

Issue: Retaliation (other protected right); Hearing Date: 02/21/14; Decision Issued: 03/26/14; Agency: GMU; AHO: Carl Wilson Schmidt, Esq.; Case No.10262; Outcome: Full Relief; **Administrative Review**: **EDR Ruling Request received 04/10/14; EDR Ruling No. 2014-3866 issued 05/29/14; Outcome: Remanded to AHO; Remand Decision issued 07/24/14; Outcome: Original decision reversed; Administrative Review: DHRM Admin Review Request received 04/10/14; DHRM Ruling issued 07/11/14; Outcome: AHO's 03/26/14 decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10262

Hearing Date: February 21, 2014

Decision Issued: March 26, 2014

PROCEDURAL HISTORY

On November 4, 2013, Grievant filed a grievance to challenge the University's failure to promote him to Lieutenant and decision to transfer him to a satellite campus. Grievant alleged the University acted in retaliation for his "making a hotline complaint and assisting in the hotline investigation." The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. The University qualified the grievance for hearing. On January 21, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 21, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether the University retaliated against Grievant for "making a hotline complaint and assisting in the hotline investigation?"

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the University retaliated against him and that the relief he seeks should be granted. 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:

George Mason University employs Grievant as a Sergeant in its Police Department. Grievant worked in the University’s Main Campus for four years as the Sergeant in charge of investigations. He was a Detective Sergeant, a position with high prestige among the sergeant positions. In October 2013, Grievant was transferred to a satellite campus. Grievant has 15 years of police experience. Twelve of those years were with the University’s Police Department. Grievant has worked as a Sergeant for eight years with the University.

Grievant observed actions by co-workers that he considered criminal or inappropriate. He attempted to report his concerns through his chain of command, but found that Police Department command staff was willing to “turn a blind eye” towards the inappropriate behavior. Grievant decided to call the State Employee Fraud, Waste, and Abuse Hotline¹ (“Hotline”).

On January 18, 27, and 30, 2012, the University’s Division of State Internal Audit received allegations via the State Employee Fraud, Waste, and Abuse Hotline against employees of the University’s Police Department. Allegations were made against one of the two Captains, all four Lieutenants, four of eight Sergeants, and two non-Law Enforcement employees. No allegations were made against Grievant. Grievant was one of the individuals who called the Hotline to make allegations against the University’s Police Department. Grievant called the Hotline in good faith with the belief that the information he was reporting was accurate.

The University’s Director of Internal Audit (“Auditor”) began an investigation of the Hotline call allegations. The Auditor contacted the Former Assistant Chief of the Police Department and asked for the assistance of Grievant and the Detective. The Former Assistant Chief told the Auditor he could use the two employees as he deemed necessary. The Former Assistant Chief instructed Grievant and the Detective to assist

¹ In July 2012, the State Employee Fraud, Waste, and Abuse Hotline became the State Fraud, Waste, and Abuse Hotline. Responsibility for the program was given to the State Inspector General.

the Auditor as the Auditor needed. The Former Chief told Grievant that he would be assisting the Auditor and that the Former Assistant Chief would be his point of contact.

In March 2012, Grievant began providing assistance to the Auditor. Prior to performing any duties for the investigation, Grievant met privately with the Auditor and told the Auditor that he was one of the callers to the Hotline. Grievant wanted to know if the Auditor had any concerns about Grievant assisting the Auditor. The Auditor stated that he did not have any concerns about using Grievant in the investigation. The Auditor used Grievant and the Detective to perform tasks relating to the retrieval of information. For example, if the Auditor wanted to conduct a forensic examination of an employee's computer hard drive, the Auditor would ask Grievant and/or the Detective to obtain the employee's University issued computer and bring it to the Auditor. Grievant and the Detective would assist in the examination of the computer.

The Auditor issued a lengthy confidential report outlining his findings from the investigation. The report showed wide-spread violations of State policy and law among the senior leadership command of the Police Department. For example, the Former Captain failed to record his leave taken, viewed, shared, and stored sexually explicit materials on his State issued computer while on State time, and made racist/sexually explicit comments to other employees. Former Lieutenant M's State issued computer showed over 3,000 sexually explicit photographs and 80 messages requesting sexual favors. He sent sexually explicit emails to junior officers in the Police Department. Former Lieutenant B engaged in theft of items placed in "lost and found." Sergeant L admitted to picking-up his child from day care three or four times about four years ago, while on duty in his assigned patrol vehicle without taking leave but with the approval of his supervisor. Sergeant L received emails with sexually explicit materials and stored them in a folder he created on his hard drive.² Sergeant M admitted to taking medicine home (after stopping at the store) to her children on the night shift of February 11-12, 2012 using the State patrol car and on State time but with approval of her supervisor. Numerous other violations of policy and law were identified by the Auditor.

As a result of the investigation, approximately seven or eight member of the Police Department left the University. Although no allegations were made against the Former Chief, once he reviewed the Auditor's findings, he elected to resign from his position.

