Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 01/15/15; Decision Issued: 02/19/15; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10508; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10508

Hearing Date: January 15, 2015
Decision Issued: February 19, 2015

PROCEDURAL HISTORY

On October 9, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records, failure to follow a supervisor's instructions, and in the Agency's judgment discipline is appropriate.

On November 3, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 24, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 15, 2015, 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?

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 Social Services employed Grievant as an Enforcement Supervisor at one of its facilities. Grievant reported to the District Manager who worked at the Facility. Grievant served as a member of the management team at the Facility. Grievant had been employed by the Agency since November 16, 1994. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency receives and distributes child support payments. When a non-custodial parent sends the Agency money to be paid to the custodial parent, the Agency is supposed to follow the "federal hierarchy." Under the federal hierarchy, money received from a non-custodial parent is "pushed" first to the custodial parent. Only in certain circumstances can money be paid to reimburse the TANF program for its prior expenditures involving the parents and their children.

A Former Assistant Director created a competition among districts to see which district could show the greatest increase in the number of cases where money collected was repaid for TANF cases. A TANF case was one where money was owed to the Commonwealth because payments had been made under the TANF program.

Ms. J reported to Grievant. She asked Mr. C to make an adjustment to a child support payment so that a dollar of the payment would be pushed to a TANF account. Mr. C knew that the adjustment would be contrary to the federal hierarchy and did not wish to make the adjustment. He questioned Ms. J about the authority to take the

action. Ms. J said it had been approved by Grievant and Mr. C should speak with Grievant. Mr. C asked Grievant whether he could push a portion of the child support payment to the TANF account. Grievant told him it was ok to move the money. On July 21, 2014, Mr. C went to his supervisor and told her he had been asked to make the adjustment by Ms. J and that Grievant had approved the adjustment. Mr. C asked Grievant whether to approve the transaction. Mr. C's supervisor spoke with the District Manager and following their conversation authorized Mr. C to make the adjustments. Beginning on July 21, 2014, approximately 12 case adjustments in the amount of $1.00 were made contrary to the federal hierarchy in accordance with Grievant's instruction.

Several employees including Grievant complained to Agency executives about how poorly the District Manager was operating the Agency's district office. Grievant filed her first complaint against the District Manager in 2004. Agency executives investigated the complaints but routinely sided with the District Manager creating frustration among those who had complained. In May 2014, the Assistant Director assumed her position and began investigating the complaints including those from Grievant. The Assistant Director concluded that many of the complaints about the District Manager were valid.

In September 2014, the Assistant Director met with the District Manager to give the District Manager notice of the Agency's intent to issue the District Manager disciplinary action. The District Manager said that she and Grievant communicated poorly and often battled. At the end of the meeting, the District Manager told the Assistant Director about child support payments being pushed contrary to the federal hierarchy. The District Manager alleged Grievant was responsible for the violation of policy. The Agency began an investigation.

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."

Under the Federal Regulation Desktop Guide:

> Child support payments must be distributed based on federal guidelines identifying the hierarchy and priority of accounts.[2]

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

[2] Agency Exhibit 5.

Under the federal hierarchy, money received from a non-custodial parent must be distributed first to the custodial parent.

The Agency was obligated to report child support enforcement data to the Federal Government using an OCSE-17 form. Under the Instructions for Completing Form OCSE-17, states could suffer "Consequences of Reporting Unreliable Data":

> States must not estimate counts for reporting on the OCSE-157. Actual numbers must be reported. *** These lines will be audited for completeness and reliability …. *** If audit results find the data needed to compute an incentive measure are incomplete or unreliable, the state will not be eligible for an incentive payment for measures which use these data and the amounts otherwise payable to the state under Title IV-A may be reduced by 1 to 5 percent.[3]

Grievant instructed and authorized portions of child support payments to be distributed contrary to the Agency's policies. The effect of her instruction was that the Agency's internal report and reports presented to the Federal government were inaccurate. If the OCSE-17 presented to the Federal government falsely depicted the Agency's application of child support payment, the Federal government could have reduced incentive payments to the Agency.

