Issues: Group III Written Notice (falsifying records, conduct unbecoming, failure to follow instructions, insubordination), Termination and Retaliation; Hearing Date: 10/17/12; Decision Issued: 01/04/13; Agency: Virginia Community College System; AHO: Carl Wilson Schmidt, Esq.; Case No. 9929; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received on 01/22/13; EDR Ruling No. 2013-3522 issued 03/13/13; Outcome: Hearing Decision in Compliance; Administrative Review: DHRM Ruling Request received 01/22/13; DHRM Ruling issued 03/19/13; Outcome: Hearing Decision in Compliance; Judicial Review: Appealed to Circuit Court in Loudoun County on 04/15/13; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9929

Hearing Date: October 17, 2012
Decision Issued: January 4, 2013

PROCEDURAL HISTORY

On August 13, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow General Orders and DHRM policies.

On August 30, 2012, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeding to hearing. On September 17, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 17, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

5. Whether the Agency retaliated against Grievant?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

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

The Virginia Community College System employed Grievant as a Police Officer at one of it Colleges until his removal effective August 13, 2012. He began working for the Agency on December 21, 2007. The purpose of his position was to provide security for college and personal property at the College through crime prevention activities, patrol, investigation of all reported and suspected criminal activity, and enforcement of State traffic laws.

Grievant had prior active disciplinary action. He received a Group II Written Notice on July 23, 2010.

On September 11, 2006, Grievant and his Wife, a Virginia State Trooper, had an argument at their residence. The Wife mentioned the altercation in confidence to another employee who she considered to be a friend. That employee disclosed the matter to Virginia State Police managers who initiated an investigation. Trooper S and Sergeant B of the Virginia State Police investigated the incident. Grievant told the investigators he denied the allegations. Trooper S spoke with the Commonwealth's Attorney who declined to bring charges against Grievant. Grievant was never arrested or detained by the Virginia State Police. Trooper S closed his case file on October 10, 2006.

Grievant submitted an application for employment dated September 18, 2007 in which he certified "that all statements and representations made by me in this form are true and correct to the best of my knowledge." Grievant did not disclose the September 11, 2006 alleged conflict on his application for employment because he did not see a question requiring such disclosure.

Lieutenant S conducted a background investigation of Grievant before the Agency hired Grievant. He was aware of the alleged domestic violence incident but did not consider it to be of a serious nature. The Agency hired Grievant as a Police Officer.

On June 24, 2011, Grievant signed the LInX user agreement stating:

> I … hereby acknowledge that I have read, understood and agree to comply with the NCR LInX User rules, I also understand that the LInX system and equipment are subject to monitoring to ensure proper function and to protect against improper unauthorized use, access or dissemination of information. Unauthorized request, use, dissemination or receipt of LInX information could result in civil or criminal proceedings being brought against the agencies and/or individuals involved. Violations of these rules may subject the user to possible disciplinary action and LInX access termination." [1]

Grievant received training on the LInX system. Grievant knew that Lieutenant W would often have employees run reports on themselves as part of that training. On August 10, 2011, Grievant used the LInX system to print a report on himself as a continuation of his training. Grievant's LInX report showed that he had been investigated by the Virginia State Police for alleged domestic violence in 2006. The report listed Grievant as an "offender" for "simple assault." Grievant believed that the investigation should not have been reported in LInX because he had not been arrested and no criminal charges had been brought against him. He believed that his LInX file was in error. He gave a copy of the report to his attorney with the objective of having his record corrected. He did not ensure that the report was destroyed within 72 hours as required by policy.

In February 2012, the Student lost a flash drive containing her work papers and a database important to her. She filed a report with Officer G of the Agency's Police Department to attempt to locate the flash drive. She called Officer G and asked if the Agency had found her flash drive. Officer G told her the flash drive had not been found. The Student told Officer G that the Police Department needed to find the flash drive. She waited for a few days but did not receive a response from Officer G or the Police Department. She went to the Police Department. Grievant and Officer G were working when she arrived. She stated why she was there but received no response. She waited for ten to twenty minutes without receiving a response. Grievant questioned why she could not simply purchase another flash drive. She replied that she had important

[1] Agency Exhibit D.

information on the flash drive and need the drive she had lost. She was told that the flash drive might be in the "lost and found". The Student asked for a business card from Officer G but he did not have one. Grievant had a business card so he suggested Officer G write his name on the back of Grievant's business card and the card be given to the Student. Officer G wrote his name on the card and the card was given to the Student. At some point, Grievant hit his fists on a table, stood up and said that the Student was accusing him of not doing a good job. The Student perceived Grievant's response as strange since she was not talking to Grievant. Grievant walked to the back and obtained a form and returned to the front. He shoved the form in the Student's right hand and told her she had to fill out the form. Grievant explained to her that if she filled out the form that he could come after her with a lawsuit and obtain a judgment and take her and her family for everything they had. The Student observed that Grievant was angry. Grievant pointed his finger at her and told her to get out.[2] The Student concluded it was best to leave the Police Department. She was noticeably upset when she left the Police Department. She walked by the Provost's office and the Secretary asked the Student if she was all right. The Student explained what had happened. She later filed a complaint with the Sergeant regarding her treatment.

On May 29, 2012, Grievant signed the Administrative Proceeding Rights Notice of Allegations. The Notice advised Grievant that "[r]efusal to answer all questions pertaining to the allegations made by the complainant, both orally and in writing, shall be grounds for disciplinary action and may result in dismissal from the department." He was also informed that the "answers given during the investigation of an administrative matter cannot be used against you in any criminal proceedings." Lieutenant Commander W asked Grievant whether he had distributed LInX information to unauthorized individuals. Grievant refused to answer the questions presented to him. After his first refusal to answer the question, Grievant was advised that his refusal to answer the questions would constitute an act of insubordination and violation of the Agency's Police Department General Order 201, paragraph 1.4 (Performance of Duty) and 1.20 (Truthfulness). Grievant continued to refuse to answer the questions presented to him.

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

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[2] Grievant described the encounter, in part, as follows:

> I went and got her a complaint form and gave her the form and explain[ed to] her about the form. I told [her] that she needs to get the form notarized and everything needs to be true to the best of her knowledge, and if not I was going to sue her for lying. I said to the female that she needed to leave the office because she was getting really frustrated and there was no more that we could do for her.

See, Grievant's March 9, 2012 statement.

disciplinary action."[3] 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."

The Agency combined several separate fact scenarios into one Group III Written Notice. The question becomes whether any one of the separate allegations can substantiate a single Group III Written Notice. Each allegation must be addressed.

"[F]alsification of records" is a Group III offense.[4] Falsification is not defined by the Standards of Conduct 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.*

The Agency alleged that Grievant falsified his application for employment because he failed to disclose that he had been investigated by the State police for alleged domestic violence. The Agency's application for employment asks numerous questions about Grievant's background. It does not ask a question about whether a candidate has been investigated by a law enforcement agency without further action being taken.[5] The Agency's pre-employment investigator was aware of the incident and did not believe it was significant enough to prohibit Grievant's employment. There is no basis to issue Grievant a Group III Written Notice for falsification of his application for employment.

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

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

[5] Question 42 of the application asked if Grievant had been arrested or detained by any law enforcement agency. Grievant was not arrested or detained by the Virginia State Police. Grievant answered Question 42 correctly.

The Agency alleged that Grievant violated General Order 201-1 (Paragraph 1.7, Conduct Unbecoming)[6] when he told a student to leave the police office. The Student was a difficult customer. She was demanding and insisting that the Police Department find her flash drive. There was little the Police Department staff could do to locate the flash drive, yet the Student was insistent that the Police Department staff find the flash drive. Grievant became angry, displayed his anger to the Student, and instructed her to leave. His behavior was not consistent with good customer service and amounted to unsatisfactory work performance, a Group I offense. It is arguable that Grievant's behavior rose to the level of a Group II offense given the intensity of Grievant's response to the Student. The Student's extraordinary, prolonged, and irrational insistence that the Police Department staff search the campus for her flash drive, however, served as a basis to mitigate against elevating the disciplinary action.

The Agency alleged that Grievant violated General Order 706-1 (Complaints Against Police Personnel/Administrative Investigations) when he threatened to sue the student if she filed a complaint against him. Grievant's threat was based on the language contained in the form. As he "went over" the form with the Student, he recited the wording of the form. The certification language of the complaint form states, "I understand that any false misleading or untrue statement, accusations or allegations herein made by me, in relation to this complaint, either orally or in writing, to any person or persons investigating this complaint, may subject me to civil suit and/or criminal prosecution." Grievant's statements were not materially inconsistent with the terms of the form.

The Agency alleged that Grievant violated the provision of a federal database known as the Law Enforcement Information Exchange or LInX which restricts usage to criminal investigations, employment investigations, and training. The User Rules provide:

> An authorized user may view, read, and make notes on the data obtained as a result of a LInX query. For temporary official law enforcement purposes only, a NCR-LInX User is authorized to print or electronically save a copy of a Report of Photograph that is contained in the NCR-LInX data warehouse for a period of up to 72 hours.[7]

Grievant was obligated to destroy the report within 72 hours of printing it. He failed to do so thereby acting contrary to policy. Failure to comply with policy is a Group II offense under the Standards of Conduct.

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[6] This language is more of a "catch all" provision than a prohibition against specific behavior. If a police officer violated a standards of conduct, then it is likely that the violation would also be conduct unbecoming. It is more significant to determine whether Grievant violated a Standard of Conduct rather than focusing on the language of Policy 201-1.7A.

[7] Agency Exhibit A.

Grievant argued that he did not destroy the report within 72 hours because he did not know how to deal with the situation he faced. The report contained information that he believed was highly inaccurate. He argued that it was appropriate to disclose that information to his attorney and that he had a right to do so. Grievant's argument fails because, in essence, he is arguing that the "means justify the ends." Because the inaccuracy was important to him and needed to be corrected, he had the right to disregard the policy requiring destruction of reports within 72 hours. The policy makes no such exception.

The Agency alleged that Grievant refused to answer questions regarding whether he shared the contents of his personal record on LInX with another individual. Failure to comply with a supervisor's instructions is a Group II offense. Grievant was instructed to answer the Agency's questions as part of an administrative investigation, not a criminal investigation. Grievant failed to comply with a supervisor's instructions when he refused to answer Lieutenant Commander W's questions.

Grievant argued it was appropriate for him to refuse to answer the questions at that time because he had spoken with his attorney previously regarding the matter and needed to speak again with his attorney. The attorney-client privilege is not limited to criminal proceedings. Grievant retained the privilege to refuse to disclose his private conversations with his attorney. In this case, it is clear that Grievant refused to answer because he believed that his actions were protected by attorney-client privilege. His refusal to answer the questions was not in order to defy the Agency's investigator or cover up behavior alleged to be subject to criminal sanction. Grievant's refusal to answer the questions presented to him was appropriate under the circumstances.[8]

Grievant argued that he was denied procedural due process because the charges were based on documents he had not reviewed and or been interviewed about and for which he did not receive notice. To the extent the Agency denied Grievant procedural due process, that deficit has been cured. Grievant had notice of all the documents the Agency intended to present during the hearing and had the opportunity to present any evidence he wished during the hearing.

When the facts of this case are considered as a whole, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Grievant had prior active disciplinary action consisting of a Group II Written Notice issued in July 2010. Accordingly, there exists a basis to uphold the Agency's decision to remove Grievant based on the accumulation of disciplinary action.

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

[8] Grievant was not authorized to give his attorney a print out of the LInX report. He could be disciplined for doing so. Under the attorney-client privilege, however, he was not obligated to disclose that he had provided a copy of the document to his attorney.

Management …."[9] 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.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[10] (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 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.[11]

Grievant alleged that the Agency retaliated against him for his participation in a prior grievance. No credible evidence was presented to show that the Agency took disciplinary action with removal against Grievant because of any prior participation in a grievance proceeding. The Agency did not take disciplinary action against Grievant as a pretext for retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group II Written Notice. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

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[9] Va. Code § 2.2-3005.

[10] 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.

[11] 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).

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.[12]

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

[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

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Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Northern Virginia Community College

March 19, 2013

The grievant has requested an administrative review of the hearing decision in Case No. 9929. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The hearing officer listed, in part, the following in the PROCEDURAL HISTORY of this case:

> On August 13, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow General Orders and DHRM policies.
>
> On August 30, 2012, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 17, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 17, 2012, a hearing was held at the Agency's office.

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?

The relevant facts of this case, as enumerated by the hearing officer, are as follows:

> After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:
>
> The Virginia Community College System employed Grievant as a Police Officer at one of it Colleges until his removal effective August 13, 2012. He began working for the Agency on December 21, 2007. The purpose of his position was to provide security for college and personal property at the College through crime prevention activities, patrol,

investigation of all reported and suspected criminal activity, and enforcement of State traffic laws.

Grievant had prior active disciplinary action. He received a Group II Written Notice on July 23, 2010.

On September 11, 2006, Grievant and his Wife, a Virginia State Trooper, had an argument at their residence. The Wife mentioned the altercation in confidence to another employee who she considered to be a friend. That employee disclosed the matter to Virginia State Police managers who initiated an investigation. Trooper S and Sergeant B of the Virginia State Police investigated the incident. Grievant told the investigators he denied the allegations. Trooper S spoke with the Commonwealth's Attorney who declined to bring charges against Grievant. Grievant was never arrested or detained by the Virginia State Police. Trooper S closed his case file on October 10, 2006.

Grievant submitted an application for employment dated September 18, 2007 in which he certified "that all statements and representations made by me in this form are true and correct to the best of my knowledge." Grievant did not disclose the September 11, 2006 alleged conflict on his application for employment because he did not see a question requiring such disclosure.

Lieutenant S conducted a background investigation of Grievant before the Agency hired Grievant. He was aware of the alleged domestic violence incident but did not consider it to be of a serious nature. The Agency hired Grievant as a Police Officer.

On June 24, 2011, Grievant signed the LInX user agreement stating:

> I … hereby acknowledge that I have read, understood and agree to comply with the NCR LInX User rules, I also understand that the LInX system and equipment are subject to monitoring to ensure proper function and to protect against improper unauthorized use, access or dissemination of information. Unauthorized request, use, dissemination or receipt of LInX information could result in civil or criminal proceedings being brought against the agencies and/or individuals involved. Violations of these rules may subject the user to possible disciplinary action and LInX access termination."

Grievant received training on the LInX system. Grievant knew that Lieutenant W would often have employees run reports on themselves as part of that training. On August 10, 2011, Grievant used the LInX system to print a report on himself as a continuation of his training. Grievant's LInX report showed that he had been investigated by the Virginia State Police for alleged domestic violence in 2006. The report listed Grievant as an "offender" for "simple assault." Grievant believed that the investigation should not have been reported in LInX because he had not been arrested and no criminal charges had been brought against him. He believed that his LInX file was in error. He gave a copy of the report to his attorney with the objective of having his record corrected. He did not ensure that the report was destroyed within 72 hours as required by policy.

In February 2012, the Student lost a flash drive containing her work papers and a database important to her. She filed a report with Officer G of the Agency's Police Department to attempt to locate the flash drive. She called Officer G and asked if the Agency had found her flash drive. Officer G told her the flash drive had not been found. The Student told Officer G that the Police Department needed to find the flash drive. She waited for a few days but did not receive a response from Officer G or the Police Department. She went to the Police Department. Grievant and Officer G were working when she arrived. She stated why she was there but received no response. She waited for ten to twenty minutes without receiving a response. Grievant questioned why she could not simply purchase another flash drive. She replied that she had important information on the flash drive and need the drive she had lost. She was told that the flash drive might be in the "lost and found". The Student asked for a business card from Officer G but he did not have one. Grievant had a business card so he suggested Officer G write his name on the back of Grievant's business card and the card be given to the Student. Officer G wrote his name on the card and the card was given to the Student. At some point, Grievant hit his fists on a table, stood up and said that the Student was accusing him of not doing a good job. The Student perceived Grievant's response as strange since she was not talking to Grievant. Grievant walked to the back and obtained a form and returned to the front. He shoved the form in the Student's right hand and told her she had to fill out the form. Grievant explained to her that if she filled out the form that he could come after her with a lawsuit and obtain a judgment and take her and her family for everything they had. The Student observed that Grievant was angry. Grievant pointed his finger at her and told her to get out. The Student concluded it was best to leave the Police Department. She was noticeably upset when she left the Police Department. She walked by the Provost's office and the Secretary asked the Student if she was all right. The Student explained what had happened. She later filed a complaint with the Sergeant regarding her treatment.

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CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." 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."

The Agency combined several separate fact scenarios into one Group III Written Notice. The question becomes whether any one of the separate allegations can substantiate a single Group III Written Notice. Each allegation must be addressed.

"[F]alsification of records" is a Group III offense. Falsification is not defined by the Standards of Conduct 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.

The Agency alleged that Grievant falsified his application for employment because he failed to disclose that he had been investigated by the State police for alleged domestic violence. The Agency's application for employment asks numerous questions about Grievant's background. It does not ask a question about whether a candidate has been investigated by a law enforcement agency without further action being taken. The Agency's pre-employment investigator was aware of the incident and did not believe it was significant enough to prohibit Grievant's employment. There is no basis to issue Grievant a Group III Written Notice for falsification of his application for employment.

The Agency alleged that Grievant violated General Order 201-1 (Paragraph 1.7, Conduct Unbecoming) when he told a student to leave the police office. The Student was a difficult customer. She was demanding and insisting that the Police Department find her flash drive. There was little the Police Department staff could do to locate the flash drive, yet the Student was insistent that the Police Department staff find the flash drive. Grievant became angry, displayed his anger to the Student, and instructed her to leave. His behavior was not consistent with good customer service and amounted to unsatisfactory work performance, a Group I offense. It is arguable that Grievant's behavior rose to the level of a Group II offense given the intensity of Grievant's response to the Student. The Student's extraordinary, prolonged, and irrational insistence that the Police Department staff search the campus for her flash drive, however, served as a basis to mitigate against elevating the disciplinary action.

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An authorized user may view, read, and make notes on the data obtained as a result of a LInX query. For temporary official law enforcement purposes only, a NCR-LInX User is authorized to print or electronically save a copy of a Report of Photograph that is contained in the NCR-LInX data warehouse for a period of up to 72 hours.

Grievant was obligated to destroy the report within 72 hours of printing it. He failed to do so thereby acting contrary to policy. Failure to comply with policy is a Group II offense under the Standards of Conduct.

Grievant argued that he did not destroy the report within 72 hours because he did not know how to deal with the situation he faced. The report contained information that he believed was highly inaccurate. He argued that it was appropriate to disclose that information to his attorney and that he had a right to do so. Grievant's argument fails because, in essence, he is arguing that the "means justify the ends." Because the inaccuracy was important to him and needed to be corrected, he had the right to disregard the policy requiring destruction of reports within 72 hours. The policy makes no such exception.

The Agency alleged that Grievant refused to answer questions regarding whether he shared the contents of his personal record on LInX with another individual. Failure to comply with a supervisor's instructions is a Group II offense. Grievant was instructed to answer the Agency's questions as part of an administrative investigation, not a criminal investigation. Grievant failed to comply with a supervisor's instructions when he refused to answer Lieutenant Commander W's questions.

Grievant argued it was appropriate for him to refuse to answer the questions at that time because he had spoken with his attorney previously regarding the matter and needed to speak again with his attorney. The attorney-client privilege is not limited to criminal proceedings. Grievant retained the privilege to refuse to disclose his private conversations with his attorney. In this case, it is clear that Grievant refused to answer because he believed that his actions were protected by attorney-client privilege. His

refusal to answer the questions was not in order to defy the Agency's investigator or cover up behavior alleged to be subject to criminal sanction. Grievant's refusal to answer the questions presented to him was appropriate under the circumstances.

Grievant argued that he was denied procedural due process because the charges were based on documents he had not reviewed and or been interviewed about and for which he did not receive notice. To the extent the Agency denied Grievant procedural due process, that deficit has been cured. Grievant had notice of all the documents the Agency intended to present during the hearing and had the opportunity to present any evidence he wished during the hearing.

When the facts of this case are considered as a whole, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Grievant had prior active disciplinary action consisting of a Group II Written Notice issued in July 2010. Accordingly, there exists a basis to uphold the Agency's decision to remove Grievant based on the accumulation of disciplinary action.

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 …." 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 nonexclusive 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.

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

Grievant alleged that the Agency retaliated against him for his participation in a prior grievance. No credible evidence was presented to show that the Agency took disciplinary action with removal against Grievant because of any prior participation in a grievance

proceeding. The Agency did not take disciplinary action against Grievant as a pretext for retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is reduced to a Group II Written Notice. Grievant's removal is upheld based on the accumulation of disciplinary action.

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 each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent or is misinterpreted. In his appeal to this Agency, the grievant referenced several policies that either were applied inconsistently or misinterpreted. This ruling will address the application of two of those policies, the NCR LlnX and the DHRM Standards of Conduct. The grievant was charged with violating the provisions of the LlnX because he held in his possession a LlnX report for more than 72 hours without destroying it. As per the agreement signed by the grievant, any violation of that policy may subject the user of the Llnx system to possible disciplinary action. In the instant case, the grievant's agency issued to the grievant a Group III Written Notice with termination. The hearing officer reduced the disciplinary action to a Group II Written Notice. However, the grievant remained terminated because he had another active Group II Written Notice. The combination of two active Group II Written Notices is sufficient to terminate an employee. This Department observes that the hearing officer drew his conclusion based on his assessment of the evidence and the credibility of the parties involved. Thus, we conclude that the grievant is contesting the evidence the hearing officer considered, how he assessed that evidence, and the resulting decision. We have no authority to interfere with the application of this decision.

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Ernest G. Spratley
Assistant Director
Office of Equal Employment Services