Many of those employee had developed friendships and relationships with other employees in the Police Department and departments working with the Police Department. A number of remaining employees at the University were upset or displeased to see the employees leave. Many remaining employees were aware that Grievant and the Detective had participated in the investigation. Several employees did not like Grievant because of his participation in an investigation that resulted in the removal of long-term Police Department employees including the Former Chief who was

² Sergeant L told the Auditor that "I was stupid and just kept them" while referring to the sexually explicit emails.

later replaced with the Chief. Grievant was blamed for ending the careers of several Police Department employees.

The Chief began working for the University on June 16, 2013. During his first five months of employment, the Chief met with every member of the Police Department. In those meetings, staff mentioned the poor working environment. Several staff mentioned how Grievant behaved when he was assisting the Auditor in the investigation. For example, the Chief learned that Grievant had “high-fived” in celebration of other employees’ demise. The Chief told Grievant what other staff were saying about him because he thought Grievant needed to know the truth. Grievant told the Chief he denied “high-fiving” but was happy when some members of the Police Department left the University.

During a meeting Grievant attended, the Chief said that if he did not like someone, he would find a way not to hire that person.

Initially three lieutenant positions were vacant. When one of the existing lieutenants was promoted to captain, a fourth lieutenant position became open. The primary purpose of the lieutenant’s position was:

The University Police Lieutenant performs supervisory law enforcement, security, safety, and service functions within the George Mason University Police Department.

The knowledge, skills and abilities for the lieutenant’s position was:

Considerable knowledge of the principles and techniques of law enforcement, security, investigations, training, and crime detection and prevention. Demonstrated ability to plan, organize, and direct the efforts relating to law enforcement operations. Ability to work independently and solve problems involving many variables. Working knowledge of administrative functions in areas of policy and supervision.³

It was common knowledge among many staff working for the University that Grievant was assisting with the Auditor’s investigation. Mr. P worked in a division that worked closely with the Police Department.

The University formed a hiring Committee to assist with the selection of applicants to fill the vacant lieutenant positions. The Committee consisted of Mr. P, Ms. C, and Ms. K. Ms. K and Mr. P were aware of the problem the rest of the police force had with Grievant. They believed this problem with the police force would result in difficulty if Grievant was promoted within the Police Department. Mr. P expressed concern that if Grievant was hired for a lieutenant position, there would be a lot of ill will between Grievant and the Police Department staff. Ms. K had heard that people in the

³ Agency Exhibit 4.

Police Department disliked Grievant. She pointed out that Grievant had been observed giving a “high-five” when he learned a senior manager with the Police Department was leaving the University.

Sixteen people applied for the lieutenant positions and were considered by the Committee. The Committee was instructed to select approximately eight to ten applicants for first interviews. The Committee did not selected Grievant for an interview. The Committee’s decision was based on the opinions of Mr. P and Ms. K that Grievant’s peers did not like him. When the Chief learned of this decision, he instructed that all internal candidates including Grievant be interviewed.

The Committee recommended four applicants for interviews with the Chief. Ms. K sent the Chief a memorandum discussing the interviews for lieutenant. She wrote, in part:

[Sergeant J]

Has been with the university since 1989.

Administrative / training sergeant for the department.

Assigned one of the vacant lieutenant’s duties since August 2012.

Very well respected by his peers.

[Sergeant G]

Employed at GMU since 1996.

Past 8 years rank of sergeant supervising officers at Fairfax and PW Campus

Associates Degree in Applies Science.

Very well respected by his peers.

[Sergeant L]

10 years with the university.

Participated with task force for Homeland Security investigation / GMUPD received \$350,000 for his participation.

Associates degree in computer science.

Well respected by his peers.

[Sergeant M]

Employed by GMU since 2004.

Excellent written and verbal communication skills.

2 years college experience.

Initiated RAD program.

Instructed at ... Training Academy.

[Grievant] – committee felt his answers were disingenuous given the fact that the committee members was familiar with this candidate. Also, there seemed to be no effort in his cover letter or resume.⁴

⁴ Agency Exhibit 5.

The Chief reviewed the Committee's recommendation but decided all internal candidates would have an interview with the Chief.

On September 9, 2013, the Chief met with Grievant and told Grievant that the Committed had not recommended him for advancement.

The Chief interviewed Grievant on September 13, 2013. During the interview with the Chief, the Chief asked similar questions to those asked by the Committee. The Chief concluded that Grievant interviewed "okay" but not as well as the other the other four candidates. The Chief concluded Grievant's interview was not a poor interview.

At the time the Chief decided not to promote Grievant, the Chief knew that Grievant had called the Hotline to initiate complaints against Police Department employees.⁵ The Chief knew that Grievant had participated in the Hotline investigation by assisting the Auditor.

On October 4, 2013, the Chief read a draft of the B-Report regarding a complaint against Grievant. This report addressed a complaint filed by a subordinate Officer who worked with Grievant. The Officer had filed several Hotline complaints and was familiar with the Hotline process. In July 2013, the Officer made an official complaint to the Chief regarding Grievant's treatment of her while he supervised her. One of her complaints was that Grievant pressured her to make a Hotline complaint regarding behavior she and Grievant had observed among Police Department employees. She was upset when she later found out that Grievant had also called the Hotline and that Grievant was participating in the investigation.

The Chief assigned a Retired Chief to investigate the allegations. The Retired Chief interviewed the Officer, Grievant, and several current and former employees regarding the Officer's allegations. The Officer provided the Retired Chief with the names of several individuals to contact. The Retired Chief concluded, "I found that the credibility of both [Officer] and [Grievant] are somewhat diminished" Without discussing any evidence to support his conclusion, the Retired Chief wrote, "Clearly, [Grievant] had ulterior motives in reducing the roadblock ahead of him (promotion) and cleaning the place up was a nice bonus." The Retired Chief added, "Clearly, [Grievant] has a long way to go as many [of] his peers and subordinates have little faith or trust in his ability to effectively supervise or lead others. 'Doing the right thing' is merely a convenience, or as a means to an end, which is often self-serving and not in the best interests of the department or its members."⁶

⁵ Grievant contends that the Chief learned Grievant was the caller when the Chief read a report by the Inspector General regarding an investigation of the Auditor. The Chief testified Grievant told him he was a Hotline caller and he only knew Grievant was the caller on some date in the middle of September 2013. How the Chief learned that Grievant was a Hotline caller is not significant. What is significant is that the Chief knew Grievant was a Hotline caller before the Chief decided not to promote Grievant.

⁶ Agency Exhibit 7. The Retired Chief issued the final report on October 28, 2013.

The Chief decided who to select as lieutenants over the weekend of October 4, 2013. The Chief relied on the B-Report while making his decision to deny a promotion to Grievant.

On October 8, 2013, Grievant met with the Chief. The Chief said he was not going to promote Grievant because Grievant did not get along with people. He said he would transfer Grievant to another campus to give Grievant a chance to improve his reputation in the department and make him a viable candidate. The Chief told Grievant that it was a conflict of interest for Grievant to have participated in the investigation. The Chief said Grievant should have told command staff about his conflict.

The University announced the selection of four lieutenants on October 9, 2013. Sergeant L, Sergeant M, Sergeant G, and Sergeant J were selected for promotion.

After the Chief announced selection of the new lieutenants, he transferred Grievant to a satellite campus. The Chief asserted that the reason for the transfer was because the University did not wish to send inexperienced Sergeants to supervise staff working at a satellite campus. The Chief claimed the transfer would be temporary. Nothing in the record, however, shows the duration of Grievant's transfer was for a specific period of time with a return to the Main Campus at the expiration of that time period. The Hearing Officer does not believe that Grievant's transfer was intended to be "temporary." Employees transferred to satellite campuses were often less likely to be promoted in the future.

One of the reasons Grievant was denied promotion was because of his interaction with a former employee. A former employee used the University's credit card to purchase fuel for his personal vehicle. He was allowed to resign his position and was not prosecuted for his theft. On August 28, 2013, the former employee sent the Chief an email complaint regarding "the rudeness of one of your supervisors." The former employee said that on August 6, 2013, he attended a Conference on behalf of his employer, another university's police department. Grievant also attended the Conference on behalf of the University. According to the former employee, as the former employee's group was registering at the hotel, the Detective greeted the former employee. The Detective pointed to Grievant and said to Grievant, "Hey, look who's here." The former employee extended his hand to shake Grievant's hand but Grievant said, "You're lucky I didn't investigate your case because I would have locked your ass up." The interaction with Grievant made the former employee feel embarrassed and uncomfortable.

The University investigated the allegation. The Detective said he did not see or hear any conversation between Grievant and the former employee. Grievant said he attended the Conference on August 8, 2013 and was approached by the former employee in a hallway. Grievant told the former employee he "had nothing to say to him." The former employee said, "What?" and Grievant responded with words to the

effect that if it had been up to Grievant, he would have arrested the former employee.⁷ The investigator concluded, "While I believe it was not [Grievant's] intent to embarrass [former employee] or to upset him, the complaint could have been avoided by him either walking away or simply stating he did not wish to speak with [former employee] and leave it at that."⁸

Several of Grievant's subordinates and work group were moved to a new set of offices. Some of the offices did not have furniture and Lieutenant L told the employees go to surplus to obtain desks. When Grievant returned the next day, both of his detectives were upset. One detective said he felt he was being treated as a second class citizen. Later on, the Chief asked Grievant how the move was going. Grievant responded that one of his detectives said he felt like a second class citizen.