DHRM § 1.60(V) lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgment of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section."

In the Agency's judgment, Grievant should receive a Group III Written Notice with removal. The Agency's judgment is supported by the evidence. Grievant instructed an employee to divert a portion of child support payments from the custodial parent into a TANF account. This caused the Agency's internal documents to reflex a misapplication of policy. It also placed the Agency at risk of representing to the Federal government it had complied with the federal hierarchy when in fact it had not. Grievant's behavior is best described a deceitful. When an employee is deceitful, his or her behavior is consistent with the Group III offenses of theft and falsification.[4] Upon the issuance of a Group III Written Notice, an employee may be removed from employment. Accordingly, Grievant's removal is upheld.

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[3] Agency Exhibit 6.

[4] The Agency alleged that Grievant falsified documents. The Agency's documents were not, in themselves, false. The documents reflected the transactions actually made. The transactions, however, were contrary to the federal hierarchy.

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 …."[5] 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.

Grievant contends the disciplinary action should be mitigated because her actions were unduly influence by the District Manager. The evidence does not support this assertion for two reasons. First, the Assistant Director assumed her post in May 2014. Grievant made numerous complaints to the Assistant Director about the District Manager and how the District Manager was behaving inappropriately. Grievant and the Assistant Director had lengthy conversations about the District Manager. Many of the calls were initiated by Grievant for the purpose of condemning the behavior of the District Manager. Grievant did not allege during any of these phone calls that the District Manager instructed Grievant to push child support payments contrary to the federal hierarchy. Grievant sent the Assistant Director a memorandum on August 27, 2014 outlining numerous dates and events describing the District Manager's inappropriate behavior. Grievant did not mention that the District Manager had instructed her to violate the federal hierarchy. Grievant knew that pushing money contrary to the federal hierarchy would be a significant breach of policy. If Grievant believed that the District Manager had instructed staff to act contrary to the federal hierarchy, Grievant likely would have told the Assistant Director early in their conversations. Grievant's failure to do so shows that the District Manager did not initiate the violation of policy.[6] Second, the Assistant Director learned of the misapplication of the federal hierarchy when she presented the District Manager with disciplinary action. It is unlikely the District Manager would have confessed to additional misbehavior to the Assistant Director thereby creating the risk of receiving additional disciplinary action.[7] It would not have been in the District Manager's best interest to do

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[5] Va. Code § 2.2-3005.

[6] In October 2014, Grievant first claimed to the Assistant Director that she was unduly influenced by the District Manager.

[7] The Agency later disciplined the District Manager for knowing about the violation of policy but failing to stop the practice. On August 5, 2014, the District Manager sent Mr. C and other staff an email stating that, "[n]o one has the authority to put a HOLD on a case except for the Supervisors. *** Money is supposed to move itself when it comes in unless it is an exception to the rule. We are not to ask a fiscal to manipulate the system. This is against policy." See, Grievant Exhibit 6.

so. It is most likely that the District Manager disclosed the misapplication of policy in order to seek retribution against Grievant because of Grievant's numerous complaints about the District Manager. In light of the standard set forth in the Rules, 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;[8] (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.[9]

Grievant made numerous complaints to Agency executives regarding the inappropriate actions of the District Manager and other staff at the Facility. She engaged in protected activity. Grievant suffered an adverse employment action because she received disciplinary action. Grievant has not established a link between her protected activity and the adverse employment action. The Agency did not take disciplinary action against Grievant as a pretext for retaliation.

Grievant alleged the Agency denied her right of procedural due process. To the extent the Agency failed to afford her a reasonable opportunity to respond, the hearing process cured this defect in procedural due process. Grievant could present to the Hearing Officer whatever defenses and evidence she believed the Agency failed to properly consider.

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 **upheld**.

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[8] 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.

[9] 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.[10]

[10] 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].

/c/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer