non-retaliatory business reason for the adverse action, the burden is on the Grievant to prove Agency's stated reason was a pretext.

The OPINION of the hearing officer is stated as the following:

Agency complains they would not have hired Grievant had they known of her false application. There was considerable testimony that numerous committees review a perspective employee's application before a person is approved for employment. A basic point at the first level of scrutiny was missed. Grievant claimed to have been continuously employed from April of 2004 through February of 2006 with one employer. If Agency had called to confirm these employment dates, Agency would have immediately recognized the first falsehood. Thereafter, Agency could have commenced questioning Grievant where she had actually been employed during the 2004 through 2006 time frame. However, Agency's failure to carefully verify the information does not lessen Grievant's intentional action of falsifying her employment application. The Grievant's application had several questionable statements. Of the several alleged falsehoods, two were actually proven. Grievant did not hold a Bachelor of Arts Degree from any Institution and the Grievant omitted or concealed at least one previous employment. The Grievant admitted to both of these errors in testimony and by letter of August 19, 2011, to her superior. Grievant was unable to offer any evidence to contradict the above allegations other than they were mistakes on her part when drafting the application. Also of concern was Grievant's possession of a Bachelor of Science Degree from a non-accredited college and holding certificates that require a Master's level education. However, no conclusive proof of these additional allegations were offered.

Grievant repeatedly testified that the application had not contained false information, but only erroneously submitted information in an electronic format. As to the Bachelor of Arts Degree, this explanation was completely incredible as Grievant

continued to use the "BA" certification on numerous correspondences.

Grievant stated she believed the Agency was aware of her employment at another State Facility during the April of 2004 through February of 2006 time period. She proffered as evidence the email from a Clerk in Human Resources, stating Grievant's prior service with State Facilities, which qualified her for service credit time. This document included the correct work history as to State employment of Grievant. The Clerk was not a part of the Selection Committee and it was never stated or denied that Clerk was aware that this created inconsistencies with the employment application. Grievant contends that since the email was copied to other Human Resource personnel, they should have seen the errors and acted accordingly. Again, whether the error was acknowledged or not, it was not Agency's duty to correct the application.

Grievant believed Agency should have considered mitigation of the discipline based on her good employment record. The Agency stated mitigation was considered and acknowledged that the employee had indeed made contributions during employment. However, the breach of trust was too overwhelming and consistent to consider her continued employment.

The Hearing Officer's conclusion is that Grievant did intentionally falsify her employment application to [the facility]. The allegations have been proven and are consistent with Standards of Conduct, Policy: 1.60, Effective Date: 04116/08 and the offense "falsification of records" of Code: 74 are consistent with discharge of a Group III Offense nature. Code: 74; Falsifying of Records was attached to Grievant's written notice. Mitigation was considered and rejected by Agency.

Grievant then stated her claim of Retaliation. Grievant believed the Written Notice and termination was due to her reporting her complaints of Agency to her State Representative. Grievant further believed Agency had no right to obtain her personnel records from her previous State employer. The Grievant gave considerable evidence about her complaints regarding her first investigation" and is of the opinion these complaints were pertinent to the retaliation claim. The 76 pages of complaints/notes all regarded the first investigation. The first investigation was not grieved and not a part of this hearing. The notes have no relevance to this hearing other than being the content of the report to her State Representative. The time line of events show the second investigation of Grievant was commenced well before Agency had knowledge of Grievant's complaints to her State Representative. The Grievant has shown no connection between her contact with her State Official and the Agency's investigation resulting in a discipline decision. The basis for which the Group III Written Notice is issued is a sound and proven basis. Whether or not the Agency should have received Grievant's employment records is not pertinent to this hearing as it was clearly allowable for the Agency to report employment dates, which then established that Grievant had not been truthful on her previous employment application.

The conclusion is that there is no nexus on which to base retaliation and no

abuse of discretion in issuing a Group III Written Notice regarding falsification of records.

The hearing DECISION is as follows:

For the above stated reasons the Group III disciplinary action is **upheld** and the retaliation claim is **denied**.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the instant case, the hearing officer concluded, "...that Grievant did intentionally falsify her employment application to [the facility]. The allegations have been proven and are consistent with Standards of Conduct, Policy: 1.60, Effective Date: 04/16/08 and the offense "falsification of records" of Code: 74 are consistent with discharge of a Group III Offense nature. Code: 74; Falsifying of Records was attached to Grievant's written notice. Mitigation was considered and rejected by Agency." There is no basis for DHRM to intercede with respect to this conclusion because this is an evidentiary matter.

Concerning the grievant's appeal of the hearing decision on the basis that the allegation of retaliation was not considered by the hearing officer, it appears that, based on the chronology and analysis of events by the hearing officer, this issue was addressed appropriately. Thus, this issue warrants no further review.

Regarding the grievant's concern that mitigation should have been considered by the Agency, the hearing officer determined that agency officials did evaluate mitigating factors. Thus, this issue warrants no further review.

Finally, the grievant raised the issue that the officials secured employment data from her files without securing her permission. According to the provisions of DHRM Policy 6.05, Personnel Records Disclosure, *Disclosure of Information to Third Parties*:

- Certain personal information must be disclosed to third parties upon request and may be disclosed without the knowledge and consent of the subject employee. This information includes:
 1. employee's position title;
 2. employee's job classification title;

3. dates of employment; and
 4. annual salary, official salary or rate of pay, if such pay exceeds \$10,000 per year.
- Other personal information may not be disclosed to third parties without the written consent of the subject employee. This information includes, but may not be limited to:
 1. performance evaluations;
 2. mental and medical records;
 3. credit or payroll deduction information;
 4. applications for employment;
 5. records of suspension or removal including disciplinary actions under the Standards of Conduct, Policy 1.60;
 6. records concerning grievances or complaints;
 7. scholastic records;
 8. records of arrests, convictions, or investigations;
 9. material relating to Workers' Compensation claims;
 10. material relating to Unemployment Compensation claims;
 11. retirement records;
 12. confidential letters of reference or recommendation;
 13. results of pre-employment tests; and
 14. personal information such as race, sex, age, home address, home telephone number, marital status, dependents' names, insurance coverage, or social security number.
 - The following individuals/agencies may have access to employee records without the consent of the subject employee. This list is not all inclusive.
 1. employee's supervisor and, with justification, higher level managers in the employee's supervisory chain.
 2. The employee's agency head or designee and agency human resource employees, as necessary.
 3. Specific private entities which provide services to state agencies through contractual agreements (such as health benefits, life insurance, Workers' Compensation, etc.) in order to provide such services.

Please note that the above policy defines Third Parties as “Individuals other than the subjects of the records, including other state agencies, who request information from the records maintained by the agencies.” In the instant case, the agency here is identified as the Department of Behavioral Health and Developmental Services (DBHDS). Because DBHDS is the curator of and owns all agency records, that agency had the right to share all personnel records with its facilities. In addition, in this case the grievant could have been reemployed by *any* new agency, and that agency would have had every right under policy to request a copy of the previous employment record.

Based on the above reasons, DHRM has no reason to intercede in the application of this decision.

Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services