A vehicle was seized from a drug dealer and turned over to the University. The vehicle was assigned to Grievant, a sworn law enforcement officer. Under the Department of Criminal Justice Services' Forfeited Asset Sharing Program Manual, it was impermissible for the vehicle to be used by non-law enforcement personnel for non-law enforcement business.⁹ The Chief informed Grievant that he was removing the vehicle from Grievant and assigning it for use by the University's security guards. University security guards were non-sworn personnel with no police authority.¹⁰ Grievant told the Chief that transferring the vehicle was contrary to policy. The Chief interpreted Grievant's comments to be a challenge to the Chief's authority.¹¹

On October 15, 2013, Grievant's Supervisor, Lieutenant M, completed Grievant's annual performance evaluation. The Chief signed the evaluation on October 17, 2013 as the Reviewer. Grievant received an overall rating of High Achiever. The Supervisor's comments included:

[Grievant provided positive supervision to the officers assigned to his squad. He provides and applies the community policing concept by having officer's conduct vehicle, bicycle, and foot patrols of the community.

[Grievant] provides training and guidance to the officers assigned to his section. He is responsible to ensure that critical thinking skills are appropriately applied to every situation that his officers encounter.

⁷ Agency Exhibit 6.

⁸ Agency Exhibit 6.

⁹ Grievant Exhibit 10.

¹⁰ See, General Order 11 page 4 of 6. Grievant Exhibit 11.

¹¹ The Chief had called the appropriate authority to obtain permission to reassign the vehicle.

[Grievant] promotes a strong interaction with other university offices such as housing and judicial affairs. He places a heavy emphasis on interaction with the community, faculty, staff and students to help ensure the safety of all concerned.

[Grievant] is often relied upon to make critical decisions in the absence of command leadership such as on weekends and while the night shift. He approaches his assignments in a fair, firm, and friendly manner and accomplishes all tasks presented before him.

[Grievant] provides his section members continual feedback as to their work performance. He ensures that they have the necessary skills to accomplish the department's mission. He makes on the spot corrections and promotes officer safety.

[Grievant] has performed a very critical role heading up the department's Criminal Investigative Section. He has provided the necessary guidance and leadership to his team members so they can continue to support the department's goals and objectives. He has performed very well in this role and has the potential to serve the department and the George Mason community in roles of greater responsibility.¹²

On November 4, 2013, Grievant filed a grievance challenging the University's failure to promote him and the University's decision to transfer him to a satellite campus. In the Second Step response, the Chief described the reasons why he did not promote Grievant. He wrote, in part:

Ultimately, on October 4, 2013, after taking into account the committee's recommendation, your performance on the final interview in comparison to the other candidates interviewed, as well as several negative direct factors of which I have addressed with you during my initial five months of serving as Chief of Police, I determined that you were not a viable candidate for promotion to Lieutenant at this time. Those direct factors included the following:

As a result of a citizen's complaint against you it was determined that you engaged in rude or unprofessional behavior directed at a former department employee while representing the police department at the annual department hosted [Conference]. This complaint was sustained against you on September 9, 2013.

¹² Grievant Exhibit 12.

On several occasions including the early morning of August 30, as well as during meetings with me on September 9 and 11 of 2013, you consistently and inappropriately used disparaging comments when describing your fellow colleagues including several of which were in direct competition with you in the Lieutenant's process. These comments included labeling some of those colleagues as "criminals" and "thieves" as well as questioning their competency.

On several occasions you have directly challenged several of my decisions to include reassigning a department vehicle assigned to your unit in which you inferred that I was violating policy by reassigning the vehicle which in fact I was not, you directly accused me of treating your assigned detectives as "second class citizens" when I directed them to move from individual offices to a shared office with cubicles in the interest of space management and you were visibly in disagreement when I made the decision to include student government representation on the police officer hiring panel in an effort to increase collaboration with campus partners.

Additionally, as a result of a second internal affairs investigation that was initiated in July 2013 in which several allegations were made against you by a current department member, several indirect issues were raised during that investigation that highlighted concerns regarding your character and integrity that included your decision to intentionally withhold information from department command staff so that you could assist the State Auditor in the audit investigation of your own complaints against department members.

This along with all of the above direct factor call into question your ability to lead in a position and ethical manner, interact professionally with internal and external constituents, and your ability to support decisions made by command staff in a manner that would foster an environment of effective followership.

None of the reasons described by the Chief resulted from the questions he asked Grievant during Grievant's interview with the Chief.

CONCLUSIONS OF POLICY

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he (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 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.¹³

Protected Activity. Protected activity includes calling the Hotline and participating in a Hotline investigation. *Va. Code § 2.2-309* provides:

It shall be the policy of the Commonwealth that employees of state government be freely able to report instances of wrongdoing or abuse committed by their employing agency, other state agencies, or independent contractors of state agencies.

Va. Code § 2.2-3011 provides:

A. No employer may discharge, threaten, or otherwise discriminate or retaliate against a whistle blower whether acting on his own or through a person acting on his behalf or under his direction.

