

Issues: Group I Written Notice (disruptive behavior), Group III Written Notice (workplace violence), and Termination; Hearing Date: 01/11/13; Decision Issued: 01/15/13; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9940, 9993; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 01/29/13; EDR Ruling No. 2013-3525 issued 02/22/13; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 01/29/13; DHRM Ruling issued 03/05/13; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9940 / 9993

Hearing Date: January 11, 2013

Decision Issued: January 15, 2013

PROCEDURAL HISTORY

On June 19, 2012, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior. On October 18, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

On July 11, 2012, Grievant timely filed a grievance to challenge the Group I Written Notice. On November 14, 2012, Grievant timely filed a grievant to challenge the Group III Written Notice. Grievant requested a hearing. On November 27, 2012, the Office of Employment Dispute Resolution (EDR) issued Ruling No. 2013-3481 consolidating the two grievances for a single hearing. On December 5, 2012, EDR assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this appeal due to the unavailability of a party. On January 11, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
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 Department of Juvenile Justice employed Grievant as an Office Service Assistant at one of its facilities until her removal effective October 18, 2012. She began working for the Agency in October 2001. No evidence of prior active disciplinary action was introduced during the hearing.

On June 18, 2012, Grievant was one of four office service assistants working at the facility. She was working at the front desk which was separated by a door to the office service assistant's pool. Ms. L and Ms. B were working at two of several desks grouped together. Grievant called Ms. B and asked Ms. B to come relieve her so that she could go to the restroom. Ms. B said she was on her lunch break until 1 p.m. Grievant asked Ms. B if Ms. L was on her lunch break. Ms. B asked Ms. L if Ms. L was on her lunch break and Ms. L said "yes" and that her lunch break was scheduled to end at 1 p.m. Ms. B told Grievant what Ms. L said. Grievant became angry because she recognized that the other employees were not acting in accordance with their prior agreement that only two office service assistants could be on break at the same time.

Another office service assistant, Ms. S, had left the building to pick up lunch for other staff and bring it back to the office. When Ms. S returned to the facility, she relieved Grievant and Grievant went to the restroom. Grievant complained to the Team Leader that the other employees were not following the established practice. Grievant walked to the officer service assistant pool and began speaking in a loud voice to Ms. L. Grievant said, "You girls can't be taking lunch at the same time." Grievant did not use profanity. Grievant walked back to the front desk and resumed her duties.

Ms. Le is a Senior Probation Officer at the Facility. She and Grievant had a good working relationship.

On either July 30, 2012 or August 6, 2012, Ms. Le, Ms. G, and an intern were working at or near Ms. Le's desk. Someone had placed a pile of folders on Grievant's desk. Grievant asked who placed the folders in her office and she was told that Ms. Le did so. Grievant walked to Ms. Le's office and asked why Ms. Le had given her so much work to do. Grievant approached Ms. Le from Ms. Le's left side. Grievant placed her left hand around the front of Ms. Le's throat. Grievant placed her right hand around the back of Ms. Le's neck. Grievant then squeezed her two hands together. Grievant did not squeeze so hard as to prevent Ms. Le from breathing. Ms. Le was shocked, confused, and angered by Grievant's action. She turned her head to her right and said to Grievant, "You have two f—king milliseconds to get your hands from my neck." Grievant removed her hands from Ms. Le's neck. Ms. Le asked Grievant to leave. Grievant walked away from the area. If Ms. Le had not been able to exercise self-control, she would have punched Grievant in the face. Ms. Le, Ms. G and the intern expressed dismay at what Grievant did. One of the group asked, "Did this just happen?" Another one of the group asked, "Has she lost her mind?"

Ms. Le did not report the matter immediately because she believed she would get in trouble for cursing in front of an intern. Only in later discussions with Agency managers did the incident become known.

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."¹ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Group I

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

The Agency argued that Grievant engaged in disruptive behavior on June 18, 2012. Although it is clear Grievant was frustrated and her voice was raised, it is not clear her behavior was sufficiently disruptive to justify the issuance of a Group I Written Notice. The two people closest to Grievant were Ms. L and Ms. B. Ms. L testified that Grievant's behavior was not disruptive. The Agency did not call Ms. B as a witness. The Agency called Ms. S as a witnesses but it is unclear whether Ms. S actually observed the altercation as she claimed. Several witnesses testified that Ms. S was not present at the time Grievant was speaking with Ms. L. Ms. S testified that she heard Grievant say "Why the hell are two people taking lunch at the same time!" Ms. S told the investigator, however, that Grievant did not use profanity during the encounter on June 18, 2012. When the Team Leader walked back to the OSA pool after being notified of a possible conflict, Ms. S was not there.

The Agency has not presented sufficient evidence to support the issuance of a Group I Written Notice for disciplinary action. The Group I Written Notice must be reversed.

Group III Written Notice

Agency Policy 05-008 governs Workplace Violence. This policy defines workplace violence as:

Any act that results in threatened or actual harm to persons or property. This includes not only physical assaults, but also verbal or written communication or gestures intended to threaten or intimidate others, or which convey a direct or indirect threat of harm to oneself or others.

DHRM Policy 1.80 defines workplace violence as:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.

Prohibited actions under DHRM Policy 1.80 include:

Prohibited conduct includes, but is not limited to:

- injuring another person physically;
- engaging in behavior that creates a reasonable fear of injury to another person;
- engaging in behavior that subjects another individual to extreme emotional distress;

- possessing, brandishing, or using a weapon that is not required by the individual's position while on state premises or engaged in state business;
- intentionally damaging property;
- threatening to injure an individual or to damage property;
- committing injurious acts motivated by, or related to, domestic violence or sexual harassment; and
- retaliating against any employee who, in good faith, reports a violation of this policy.

Employees violating DHRM Policy 1.80 will be subject to disciplinary action under Policy 1.60, *Standards of Conduct*, up to and including termination, based on the situation.

Grievant engaged in workplace violence against Ms. Le. Grievant engaged in threatening behavior. Her actions served as a physical assault against Ms. Le. Grievant established an intimidating presence to communicate her displeasure with being assigned cases. 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, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that she merely put her hands on Ms. Le's neck in order to massage her neck. This argument is not supported by the evidence. Ms. Le's testimony was credible. Ms. Le's response to Grievant's behavior was immediate and intense and would have been inconsistent with someone trying to massage a person's neck as opposed to squeezing a person's neck in a choking manner.

Grievant argued that she was joking and laughing and did not intend to harm or intimidate Ms. Le. This argument is not supported by the evidence. Grievant did not communicate with Ms. Le prior to touching her. Ms. Le was focused on her work with the intern. Ms. Le displayed no behavior to suggest that she intended or expected a light-hearted interaction with Grievant. No one heard Grievant laughing or observed her displaying demeanor consistent with someone playing a joke on another employee. Grievant was expressing her frustration with being given additional work by Ms. Le. The evidence shows that Grievant was frustrated with Ms. Le and approached her and squeezed her neck in a threatening manner.

Grievant argued that the intern and Ms. G did not report Grievant's behavior and that Ms. Le reported the incident several weeks after it occurred. Grievant reasoned that if her behavior had been sufficient to rise to the level justifying disciplinary action, surely it would have been reported on a more timely basis. The evidence showed that Ms. Le did not report the incident immediately because she feared she would get in trouble for cursing in front of the intern and not because she believe Grievant's behavior was insignificant.

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”² 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 Group III Written Notice with removal.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;³ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant’s evidence shows by a preponderance of the evidence that the Agency’s stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency’s explanation was pretextual.⁴

Grievant engaged in a protected activity because she filed a complaint with the State Fraud, Waste, and Abuse Hotline. Grievant suffered an adverse employment action because she was removed from employment. When Agency Investigators arrived at the Facility on August 24, 2012, they disclosed the allegations to the Unit Director. The Unit Director surmised that Grievant was the one who had filed the complaint. He based his assumption by concluding that Grievant was the only person who could have known sufficient facts to make the complaint. The Unit Director learned of Grievant’s conflict with Ms. Le a day or two before meeting with the Agency

² *Va. Code § 2.2-3005.*

³ 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.

⁴ 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).

Investigators and asked them how to proceed to have the allegations against Grievant investigated given that the Agency Investigators formed a unit new to the Agency. They advised the Unit Director that they could investigate the allegations against Grievant. Although the Unit Director was involved in discussions with Agency managers regarding Grievant's behavior, he was not a deciding voice regarding whether Grievant would receive disciplinary action and the appropriate level of disciplinary action. There does not appear to be a sufficient nexus between the protected activity and the adverse employment action such that the Agency retaliated against Grievant. If the Hearing Officer assumes for the sake of argument that the Unit Director was sufficiently involved in the Agency's disciplinary decision making, Grievant's behavior is sufficiently egregious for the Hearing Officer to conclude that the Agency would have issued a Group III Written Notice with removal in the absence of any retaliatory motive. The Agency's disciplinary action in this case is not a pretext to retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice with removal 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 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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Juvenile Justice

March 5, 2013

The grievant has requested an administrative review of the hearing officer's decision in Case Nos. 9940 & 9983. 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, in part, listed the following in the PROCEDURAL HISTORY of this case:

June 19, 2012, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior. On October 18, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

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 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 Department of Juvenile Justice employed Grievant as an Office Service Assistant at one of its facilities until her removal effective October 18, 2012. She began working for the Agency in October 2001. No evidence of prior active disciplinary action was introduced during the hearing.

On June 18, 2012, Grievant was one of four office service assistants working at the facility. She was working at the front desk which was separated by a door to the office service assistant's pool. Ms. L and Ms. B were working at two of several desks grouped together. Grievant called Ms. B and asked Ms. B to come relieve her so that she

could go to the restroom. Ms. B said she was on her lunch break until 1 p.m. Grievant asked Ms. B if Ms. L was on her lunch break. Ms. B asked Ms. L if Ms. L was on her lunch break and Ms. L said "yes" and that her lunch break was scheduled to end at 1 p.m. Ms. B told Grievant what Ms. L said. Grievant became angry because she recognized that the other employees were not acting in accordance with their prior agreement that only two office service assistants could be on break at the same time.

Another office service assistant, Ms. S, had left the building to pick up lunch for other staff and bring it back to the office. When Ms. S returned to the facility, she relieved Grievant and Grievant went to the restroom. Grievant complained to the Team Leader that the other employees were not following the established practice. Grievant walked to the officer service assistant pool and began speaking in a loud voice to Ms. L. Grievant said, "You girls can't be taking lunch at the same time." Grievant did not use profanity. Grievant walked back to the front desk and resumed her duties.

Ms. Le is a Senior Probation Officer at the Facility. She and Grievant had a good working relationship.

On either July 30, 2012 or August 6, 2012, Ms. Le, Ms. G, and an intern were working at or near Ms. Le's desk. Someone had placed a pile of folders on Grievant's desk. Grievant asked who placed the folders in her office and she was told that Ms. Le did so. Grievant walked to Ms. Le's office and asked why Ms. Le had given her so much work to do. Grievant approached Ms. Le from Ms. Le's left side. Grievant placed her left hand around the front of Ms. Le's throat. Grievant placed her right hand around the back of Ms. Le's neck. Grievant then squeezed her two hands together. Grievant did not squeeze so hard as to prevent Ms. Le from breathing. Ms. Le was shocked, confused, and angered by Grievant's action. She turned her head to her right and said to Grievant, "You have two f-king milliseconds to get your hands from my neck." Grievant removed her hands from Ms. Le's neck. Ms. Le asked Grievant to leave. Grievant walked away from the area. If Ms. Le had not been able to exercise self-control, she would have punched Grievant in the face. Ms. Le, Ms. G and the intern expressed dismay at what Grievant did. One of the group asked, "Did this just happen?" Another one of the group asked, "Has she lost her mind?"

Ms. Le did not report the matter immediately because she believed she would get in trouble for cursing in front of an intern. Only in later discussions with Agency managers did the incident become known.

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."

Group I Written Notice

The Agency argued that Grievant engaged in disruptive behavior on June 18, 2012.

Although it is clear Grievant was frustrated and her voice was raised, it is not clear her behavior was sufficiently disruptive to justify the issuance of a Group I Written Notice. The two people closest to Grievant were Ms. L and Ms. B. Ms. L testified that Grievant's behavior was not disruptive. The Agency did not call Ms. B as a witness. The Agency called Ms. S as a witness but it is unclear whether Ms. S actually observed the altercation as she claimed. Several witnesses testified that Ms. S was not present at the time Grievant was speaking with Ms. L. Ms. S testified that she heard Grievant say "Why the hell are two people taking lunch at the same time!" Ms. S told the investigator, however, that Grievant did not use profanity during the encounter on June 18, 2012. When the Team Leader walked back to the OSA pool after being notified of a possible conflict, Ms. S was not there.

The Agency has not presented sufficient evidence to support the issuance of a Group I Written Notice for disciplinary action. The Group I Written Notice must be reversed.

Group III Written Notice

Agency Policy 05-008 governs Workplace Violence. This policy defines workplace violence as:

Any act that results in threatened or actual harm to persons or property. This includes not only physical assaults, but also verbal or written communication or gestures intended to threaten or intimidate others, or which convey a direct or indirect threat of harm to oneself or others.

DHRM Policy 1.80 defines workplace violence as:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.

Prohibited actions under DHRM Policy 1.80 include:

Prohibited conduct includes, but is not limited to:

- injuring another person physically;
- engaging in behavior that creates a reasonable fear of injury to another person; engaging in behavior that subjects another individual to extreme emotional distress;
- possessing, brandishing, or using a weapon that is not required by the individual's position while on state premises or engaged in state business;
- intentionally damaging property;
- threatening to injure an individual or to damage property;

- committing injurious acts motivated by, or related to, domestic violence or sexual harassment; and
- retaliating against any employee who, in good faith, reports a violation of this policy.

Employees violating DHRM Policy 1.80 will be subject to disciplinary action under Policy 1.60, *Standards of Conduct*, up to and including termination, based on the situation.

Grievant engaged in workplace violence against Ms. Le. Grievant engaged in threatening behavior. Her actions served as a physical assault against Ms. Le. Grievant established an intimidating presence to communicate her displeasure with being assigned cases. 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, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that she merely put her hands on Ms. Le's neck in order to massage her neck. This argument is not supported by the evidence. Ms. Le's testimony was credible. Ms. Le's response to Grievant's behavior was immediate and intense and would have been inconsistent with someone trying to massage a person's neck as opposed to squeezing a person's neck in a choking manner.

Grievant argued that she was joking and laughing and did not intend to harm or intimidate Ms. Le. This argument is not supported by the evidence. Grievant did not communicate with Ms. Le prior to touching her. Ms. Le was focused on her work with the intern. Ms. Le displayed no behavior to suggest that she intended or expected a light-hearted interaction with Grievant. No one heard Grievant laughing or observed her displaying demeanor consistent with someone playing a joke on another employee. Grievant was expressing her frustration with being given additional work by Ms. Le. The evidence shows that Grievant was frustrated with Ms. Le and approached her and squeezed her neck in a threatening manner.

Grievant argued that the intern and Ms. G did not report Grievant's behavior and that Ms. Le reported the incident several weeks after it occurred. Grievant reasoned that if her behavior had been sufficient to rise to the level justifying disciplinary action, surely it would have been reported on a more timely basis. The evidence showed that Ms. Le did not report the incident immediately because she feared she would get in trouble for cursing in front of the intern and not because she believed Grievant's behavior was insignificant.

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 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 Group III Written Notice with removal.

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 employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.

Grievant engaged in a protected activity because she filed a complaint with the State Fraud, Waste, and Abuse Hotline. Grievant suffered an adverse employment action because she was removed from employment. When Agency Investigators arrived at the Facility on August 24, 2012, they disclosed the allegations to the Unit Director. The Unit Director surmised that Grievant was the one who had filed the complaint. He based his assumption by concluding that Grievant was the only person who could have known sufficient facts to make the complaint. The Unit Director learned of Grievant's conflict with Ms. Le a day or two before meeting with the Agency Investigators and asked them how to proceed to have the allegations against Grievant investigated given that the Agency Investigators formed a unit new to the Agency. They advised the Unit Director that they could investigate the allegations against Grievant. Although the Unit Director was involved in discussions with Agency managers regarding Grievant's behavior, he was not a deciding voice regarding whether Grievant would receive disciplinary action and the appropriate level of disciplinary action. There does not appear to be a sufficient nexus between the protected activity and the adverse employment action such that the Agency retaliated against Grievant. If the Hearing Officer assumes for the sake of argument that the Unit Director was sufficiently involved in the Agency's disciplinary decision-making, Grievant's behavior is sufficiently egregious for the Hearing Officer to conclude that the Agency would have issued a Group III Written Notice with removal in the absence of any retaliatory motive. The Agency's disciplinary action in this case is not a pretext to retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice with removal is **upheld**.

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 her request for an administrative review, the grievant challenged that the hearing officer's decision is inconsistent with policy. The grievant did not identify how the hearing decision is inconsistent with either the DHRM Workplace Violence Policy No. 1.80 or DJJ Policy 05-008, or DHRM Policy No. 1.60. Rather than demonstrating that there is a policy violation, it appears that the grievant is contesting the evidence the hearing officer considered, how he assessed that evidence, and the resulting decision. Thus, we have no authority to interfere with the application of this decision.

Ernest G. Spratley
Assistant Director
Office of Equal Employment Services