Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 12/09/14; Decision Issued: 12/18/14; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10476; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 12/30/14; EDR Ruling No. 2015-4075 issued 01/15/15; Outcome: Remanded to AHO to reopen hearing; Reopened Hearing Date: 03/05/15; Remand Decision Issued: 03/11/15; Outcome: Partial Relief but Termination Upheld; Administrative Review: EDR Ruling Request on 03/11/15 Remand Decision received 03/26/15; EDR Ruling No. 2015-4125 issued 04/23/15; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 12/30/14; DHRM Ruling issued 05/15/15; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10476

Hearing Date: December 9, 2014
Decision Issued: December 18, 2014

PROCEDURAL HISTORY

Grievant was an academic instructor for the Department of Corrections ("the Agency"), with 4 years tenure. On September 16, 2014, the Grievant was issued a Group III Written Notice, with termination, for falsifying records. The offense date was September 3, 2014.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On October 8, 2014, the Office of Employment Dispute Resolution, Department of Human Resource Management ("EDR"), appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for November 7, 2014, the first date available for the parties. Subsequently, the grievant retained counsel and moved for a continuance of the hearing. Without objection by the Agency, for good cause shown, the grievance hearing was continued to December 9, 2014, on which date the grievance hearing was held, at the Agency's facility.

Both the Agency and the Grievant submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's or Grievant's exhibits, respectively. The parties were permitted one week following the grievance hearing to submit legal authorities. The Agency submitted its legal memorandum and it is made a part of the grievance hearing record. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel for Grievant
Representative for Agency
Counsel for Agency
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?

Through her grievance filings and presentation, the Grievant requested rescission of the Group III Written Notice, reinstatement, back pay, and attorney's fees.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> 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 which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on its Standards of Conduct, Operating Procedure 135.1, which defines Group III Offenses to include acts of misconduct of such a severe nature that a first occurrence normally should warrant removal. The purpose of the policy is stated:

> The purpose of this policy is to set forth the Commonwealth's Standards of Conduct that the Department of Corrections must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace or outside the workplace when the conduct impacts an employee's ability to do his or her job, or influences the agency's overall effectiveness.

Agency Exh. 12. Falsification of documents is an offense severe enough to be designated a Group III offense.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offense

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

The Agency employs the Grievant as an academic instructor, and she has been employed there for four years as of the offense date. The current Written Notice charged the Grievant as follows:

> On September 3, 2014, [the Grievant] turned in the August 2014 Teacher Enrollment and Attendance Monthly Summary Report, which is based on the classroom attendance registers. This report included data to indicate that a specific class was held on two separate days: August 25 & 27. This is clearly false information as [the Grievant] was specific in her conversation of August 28, 2014, with the principal that she did not teach these classes; she left the facility at 2 p.m. on each day.

> Falsification of these documents is an egregious act; it creates a severe breach of security as there are documented indicators that an offender is in a specific place being appropriately monitored. As indicated in the circumstances considered section below, [the Grievant] continued submission of false records has resulted in the non-certification of the school accountability for the Central Virginia Correction Unit 13 Division of Education for three months; audit accountability is out of compliance. This places required offender programming in jeopardy and prohibits the VADOC and the educational division from meeting its strategic plan for offenders.

As circumstances considered, the Written Notice provided:

> Classroom attendance records (Registers) are legal documentation of time and attendance used to document accountability of attendance and to provide data that has a defined impact on both state and federal funding. These records are also critical in defining ability to meet audit standards set by the state/federal levels as well as to meet the Department's standards set by the American Correctional Association.
>
> [The Grievant] submitted registers for the months of April, May, July and August that were erroneous. When required to correct, one month was sent back two times for correction and one month sent back three times. [The Grievant] sent an email that indicated "this input of student's info and their attendance is tedious and time consuming." A counseling session was held on June 13, 2014, and one of the topics being the importantance of register maintenance.

The Agency's witness, the principal and Grievant's supervisor, testified consistently with the terms of the Written Notice, including the counseling the Grievant, the Grievant's erroneous attendance documentation, and the importance of such documentation for the Agency. The principal testified that the same expectations apply to all instructors, and the Grievant has not been singled out.

The Grievant testified that her errors were the result of overwork, lack of resources, and technology issues, but she conceded that the errors as described by the Agency occurred. The Grievant testified that she had no purposeful intention to falsify documents. The Grievant also testified that the Agency retaliated against her because she elected to contact her superiors outside the chain of command, irritating Agency management, including the principal.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness.

For years, grievance decisions have typically required a showing of intent to establish that an employee has falsified a document. *See, e.g.*, EDR Ruling No. 2012-3176 (and discussion of hearing decision therein); EDR Ruling No. 2009-2325 (same). The hearing officer must consider the evidence in light of the meaning of falsification.

"Falsifying" is not defined by the Standards of Conduct, but the Hearing Officer interprets this provision to require proof of intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) as follows:

> Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

This interpretation is also consistent with the New Webster's Dictionary and Thesaurus that defines "falsify" as:

> to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice.*

Based on the manner, tone, and demeanor of the witnesses, I find the Grievant credible when she testified that she never intended to falsify any information. The Grievant admits the mistakes in the documentation identified by the Agency in the Written Notice. The Agency has the burden to show convincing information beyond equipoise that the Grievant intentionally falsified her reports. She may have been guilty of negligence, carelessness, or even indifference, but there is no demonstrated motivation that supports an intention to falsify documentation. While the Grievant may have felt the paperwork was too tedious, more is needed to show *intent* than carelessness, inattention, or indifference.

While it is true that the Grievant's reports were materially inaccurate, as described by the Agency in the Written Notice and with testimony at the grievance hearing, the Agency has not borne its burden of proof to show the requisite intention by the Grievant to falsify information. The documentation errors are convincingly described by the Grievant as rising no higher than failure to follow supervisor's instructions or poor job performance. Because of the Agency's counseling of the Grievant to prepare her reports more accurately, and because of the serious security concern and accreditation involved, the offense is severe enough to warrant a Group II for failure to follow supervisor's instructions or poor job performance. Even a violation of safety rules where there is not a threat of bodily harm is designated as a Group II offense in Policy 135.1. The facts do not support a falsification conclusion at a Group III level.

The reports and paperwork were done with carelessness and indifference, supporting, instead, a Group II level offense of failure to follow supervisor's instructions or poor job performance that significantly affects agency operations. Thus, because of the lack of intent to falsify, I reduce the level of discipline to a Group II Written Notice—appropriate for offenses such as failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy, including violating safety rules where there is not a threat of bodily harm. Operating Procedure 135.1. Because of the severity of the errors and the significant impact on the Agency, a period of suspension is also appropriate—the maximum of 10 days.

Retaliation

The Grievant asserts that the Agency's action is motivated by retaliation. For a claim of retaliation to succeed, the Grievant must show (1) she engaged in a protected activity; (2) she suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); s*ee, e.g*., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. If the Agency presents a nonretaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

The Grievant engaged in protected activity by contacting superior management seeking certain relief. The Grievant asserts that the retaliation she has experienced stems from this conduct of going "outside of the chain of command." Further, she could be viewed as having potentially suffered a materially adverse action due to the agency's discipline and termination. However, the Grievant does not satisfy the burden of proof of showing that the materially adverse action was taken because of his protected activity.

There is nothing to suggest that the Agency's handling of this discipline was in any way retaliatory beyond the Grievant's mere allegation. The Agency has addressed a demonstrably severe occurrence or occurrences of conduct with a single Written Notice. Grievant has not presented sufficient evidence to show that the Agency's discipline was motivated by improper factors. Rather, it appears that the determinations were based on the Grievant's actual conduct and behavior, all of which was solely within the control of the Grievant.

Mitigation

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d

133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution." 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.

Regarding the level of discipline, the Agency had leeway to impose discipline along the permitted continuum. Given the nature of the reporting errors, the impact on the Agency, and the repeated conduct, I find no evidence or circumstances to justify reducing the offense below a Group II level of discipline. A Group II Written Notice with 10 days suspension falls within the limits of reasonableness.

DECISION

For the reasons stated herein, I uphold the Agency's discipline but reduce it, accordingly, to a Group II Written Notice issued on September 16, 2014, with ten days suspension. Thus, the Grievant is reinstated to her former position or, if occupied, to an equivalent position, with back pay and benefits (less any interim earnings). Because she is reinstated, the Grievant may petition for reasonable attorney's fees.

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.[1]

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

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

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER
ON REMAND

In the matter of: Case No. 10476

Original Hearing Date:	December 9, 2014
Original Decision Issued:	December 18, 2014
Remand Hearing Date:	March 5, 2015
Remand Decision Issued:	March 11, 2015

PROCEDURAL HISTORY

By Administrative Review Ruling Number 2015-4075, issued January 15, 2015, the Office of Employment Dispute Resolution, Department of Human Resources Management ("EDR") remanded this matter to the hearing officer to hear and decide the Group II Written Notice, issued September 16, 2014, that was not addressed in the original grievance hearing and decision. The remand hearing was held, as scheduled, on March 5, 2015.

On October 8, 2014, EDR originally appointed the Hearing Officer. The grievance hearing on December 9, 2014, addressed only the Group III Written Notice. The remand hearing held on March 5, 2015, was limited to the grievance of the Group II Written Notice.

Grievant was an academic instructor for the Department of Corrections ("the Agency"), with 4 years tenure. On September 16, 2014, the Agency issued the Grievant a Group III Written Notice, with termination, for falsifying records (with offense date of September 3, 2014). The Group III Written Notice was reduced to a Group II level offense by grievance decision issued December 18, 2014. The Agency issued a separate Group II Written Notice for leaving work without providing notification on August 25 and 27, 2014.

Separate from the exhibits for the Group III grievance heard on December 9, 2014, both the Agency and the Grievant submitted additional documents for exhibits that were accepted into the Group II grievance record, and they will be referred to as Agency's or Grievant's exhibits by hearing date, respectively. The parties were permitted to submit legal authorities, and both submitted written briefs that are accepted into the grievance record. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel for Grievant
Representative for Agency
Counsel for Agency
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?

Through her grievance filings and presentation, the Grievant requested rescission of both the Group II and Group III Written Notices, reinstatement, back pay, and attorney's fees.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> 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 which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on its Standards of Conduct, Operating Procedure 135.1, which defines Group III Offenses to include acts of misconduct of such a severe nature that a first occurrence normally should warrant removal. The purpose of the policy is stated:

> The purpose of this policy is to set forth the Commonwealth's Standards of Conduct that the Department of Corrections must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace or outside the workplace when the conduct impacts an employee's ability to do his or her job, or influences the agency's overall effectiveness.

Dec. 9 Agency Exh. 12. Falsification of documents is an offense severe enough to be designated a Group III offense.

Standards of Conduct, Operating Procedure 135.1, defines Group II Offenses to include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal. Group II offenses include failure to follow a supervisor's instruction, perform assigned work or otherwise comply with applicable established policy; and leaving the work site during working hours without permission.

Agency policy, Hours of Work and Leaves of Absence, Operating Procedure 110.1, provides, at ¶ IV.C.3., that "all leave should be requested as far in advance as possible. In the event of illness, injury, or other emergency, an employee shall be required to provide adequate notice to the supervisor and request use of leave." March 5 Agency Exh. 12A.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offenses

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

Group II Written Notice (heard March 5, 2015)

The Agency employed the Grievant as an academic instructor, and she had been employed there for four years as of the offense date. The Group II Written Notice charged the Grievant as follows:

> [The Grievant], as documented on August 25 & 27, 2014, left the work site prior to the end of her scheduled shift assignment without notifying her supervisor or receiving the required prior approval. This clearly violates DOC Operating Procedure 110.1. This is not the first incident of this nature (refer to attachments and documentation below). Her actions have had an adverse impact on the educational process as classes scheduled on each of those days were cancelled; again, without the approval to do so.

As circumstances considered, the Written Notice provided:

> Documentation supports that [the Grievant] is clearly aware of the requirements of the procedures and processes; this is evidenced by the following: See attached list of dates and documentation.

March 5 Agency Exh. 1. A separate page added to the Written Notice identified eight enumerated documentation items, including emails and counseling memos.[2]

The Agency's witnesses, the school superintendent, the human resources officer, and facility superintendent, testified consistently with the terms of the Written Notice, including the counseling of the Grievant, the Grievant's erroneous attendance documentation, and the importance of following procedure for the Agency.[3] They testified to the email communications

[2] The Grievant asserted that she did not receive the attachment to the Group II Written Notice and that the Agency specifically denied her request for the supporting documentation. She asserted she first saw the Written Notice attachment when the Agency submitted the pre-hearing submission of documents. However, the Grievant did not bring this alleged procedural violation to the hearing officer's attention before the grievance hearing and such failure serves to waive any remedy. §6.3 of the Grievance Procedure Manual provides that all claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time. Further, the manual provides that once a grievance has been qualified for hearing, any claims of party noncompliance occurring during the hearing phase should be raised in writing with the hearing officer appointed to hear the grievance. There is nothing in the record to indicate the Grievant has appropriately raised the noncompliance issue.

[3] The Grievant's direct supervisor, the school principal, had retired by the time the March 5, 2015, grievance hearing was held and was not present. However, she testified at the December 9, 2014,

to the Grievant expressing the importance of her adherence to her established work schedule and the importance of prior notification of any changes and leave requests. *See* March 5 Agency Exhs. 4.B, 5, 6, 7, 8, 10, 13, and 14. For instance, on June 11, 2014, the Grievant's supervisor wrote an email to the Grievant that stated, among other things:

> I need to know in advance when the leave is going to be taken unless it is an emergency. Annual leave is approved in advance. Sick and family personal you contact your supervisor to let her know your status for the workday as well as the institution.
>
> The only whereabouts that I need to know about is when you are or are not at work. This is a requirement of exempt employees. When you submit your leave slip, you are expecting me to sign off on documentation that I know nothing about in some instances.

March 5 Agency Exh. 13.

Another teacher, V.R., testified on the Grievant's behalf. V.R. testified that the principal's assistant[4] requested that their leave be written on a paper calendar so that the leave could be logged with the staff leave at another location. The principal was present at the Grievant's facility only one day per week, as the principal supervised multiple facilities at different locations. V.R. testified that the principal gave the teachers, including the Grievant, her home and cell phone numbers so that she could always be reached for such notifications. V.R. had a standing medical authorization on file that addressed her regular needs to leave work unexpectedly to address the effects of severe migraine headaches. V.R. testified that she understood she was to notify her supervisor in advance if possible of any leave or changes in work hours. V.R. testified somewhat equivocally, but she confirmed that annual leave had to be arranged in advance, according to policy, and that the paper calendar did not excuse prior notification and approval for leave.

The Grievant testified that the leave in question was related to medical appointments and she had no purposeful intention of not notifying her supervisor when her work schedule needed to change. The Grievant also testified that she understood that writing her leave on the paper calendar satisfied the requirement that she notify her supervisor and obtain approval for leave, and that nothing more was required. The Grievant admitted that the supervisor was only onsite one day per week, and the Grievant testified that her leave would often need to change from day to day because she had no control over her physician's appointment schedule. On August 25 and 27, 2014, the Grievant had written on the paper calendar a notation that she would be leaving at 2:00 p.m. When this notation was made is unclear. However, the undisputed records show that the Grievant instead left work on those days at about 1:00 p.m., and that she provided no notification to anyone in supervision. The Grievant testified that she did not cancel any classes on those dates because the classes were already cancelled because of test scoring or other reasons. The Grievant conceded on cross-examination that her supervisor had asked for text

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grievance hearing. The principal testified that the same expectations apply to all instructors, and the Grievant has not been singled out.

[4] The assistant is no longer an Agency employee and was not present at the grievance hearing.

messages, email, or telephone messages for any leave requests or work schedule changes. Mar. 5 Agency Exh. 13. The Grievant testified that she sometimes contacted her supervisor when leave changes occurred, but she could not state when.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness.

Because of the Agency's counseling of the Grievant to provide advance notification of changes in her work schedule according to policy, the Grievant's testimony that she understood she only had to write her work schedule changes on the paper calendar is not credible. Such contention is contradicted by the Grievant's own testimony, and that of V.R., that the supervisor provided her home telephone number, cell telephone number, and email address, for the express purpose of such notifications. Further, the paper calendar notation method, assuming that otherwise served as adequate notice and permission, was shown by the Grievant to be clearly erroneous because on both days in question she left her workplace one hour earlier than indicated on the paper calendar. Only in an emergency situation is prior notification excused, and there was no emergency on August 25 or 27, 2014, that required the Grievant to leave at 1:00 instead of 2:00.

This failure by the Grievant exhibited a carelessness and indifference to her obligations of notification and approval for taking leave, supporting and justifying the Agency's Group II level offense for leaving work early without permission and failure to follow supervisor's instructions. According to the Grievant's unrebutted testimony, no classes were missed on August 25 and 27, contrary to the reference in the Written Notice. However, the missed classes are not critical to the violation charged. The missed classes, if proven by the Agency, would present an aggravating factor that the Grievant has rebutted. Thus, without missed classes, the offense is proved and I uphold the Group II Written Notice—an appropriate level for such offenses of leaving work without permission and failing to follow supervisor's instructions.

Group III Written Notice (heard December 9, 2014)

As noted above, the Agency employed the Grievant as an academic instructor, and she had been employed there for four years as of the offense date. The Group III Written Notice charged the Grievant as follows:

> On September 3, 2014, [the Grievant] turned in the August 2014 Teacher Enrollment and Attendance Monthly Summary Report, which is based on the

> classroom attendance registers. This report included data to indicate that a specific class was held on two separate days: August 25 & 27. This is clearly false information as [the Grievant] was specific in her conversation of August 28, 2014, with the principal that she did not teach these classes; she left the facility at 2 p.m. on each day.
>
> Falsification of these documents is an egregious act; it creates a severe breach of security as there are documented indicators that an offender is in a specific place being appropriately monitored. As indicated in the circumstances considered section below, [the Grievant] continued submission of false records has resulted in the non-certification of the school accountability for the Central Virginia Correction Unit 13 Division of Education for three months; audit accountability is out of compliance. This places required offender programming in jeopardy and prohibits the VADOC and the educational division from meeting its strategic plan for offenders.

As circumstances considered, the Written Notice provided:

> Classroom attendance records (Registers) are legal documentation of time and attendance used to document accountability of attendance and to provide data that has a defined impact on both state and federal funding. These records are also critical in defining ability to meet audit standards set by the state/federal levels as well as to meet the Department's standards set by the American Correctional Association.
>
> [The Grievant] submitted registers for the months of April, May, July and August that were erroneous. When required to correct, one month was sent back two times for correction and one month sent back three times. [The Grievant] sent an email that indicated "this input of student's info and their attendance is tedious and time consuming." A counseling session was held on June 13, 2014, and one of the topics being the importantance of register maintenance.

The Agency's witness, the principal and Grievant's supervisor, testified consistently with the terms of the Written Notice, including the counseling the Grievant, the Grievant's erroneous attendance documentation, and the importance of such documentation for the Agency. The principal testified that the same expectations apply to all instructors, and the Grievant has not been singled out.

The Grievant testified that her errors were the result of overwork, lack of resources, and technology issues, but she conceded that the errors as described by the Agency occurred. The Grievant testified that she had no purposeful intention to falsify documents. The Grievant also testified that the Agency retaliated against her because she elected to contact her superiors outside the chain of command, irritating Agency management, including the principal.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The

task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness.

For years, grievance decisions have typically required a showing of intent to establish that an employee has falsified a document. *See, e.g.,* EDR Ruling No. 2012-3176 (and discussion of hearing decision therein); EDR Ruling No. 2009-2325 (same). The hearing officer must consider the evidence in light of the meaning of falsification.

"Falsifying" is not defined by the Standards of Conduct, but the Hearing Officer interprets this provision to require proof of intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) as follows:

> Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

This interpretation is also consistent with the New Webster's Dictionary and Thesaurus that defines "falsify" as:

> to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice.*

Based on the manner, tone, and demeanor of the witnesses, I find the Grievant credible when she testified that she never intended to falsify any information. The Grievant admits the mistakes in the documentation identified by the Agency in the Written Notice. The Agency has the burden to show convincing information beyond equipoise that the Grievant intentionally falsified her reports. She may have been guilty of negligence, carelessness, or even indifference, but there is no demonstrated motivation that supports an intention to falsify documentation. While the Grievant may have felt the paperwork was too tedious, more is needed to show *intent* than carelessness, inattention, or indifference.

While it is true that the Grievant's reports were materially inaccurate, as described by the Agency in the Written Notice and with testimony at the grievance hearing, the Agency has not borne its burden of proof to show the requisite intention by the Grievant to falsify information. The documentation errors are convincingly described by the Grievant as rising no higher than failure to follow supervisor's instructions or poor job performance. Because of the Agency's counseling of the Grievant to prepare her reports more accurately, and because of the serious

security concern and accreditation involved, the offense is severe enough to warrant a Group II for failure to follow supervisor's instructions or poor job performance. Even a violation of safety rules where there is not a threat of bodily harm is designated as a Group II offense in Policy 135.1. The facts do not support a falsification conclusion at a Group III level.

The reports and paperwork were done with carelessness and indifference, supporting, instead, a Group II level offense of failure to follow supervisor's instructions or poor job performance that significantly affects agency operations. Thus, because of the lack of intent to falsify, I reduce the level of discipline to a Group II Written Notice—appropriate for offenses such as failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy, including violating safety rules where there is not a threat of bodily harm. Operating Procedure 135.1.

Retaliation

The Grievant asserts that the Agency's action is motivated by retaliation. For a claim of retaliation to succeed, the Grievant must show (1) she engaged in a protected activity; (2) she suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. If the Agency presents a nonretaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

The Grievant engaged in protected activity by contacting superior management seeking certain relief. The Grievant asserts that the retaliation she has experienced stems from this conduct of going "outside of the chain of command." Further, she could be viewed as having potentially suffered a materially adverse action due to the agency's discipline and termination. However, the Grievant does not satisfy the burden of proof of showing that the materially adverse action was taken because of his protected activity.

There is nothing to suggest that the Agency's handling of this discipline was in any way retaliatory beyond the Grievant's mere allegation. The Agency has addressed a demonstrably severe occurrence or occurrences of conduct with the Written Notices. Grievant has not presented sufficient evidence to show that the Agency's discipline was motivated by improper factors. Rather, it appears that the determinations were based on the Grievant's actual conduct and behavior, all of which was solely within the control of the Grievant.

Mitigation

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution." 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.

Regarding the level of discipline, the Agency had leeway to impose discipline along the permitted continuum. Given the nature of the two Group II Written Notices, as decided above, the impact on the Agency, and the repeated conduct for each Group II Written Notice, I find no evidence or circumstance that allows the hearing officer to reduce the discipline further than explained above. The agency has proved (i) the employee engaged in the behavior described in the written notices, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline of termination must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

DECISION

For the reasons stated herein, I uphold the Agency's Group III Written Notice but reduce it, accordingly, to a Group II Written Notice issued on September 16, 2014. I uphold the Agency's Group II Written Notice issued on September 16, 2014. Based on the accumulation of discipline—two Group II Written Notices—the Agency has elected termination. Because a disciplinary record of two Group II Written Notices supports the normal discipline of termination, without sufficient bases for mitigation of the termination, I uphold the Agency's termination of the Grievant.

The Grievant argues that termination is not justified or permitted because the termination decision in the Group III Written Notice was not expressly based on accumulated discipline. *See* Grievant's memorandum, relying on *Rules for Conducting Grievance Hearings*, at § VI.B.3. However, nothing in the *Rules* requires any specific language be used in written notices. In its Ruling No. 2015-4075, at page 6, when remanding this matter EDR held:

> While this case did not initially involve an agency action "based on accumulated active Written Notices," the hearing officer and all parties were aware at hearing that two disciplinary actions existed. The clear purpose of this section [VI(B)(3)] of the *Rules* is for hearing officers not to rule on the final disciplinary action, i.e., a termination, until all grieved Written Notices are heard and decided so that an employee's full disciplinary record is properly considered.

Contrary to the Grievant's interpretation of the *Rules*, EDR, at least implicitly, held that the accumulation of discipline must be considered for determining whether termination is appropriate and EDR remanded for that purpose. Further, I am guided by § VI.B.1, which provides:

> When the hearing officer sustains fewer than all of the agency's charges, the hearing officer may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process or proceedings before the hearing officer that it desires that a lesser penalty be imposed on fewer charges.

While the number of charges remains the same, the concept directing the hearing officer to maintain the maximum reasonable discipline for two Group II Written Notices—termination—is clear, unless the Agency indicates a lesser penalty may be imposed. The Agency most definitely has not indicated a lesser penalty, and there are no mitigating circumstances to reduce the maximum reasonable discipline elected by the Agency.

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:

3. 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.

4. 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]

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

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