B. No employer may discharge, threaten, or otherwise discriminate or retaliate against a whistle blower because the whistle blower is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry by an appropriate authority or in a court action.

Va. Code § 2.2-3012(A) provides:

Any whistle blower covered by the state grievance procedure (§ 2.2-3000 et seq.) may initiate a grievance alleging retaliation and requesting relief through that procedure.

Va. Code § 2.2-3004(A) provides:

A grievance qualifying for a hearing shall involve a complaint or dispute by an employee relating to the following adverse employment actions in which the employee is personally involved, including but not limited to *** (v) acts of retaliation as the result of the use of or participation in the grievance procedure or because the employee has complied with any law of the United States or of the Commonwealth, has reported any violation of such law to a governmental authority, has sought any change in law before the Congress of the United States or the General Assembly, or has reported an incidence of fraud, abuse, or gross mismanagement; and (vi) retaliation for exercising any right otherwise protected by law.

¹³ 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).

In January 2012, Grievant called the Hotline to report violations of law and State policy. His action was protected behavior. He was a “whistle blower.”

Grievant was instructed by a supervisor to assist the Auditor with his investigation of the Police Department. Grievant complied with his supervisor’s instruction and assisted the Auditor as directed by the Auditor while the Auditor investigated the allegations raised by several Hotline calls including Grievant’s call. Grievant’s participation in the Auditor’s investigation of the Hotline call initiated by Grievant was protected activity. Grievant’s participation in the Auditor’s investigation of the Hotline calls initiated by callers other than Grievant was protected activity.

Adverse Employment Action. Grievant suffered an adverse employment action. He applied for a promotion from Sergeant to Lieutenant within the Police Department. He was rejected for the position of Lieutenant and remained a Sergeant.

Grievant’s transfer was also an adverse employment action. As an immediate consequence of his denial of a promotion to Lieutenant, Grievant was moved from the Main Campus to a satellite campus. If he had been promoted to Lieutenant, he would have remained on the Main Campus. Because he was denied a promotion and other sergeants were promoted in his place, he remained an experienced sergeant. The University presented evidence that the reason it transferred Grievant to a satellite campus was because it needed experienced sergeants operating its satellite campuses. If this reasoning is adopted, Grievant would not have been moved to another campus had he received a promotion. Thus, the University’s transfer of Grievant was so intertwined with the University’s refusal to promote Grievant that the transfer was an adverse employment action.

Causal Link. Grievant suffered an adverse employment action because of his participation in a protected activity. Grievant was denied a promotion because he called the Hotline and participated in the Auditor’s investigation.

One of the themes with respect to the evidence in this case is that Grievant was not well-liked by his peers. A primary reason why Grievant was not well-liked by his peers was because he participated in the Hotline investigation. Many of Grievant’s co-workers observed his participation and observed that several employees with long tenure were removed because of the investigation. Grievant was blamed for the removal of those employees.

A second theme is that hiring decisions were made based on how well the applicants were liked or respected by their peers. The effect of failing to hire Grievant because he was not liked by his peers was to refrain from hiring Grievant because he engaged in protected activity by participating in the Hotline investigation.

The Committee retaliated against Grievant for his participation in the Hotline investigation. Mr. P was a member of the Committee and he influence the Committee

to avoid selecting Grievant for an interview with the Committee. After the Chief overrode that decision and required the Committed to interview Grievant, he recommended Grievant not be selected for an interview by the Chief. Mr. P acted largely based on his dislike of Grievant because Grievant participated in the investigation. The Committee recommended three of the sergeants for interviews with the Chief because they were respected by their peers. The Committee did not recommend Grievant because of how he was perceived by his peers.

The decision to deny Grievant a promotion was ultimately made by the Chief. The Chief wrote that he took “into account the committee’s recommendation” as part of his deliberation. By relying on the Committee’s recommendation, the Chief relied on the intent of Mr. P to retaliate against Grievant.

The Chief reviewed a draft of the B-Report and considered it when making his decision to deny Grievant a promotion. The Retired Chief interviewed former employees who commented that Grievant was not well liked in the department.¹⁴ Many of the conclusions formed by the Retired Chief appear unreliable and/or based on speculation.¹⁵ The Retired Chief wrote, “many [of] his peers and subordinates have little faith or trust in his ability to effectively supervise or lead others.” Grievant was disliked by his peers because of his participation in the Hotline investigation.

The Chief denied Grievant a promotion because of “concerns regarding your character and integrity that included your decision to intentionally withhold information from department command staff so that you could assist the State Auditor in the audit investigation of your own complaints against department members.” This statement confirms that the Chief retaliated against Grievant by refusing to promote Grievant because Grievant was a caller to the Hotline and Grievant participated in the Hotline investigation.

The premise of the University’s argument that Grievant should have recused himself or disclosed that he was a caller is based on the presumption of a conflict of interest. It is not clear what, if any, conflict existed. The University had no policy applicable to Grievant that would have prohibited Grievant from being a caller and participating in the investigation. Based on the evidence presented, it appears that the Auditor had complete authority to design and implement the investigation. The Auditor asked Grievant to perform tasks in furtherance of the Auditor’s investigation of the Police Department. No evidence was presented showing that Grievant was involved in the decision-making or was somehow able to influence the outcome of the Auditor’s final report. Indeed, based on the Hearing Officer’s assessment of the Auditor’s demeanor, it would be highly unlikely anyone including Grievant would be able to

¹⁴ The B-Report was redacted. It is unclear whether the former employees who complained about Grievant left the University because of the Auditor’s findings. If so, they would have had a motive to speak poorly of Grievant.

¹⁵ For example, nothing in the report supports the Retired Chief’s conclusion that Grievant’s hotline complaints were motivated by a desire for promotion.

prevent the Auditor from making independent and objective report findings. In addition, if a conflict had existed, Grievant's responsibility for that conflict was resolved when the Auditor elected to continue receiving Grievant's assistance after the Auditor learned Grievant was one of the callers. Whether the Former Assistant Chief would have assigned Grievant to the investigation had he known Grievant was a caller is insignificant given that the person conducting the investigation determined Grievant's services were necessary for the investigation.

The Chief testified that because the Police Department assigned Grievant to assist the Auditor, the Police Department had the right to know "that information." The Chief testified that Grievant should have told the Former Assistant Chief because the Former Assistant Chief was not part of the allegation. There is no policy, regulation, or statute supporting the Chief's assertion that the Police Department had the right to know anything at all about Grievant's call to the Hotline regardless of any conflict perceived by the University. The underlying concept of the Hotline program is that callers retain the right of anonymity. Even Hotline staff are not entitled to know the identity of callers.

The University argued that Grievant's choice to participate in the investigation was somehow different from his act of participating in the investigation. The University is arguing a distinction without a difference. Part of participating in an activity is a decision to participate. Grievant's decision to participate in the investigation was participation in the investigation.

If the Hearing Officer assumes for the sake of argument that there is a material difference between the decision to participate and participation, the University's assertion is merely pretext for retaliation. The University's focus on Grievant's ethical behavior raises significant concern regarding its understanding of Grievant's behavior and character. On the one hand, the University considers Grievant to be unethical for failing to inform his commanders that he was a Hotline caller, but on the other hand ignores Grievant's high ethical standards that made him believe he should report rampant violations of the State's Standards of Conduct. Grievant's actions resulted in the University being able to remove what amounted to a cesspool of pornography and other policy violations among senior Police Department managers.

In addition to Grievant's alleged lack of character and integrity, the University offered other reasons to support its decision to refrain from promoting Grievant. These reasons are not sufficient to support a basis to deny Grievant a promotion because they are either based on Grievant's protected activity or pretext.

The University claimed that Grievant should be denied a promotion because of a citizen's complaint against him. The evidence showed that Grievant attended a Conference, encountered a former employee who stole from the University but was allowed to resign, and was rude to the former employee. He did not violate the Standards of Conduct. Sergeant L, however, saved sexually explicit materials on his computer contrary to Va. Code § 2.2-2827 and DHRM Policy 1.75. Sergeant L abused State time and misused State property when he used the University's patrol vehicle to

pick up his child while being paid by the University. The University could have taken disciplinary action against Sergeant L based on his behavior. In addition, Sergeant M abused State time and misused State property when she used the University's patrol vehicle to take stop at a store, purchase medicine, and take it to her child while being paid by the University. The University could have taken disciplinary action against Sergeant M based on her behavior. It should have been obvious to these employees that the Commonwealth of Virginia does not pay employees to perform their personal errands. The University was willing to forgive the far more serious misbehavior of Sergeant L and Sergeant M and promote them to the Lieutenant positions. Suggesting that Grievant is not a candidate for promotion because he was rude but promoting two employees who violated the Standards of Conduct is a distinction not based on rational thought. The University's claim that Grievant should not be promoted because he was rude to a former employee is merely a pretext for retaliation.

The University argued that Grievant should not be promoted because during meetings with the Chief, Grievant consistently and inappropriately used disparaging comments when describing his fellow colleagues, challenged the Chief's decisions, and complained that the Chief was treating his Grievant's co-workers as second class citizens.

Grievant's comments to the Chief were protected behavior. In EDR Ruling 2008-1964, 2008-1970, the Director addressed the following allegation:

The grievant asserts that she asked her supervisor to reconsider her annual performance evaluation. When her supervisor refused to do so, the grievant asked her supervisor's supervisor (the reviewer) to reassess her evaluation. The grievant asserts that shortly after the reviewer modified her evaluation, her supervisor screamed at her on a number of occasions, called her a liar, and threatened to "write her up" (issue formal discipline).

Virginia Code § 2.2-3000(A) states:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The EDR director concluded:

Under Virginia Code § 2.2-3000, "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee

problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management.” Thus, bringing a concern about an annual performance evaluation to a reviewer would appear to be an act “otherwise protected by law.”

The EDR Director has broadly interpreted Virginia Code § 2.2.-3000 to define as protected activities (otherwise protected by law) attempts by employees to freely discuss their concerns with Agency management.

In EDR Ruling 2009-2128, the EDR Director narrowed the protection as follows:

This protection, however, is not without exception. For instance, an employee might still be disciplined for raising workplace concerns with management if the manner in which such concerns are expressed is unlawful (for instance, a threat of violence to life or property) or otherwise exceeds the limits of reasonableness. The limited exceptions to the general protection of employees who raise workplace concerns can only be determined on a case-by-case basis. Further, under analogous Title VII retaliation case law, it is important to note that:

[a]lmost every form of ‘opposition to an unlawful employment practice’ [the “protected act” under Title VII] is in some sense ‘disloyal’ to the employer, since it entails a disagreement with the employer’s views and a challenge to the employer’s policies. Otherwise the conduct would not be ‘opposition.’ If discharge or other disciplinary sanctions may be imposed simply on ‘disloyal’ conduct, it is difficult to see what opposition would remain protected.

The same can be said for the ability of an employee to raise their workplace concerns with management, which the General Assembly has protected in Virginia Code § 2.2-3000.

Grievant was bringing his concerns to management and, thus, his statements were protected by statute. No evidence was presented that his method of expressing his concerns was unlawful or exceeded the limits of reasonableness. The University could not base its decision to promote Grievant based on his protected behavior.

Conclusion. Grievant has established that the Agency denied him a promotion because he engaged in protected activity. Section VI of the Rules for Conducting Grievance hearings sets forth remedies available to hearing officers. Appropriate remedies include:

Retaliation/Discrimination: If the issue of retaliation or discrimination is qualified for hearing and the hearing officer finds that it occurred, the hearing officer may order the agency to create an environment free from discrimination and/or retaliation, and to take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence. The hearing officer should avoid providing specific remedies that would unduly interfere with management's prerogatives to manage the agency (e.g., ordering the discipline of the manager for discriminatory supervisory practices). ***

Transfer or Assignment of Employees: A hearing officer may order the transfer or assignment of an employee as a form of relief only i) to return the employee to the status quo in correcting improper or unsupported disciplinary action, retaliation, discrimination, or misapplication or unfair application of policy, OR ii) if it is determined that the employee is entitled to the relief based on the effect of law or, in the absence of agency discretion, policy, procedure, or agency practice. Due consideration should be given to whether there is an available position to which a transfer can be ordered.

The Hearing Officer will order the University to promote Grievant to a Lieutenant and transfer him to the Main Campus. The University can accomplish this by reclassifying his position from Sergeant to Lieutenant.

The Hearing Officer could have remanded the matter to the University and permitted the University to re-evaluate Grievant's request for promotion but without considering any protected activity. The Hearing Officer will not take this approach for several reasons. First, it is not likely Grievant could be evaluated by Police Department managers objectively and without consideration of his participation in the investigation. It is unlikely the Chief would be able to objectively evaluate Grievant. The Police Department is a para-military unit where sworn employees hold rank and are expected to comply with a supervisor's orders as a routine behavior. It is unlikely a subordinate of the Chief would be able to objectively evaluate Grievant knowing that the Chief previously concluded that Grievant should be denied a promotion.¹⁶

Second, it is unlikely University managers outside of the Police Department could objectively evaluate Grievant for promotion. The Auditor testified that the President's Chief of Staff approached the Auditor and explained how the Auditor's testimony would not be viewed favorably among senior management because it would give the appearance of working against the Chief. The Auditor testified that a Human Resource Officer came to him "as a friend" and suggested he steer clear of Grievant's grievance. Neither the Chief of Staff nor the Human Resource Officer testified and, it is possible

¹⁶ An exception might be the Supervisor who completed Grievant's annual performance evaluation. If his opinion were adopted, the outcome likely would be for Grievant to be promoted to Lieutenant. This is the same outcome the Hearing Officer is compelling.

their motives may not have been as harsh as perceived by the Auditor. The mere fact, however, that senior University leaders would approach the Auditor to discuss his appearance at the hearing raises sufficient doubt about the possibility of Grievant receiving an objective assessment. The Hearing Officer must refrain from remanding the decision-making to the University.

Third, if the University were to re-interview the sergeants selected and compare them to Grievant, the selected sergeants would have an advantage. Each of the selected sergeants has been serving as a lieutenant for approximately five months and would have had the opportunity to accumulate knowledge and experience unavailable to Grievant. It is not possible to return truly to the status quo because Grievant would be compared to others with an advantage that would not exist under the status quo.

Grievant would have been promoted in the absence of retaliation. This conclusion is evidence based on several factors. First, Grievant's October 2013 performance evaluation describes many of the expectations for a person holding a supervisor and leadership position. The Supervisor described Grievant's annual work performance with phrases such as, "positive supervision", "ensure that critical thinking skills are appropriately applied", "promotes a strong interaction with other university offices", "relied upon to make critical decisions in the absence of command leadership", "approaches his assignments in a fair, firm, and friendly manner and accomplishes all tasks presented before him", "provides his section members continual feedback", "promotes officer safety", "provided the necessary guidance and leadership to his team members" and "has the potential to serve the department and the George Mason community in roles of greater responsibility." It is clear from Grievant's evaluation that he is capable of serving as a Lieutenant.

Second, Grievant had more experience as a sergeant than several of the other sergeants actually selected. Among the sergeant positions, he held a position of high prestige.

Third, Grievant did not engage in behavior that would otherwise have been a violation of the Standards of Conduct. Sergeant L and Sergeant M engaged in behavior that was contrary to the Standards of Conduct. Although the University forgave their indiscretions, they knew or should have known that their behavior was inappropriate.¹⁷

Fourth, Grievant's refusal to tolerate blatant violations of the Standards of Conduct among leadership staff reflects a leader of good character and integrity.

DECISION

For the reasons stated herein, the University is **ORDERED**:

¹⁷ Sergeant L recognized that saving sexually explicit images to his computer was "stupid."

- 1) The University shall create an environment for Grievant that is free from retaliation.
- 2) The University shall promote Grievant from the position of Sergeant to the position of Lieutenant with the appropriate increase in compensation and seniority. The promotion shall be retroactive to the date of the grievance, November 4, 2013.
- 3) The University shall move Grievant's work location back to the Main Campus.

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.¹⁸

[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

¹⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 10262-R

Reconsideration Decision Issued: July 24, 2014

RECONSIDERATION DECISION

On July 11, 2014, the Department of Human Resource Management issued a Ruling concluding, “[w]e have no reason to interfere with this decision on the basis of it being inconsistent with policy.”

On May 29, 2014, the Office of Employment Dispute Resolution issued Administrative Ruling 2014-3866 concluding:

there is sufficient evidence to support the hearing officer’s findings that the grievant engaged in protected activity, subsequently suffered an adverse employment action, and a causal link exists between the adverse employment action and the protected activity as discussed below.

The Ruling remanded the matter to the Hearing Officer for further consideration:

It is not sufficient to simply find that the grievant would not have been transferred if he had been promoted. The hearing officer must assess the transfer decision and reasons therefor independently to determine if retaliation is founded. The hearing officer also has not explicitly considered the University’s non-retaliatory explanations for the transfer. Therefore, on remand, the hearing officer is directed to address the grieved transfer as to the remaining elements of the grievant’s retaliation claim to determine whether the hearing record supports a finding that the protected activity was the but-for cause of the transfer. ***

Upon review, we do not find that sufficient facts can be found in the record that would demonstrate such an award of relief would be the only available option to cure the retaliation and place the grievant in the same

(or nearly the same) position he would have been in had the retaliation not occurred. We recognize that the University may have at its disposal other methods, less intrusive upon its management of personnel, by which the violation can be cured appropriately. While we do not find that a hearing officer could *never* order relief such as was awarded to the grievant here, we do not believe that a sufficient factual basis exists in this instance upon which to do so.

A hearing officer's order of relief "should avoid providing specific remedies" that would "unduly interfere with management's prerogatives to manage the agency."

In this case, the University retaliated against Grievant for engaging in a protected activity by denying him a promotion and then transferring him as a direct consequence of its retaliation.

The Hearing Officer's authority to provide a remedy to Grievant is established by statute. The Office of Employment Dispute Resolution interprets that authority and expresses its interpretation through the Rules for Conducting Grievance Hearings. These Rules serve as a Hearing Officer's benchmark with respect to conducting grievance hearings and writing grievance decisions. A hearing officer must comply with the Rules regardless of whether the Rules are consistent with Virginia statute. The Hearing Officer construes the EDR Ruling in this case to serve as a *de facto* revision of the Rules to remove the Hearing Officer's authority to promote Grievant to the position of Lieutenant to rectify the University's retaliation against him. Grievant, in essence, is left without a remedy determined by the Hearing Officer but rather has one fashioned by the University that retaliated against him.¹⁹

In light of EDR's ruling, the Original Hearing Decision shall be amended to provide the following relief:

- 1) The University is ordered to create an environment for Grievant that is free from retaliation. This order shall remain in effect as long as Grievant is employed by the University.
- 2) The University is ordered to provide Grievant with a remedy that accounts for and corrects its retaliation against him.

¹⁹ It is unnecessary for the Hearing Officer to address the transfer decision and the reasons therefor because the University is ordered to consider the merits of Grievant's transfer when determining how to provide Grievant with a remedy for its retaliation against him.

APPEAL RIGHTS

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

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer