Issues: Group II (failure to follow policy), Group II (failure to follow policy), Group III (falsifying records), and Termination; Hearing Date: 07/09/12; Decision Issued: 08/02/12; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9847; Outcome: Partial Relief; **Administrative Review: AHO Reconsideration Request received 08/17/12; Reconsideration Decision issued 09/17/12; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 08/17/12; EDR Ruling No. 2013-3415 issued 10/05/12; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 08/17/12; DHRM Ruling issued 10/17/12; Outcome: Declined to Review.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9847

Hearing Date: July 9, 2012
Decision Issued: August 2, 2012

PROCEDURAL HISTORY

On June 24, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records. On June 24, 2011, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy as a reviewer of an employee's purchase card. On June 24, 2011, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy regarding permitting employees to work overtime without prior written approval.

On July 26, 2011, Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 6, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 9, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

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

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:

Virginia Commonwealth University employed Grievant as a Chief Administrative Officer for one of its academic departments. No evidence of prior active disciplinary action was introduced during the hearing. Grievant received an overall rating of Extraordinary Achiever on his 2009 and 2010 annual performance evaluations.

Grievant and his brother began the process of creating and building a Restaurant. The Restaurant operated as a Domestic Limited Liability Company. The Certificate of Formation was dated May 1, 2007 and filed with the State Department of the Treasury on May 2, 2007. The Limited Liability Company was organized for the purpose of operating Quick Service Restaurant. Grievant obtained a temporary Employer Indemnification Number for the company. January 1, 2008 was the first day wages were paid by the company.[1] Grievant ended his employment with the Restaurant effective March 31, 2008.

Grievant presented as evidence a copy of a General Employment Agreement effective January 1, 2008 showing that his base compensation salary would be at the

[1] Grievant Exhibit 1, page 26.

rate of $60,000 per year and that he would receive bonus compensation as a percentage of the company's gross sales.[2] The Document was not signed or dated. Grievant received $40,000 as a "salary advancement".

On April 17, 2011, the Restaurant Domestic Limited Liability Company was canceled because:

> This was for a restaurant chain that never was able to obtain adequate financing. We never opened for business or had any revenue.[3]

On February 19, 2008, Grievant submitted an online Application for Employment for the position of Chief Administrative Officer.[4] He listed the Restaurant as his current employer. Grievant wrote that his Job Title was Chief Operating Officer, Date Employed was from April 1, 2007, and his Starting Salary was $90,000. Grievant did not report an ending employment date or ending salary for the Restaurant. The Application for Employment contained a box entitled "Agreement" at the end of the application. The text in the box provided:

> I hereby certify that all entries are true and complete, and I agree and understand that any falsification of information herein, regardless of time of discovery, may cause forfeiture on my part to any employment in the service of the Commonwealth of Virginia. I understand that all information on this application is subject to verification and I consent to criminal history background checks. I also consent to references and former employers and educational institutions listed being contacted regarding the application. I further authorize the Commonwealth to rely on and use, as it sees fit, any information received from such contacts. Information contained in this application may be disseminated to other agencies, nongovernmental organizations or systems on a need-to-know basis for good cause shown as determined by the agency head or designee.
>
> By signing below, I certify that I have read and agree with these statements.[5]

Grievant was selected for an interview. As part of the interview process, Grievant spoke with Dr. L who became Grievant's Supervisor once Grievant began working for the Agency. During the interview, Grievant explained the nature of the Restaurant's business but did not disclose that his salary was not actually $90,000 per

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[2] Grievant Exhibit 1 page 75.

[3] Agency Exhibit 1.

[4] Grievant Exhibit 1 page 95 and page 104.

[5] Grievant Exhibit 1 page 99.

year. Dr. L established Grievant's salary based on the assumption that Grievant previously was earning salary of $90,000.

On March 21, 2008, Grievant received a letter from the Human Resource Generalist stating, "You will begin employment with VCU on April 1, 2008, at an annual salary of $84,000."[6]

On April 1, 2008, Grievant reported to work and was presented with a copy of his online Application for Employment. Grievant was asked to sign the Application for employment. Grievant signed his name and wrote the date 4/1/08 in a box entitled "Agreement" at the end of the application thereby certifying the accuracy of the information he wrote in his employment application.

In April 2011, the University Audit & Management Services office was contacted by the Dean's Office of the School of Medicine regarding fiscal activity within Grievant's Department. As part of that audit, the Auditor reviewed the financial records of Grievant's Department and interviewed Grievant and his staff. The Auditor also took possession of the personal computer owned by the Agency but used by Grievant to perform his work duties. Grievant had placed draft copies of the 2007 and 2008 joint tax returns for Grievant and his wife. A draft of Grievant's and his wife's 2007 federal income tax return showed adjusted gross income $79,673. Grievant listed wages, salary, tips etc. as $62,240 and unemployment compensation of $17,796. Grievant listed taxable interest as $483 and showed a business loss of $846. Grievant drafted a Form 1099–G showing that he was the recipient of unemployment compensation in the amount of $17,796. The Auditor compared the draft tax returns with Grievant's Application for Employment.[7]

The Agency provides some of its employees with a credit card to make purchases for the Agency of less than $5,000. These cards are referred to as P-cards. Grievant was the reviewer of the P-card accounts for several of his employees.[8] P-card accounts must be reconciled which consists of completing a purchase log, comparing the log to bank statements to make sure they reconcile, and then comparing the statements to Banner to make sure the financial system is accurate. Banner is the Agency's general ledger. As part of the audit, the Auditor asked Grievant if he had copies of the P-card statements and supporting records. Grievant told the Auditor that he had given the documents to Ms. C to be secured. The Auditor was unable to find the

[6] Agency Exhibit 7.

[7] As part of the audit, the Auditor also verified that all of the information on Dr. L's Application for Employment was correct although the Auditor did not have documentation regarding Dr. L's salary from his prior employer.

[8] Grievant Exhibit 16 shows the Corporate Purchasing Card Purchase Log Sheet submitted by Ms. M, one of Grievant' subordinates, for the time periods February 15, 2010 through March 15, 2011. Grievant signed the documents as the reviewer.

records. The Auditor also was unable to find documents showing that the P-card account information was reconciled in Banner.

On occasion, Grievant's subordinates worked and were compensated for overtime. Grievant authorized the employees reporting to him to work overtime. The Agency had Overtime Guidelines but did not have a policy requiring a supervisor to document in writing an authorization for an employee to work overtime.

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

Group III Written Notice – Falsification of Application for Employment

"[F]alsification of records" constitutes a Group III offense.[10] DHRM § 2.10 states:

> Before an applicant is eligible for employment with the Commonwealth, several records must be reviewed or verified. This information is considered part of the application process and, as with information contained on the application form, if it is later discovered that an applicant falsified any information related to his or her employment, the employee may be terminated.

"Falsification" is not defined by DHRM § 1.60 or DHRM § 2.10, but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) as follows:

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

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as:

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

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

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

Once an application for employment is submitted to a State agency, it becomes a record of that agency. If Grievant intended to falsify the application for employment, then he would have engaged in behavior rising to the level of a Group III offense.

Grievant falsified his application for employment with the Agency. Grievant listed his Starting Salary as $90,000 with the Restaurant even though his compensation was substantially lower than $90,000. Grievant knew or should have known that reporting his salary as $90,000 was false. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsifying an application for employment. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that he explained to the Agency during the hiring process that his salary depended upon many factors relating to the operation of the Restaurant but he did not intentionally mislead the Agency and the Agency did not rely upon his assertion that his annual salary was $90,000. This argument fails. The Supervisor interviewed Grievant as part of the hiring process and discussed with Grievant the nature of his employment with the Restaurant. The Supervisor was concerned that the Agency could not offer Grievant more than $84,000 per year and that Grievant would be taking a pay cut. Following his discussions with Grievant, the Supervisor believed that Grievant's salary from the Restaurant was $90,000. The Supervisor only learned that Grievant's salary was less than $90,000 when he read the audit report giving rise to the disciplinary action against Grievant. Grievant did not present any credible evidence showing that he received a salary from the Restaurant at the rate of $90,000 per year.

Grievant argued that the Agency violated his right of privacy and acted outside of Agency policy to view the contents of the hard drive of his work computer. Grievant's argument fails. Grievant's draft tax returns were found on the hard drive of the computer owned by the Agency. DHRM Policy 1.75 coverings employees' use of electronic computer systems owned by the Commonwealth of Virginia. This policy provides:

> No user shall have any expectation of privacy in any message, file, image or data created, sent, retrieved, received, or posted in the use of the Commonwealth's equipment and/or access. Agencies have a right to monitor any and all aspects of electronic communications and social media usage. Such monitoring may occur at any time, without notice, and without the user's permission.
>
> In addition, except for exemptions under the Act, electronic records may be subject to the Freedom of Information Act (FOIA) and, therefore, available for public distribution.

Under this policy, Grievant had no expectation of privacy when he created a file on the Agency's computer containing his personal tax returns. The Agency owned the personal computer used by Grievant and had the right to take possession of the computer and examine it using whatever means it chose.[11]

Grievant argued that the Agency's policies created a right of privacy. If the Hearing Officer assumes for the sake of argument that the Agency's policies may have created some expectation or right of privacy, the DHRM Policy 1.75 supersedes those policies. DHRM Policy 1.75 states, "Agencies may supplement the policy as necessary, as long as such supplement is consistent with the policy." To the extent the Agency's policies created an expectation of privacy, the Agency's policies would not be consistent with DHRM Policy 1.75 and, therefore, unenforceable.[12]

Group II Written Notice – Corporate Purchasing Card

The Agency contends that Grievant violated the Agency's Corporate Purchasing Card Procedures. This policy defines Reviewer as:

> The individual responsible for requesting limit changes, removal of industry restrictions, cancellation of cards and ensuring cardholder is in compliance with the P-Card policies and procedures. Responsible for reviewing and approving cardholder's monthly statement reconciliations.

Each department is responsible for retaining documentation of orders and returns, and reconciling them to the monthly P-Card statement and Banner, the Agency's accounting system. Each cardholder must certify that the payment for goods and services were legitimately purchased and received in accordance with established policies and procedures. The purchase log provides a location for the reviewer and the cardholder's certification signatures. The Policy defines the Reviewer's responsibilities as:

> a. Verify all purchases made are valid business expenses and comply with policies and procedures;
> b. Carefully review original monthly statements, reconciliations, and supporting documentation to verify amounts match;
> c. Sign off on a reconciliation even when there is no activity for a statement period;
> d. Report noncompliance to Program Administrator;
> e. Ensure all receipts are original receipts and vigorously questioning any receipt which does not appear in all respects to be an original receipt;

[11] Grievant argued that the Agency had obtained his tax returns contrary to the "fruit of the poisonous tree" doctrine. That concept does not apply as a rule to exclude evidence in an employment disciplinary hearing.

[12] Estoppel does not apply to the Commonwealth and, thus, Grievant would not be entitled to rely on the erroneous creation of rights by the Agency.

f. Understand that by approving the reconciliation package the reviewer is acknowledging that he/she has seen the items and can verify receipt. If the reviewer did not see the items, then supporting documentation such as an email from someone other than the cardholder must be obtained;
g. Retain all P-Card file documentation after approval. **All supporting documentation (e.g. original packing slips, original receipts, etc.) must be maintained with the statement and be retained by the reviewer.** Documentation must be retained for a period of at least three years. These records are subject to review by University officials and auditors; and
h. Reconcile the account in Banner and confirm the charges on the statement match the charges in Banner. (Emphasis original.)[13]

Grievant failed to comply with the Agency's policy because he failed to retain all P-Card documentation after approving expenditures. The Auditor was unable to find original documentation supporting the expenditures. Grievant told the Auditor that he had given the documents to Ms. C to be secured. The Auditor was unable to find document showing reconciliation of the accounts in Banner.

Group II Written Notice – Approval for Overtime.

The Agency argued that Grievant allowed staff to claim overtime without prior written approval. Grievant testified that he had given his approval to employees to work overtime and that no employees worked overtime without his approval. The Agency did not present evidence of any employees who had worked overtime without Grievant's approval. The Agency did not present evidence of any policies in effect prior to Grievant's removal that would have required written approval from Grievant for overtime work. There is no factual basis to justify the Agency's disciplinary action. The Group II Written Notice regarding approval of overtime must be reversed.

Mitigation

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 Employment Dispute Resolution…."[14] 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-

[13] Agency Exhibit 2.

[14] Va. Code § 2.2-3005.

exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant argued that the disciplinary action should be mitigated because of the inconsistent application of disciplinary action. When an employee alleges the inconsistent application of disciplinary action, the question becomes whether the agency singled out the employee for disciplinary action. Grievant argued that in 2003, the Agency permitted another employee (referred to in EDR Case Number 453) to remain employed even though the employee had falsified her application for employment. This argument fails. Grievant was not similarly situated with the employee in that case. The employee in that case was a secretary/receptionist in the president's office. The Agency mitigated the disciplinary action because the secretary/receptionist had 28 years of State service and she wrote a letter of apology to the University President. In contrast, Grievant held a managerial position. He did not have 28 years of State service and he continues to deny that his claimed salary of $90,000 was inaccurate. Given these factors and the length of time between the two cases, the Hearing Officer does not believe that Grievant was singled out for disciplinary action.

Agencies are expected to reach conclusions regarding the appropriate level of disciplinary action after receiving facts supporting disciplinary action. When an agency concludes that disciplinary action should be taken against an employee prior to receiving facts supporting a basis to take disciplinary action, the agency has demonstrated an improper motive for taking disciplinary action.

Grievant argued that the Agency took disciplinary action against them based on an improper motive. He presented evidence of an email drafted by Ms. S to an audit manager requesting an investigation related to Grievant and his department. Ms. S had been informed that an investigation of allegations against Grievant for sexual harassment was unfounded but raised questions regarding the financial management of Grievant's section. Ms. S wrote, in part:

> To be honest, I was hoping that [the Agency's EEO office] would find cause for dismissal so we didn't need to engage additional [University] resources/your office in another investigation.[15]

Ms. S was a "dotted line supervisor" with respect to Grievant. She formed an opinion that Grievant should be dismissed prior to receiving facts sufficient to support the taking disciplinary action.

Grievant also presented evidence that one of his subordinates alleged Grievant had sexually harassed her.[16] The subordinate complained to Dr. L. Dr. L believed her

[15] Grievant Exhibit 13, page 113.

and formed an opinion that Grievant should resign or be removed from the Agency. He scheduled a meeting with Grievant on April 4, 2011. Dr. L sent a memorandum to the Vice Chair asking that the Vice Chair serve as a witness during that meeting. In that memorandum, Dr. L states, "I am thinking of giving him the option to resign his position. If he does not wish to resign, I will have to fire him." On April 4, 2011, Dr. L sent an email to the Director of the Office of Equal Employment Opportunity asking that she conduct an investigation to determine if the subordinate had been sexually harassed by Grievant. On April 20, 2011, the EEO Director sent Dr. L a memorandum stating, "I had made the final determination that there is no merit to this complaint." Dr. L concluded that Grievant should be removed from employment prior to the Agency's completion of its investigation of the allegations against Grievant. There is no reason for the Hearing Officer to believe that Dr. L's opinion changed after receiving the findings by the EEO Director.

Grievant has presented sufficient evidence to show that the Agency acted out of an improper motive. There exists a basis to mitigate the Group II Written Notice by rescinding that notice. This mitigating circumstance, however, is not sufficient for the Hearing Officer to rescind the Group III Written Notice based on the nature of the facts giving rise to the Group III and on aggravating circumstances.[17]

Grievant submitted the Application for Employment prior to meeting Dr. L or Ms. S. Their opinions of him or their knowledge of him as an employee could not have influenced the facts giving rise to the Group III Written Notice. Grievant acted contrary to a policy governing all State employees as opposed to a policy governing only the Agency's employees. The Application for employment placed Grievant on notice that he would be removed from employment if the information on the application was false. Grievant participated in an interview with Dr. L in which Grievant's circumstances with the Restaurant were discussed. Grievant did not explain to Dr. L that the $90,000 figure was aspirational rather than an actual salary received by Grievant. Dr. L placed Grievant's beginning salary with the Agency at the highest level possible because Dr. L believed Grievant would be underpaid by the Agency. When Grievant began working for the Agency on April 1, 2008, he signed his Application for Employment without correcting the $90,000 figure. Grievant's failure to clarify with the Agency the nature of

[16] After learning of the allegation of sexual harassment against him, Grievant alleged the subordinate had sexually harassed him.

[17] Grievant also alleged that the Agency retaliated against him because of his complaints to the Agency's Counsel (Grievant described this as whistle blowing) and because of his filing of a sexual harassment complaint against his subordinate. In this context, retaliation against Grievant would serve as a second improper motive to take disciplinary action against him. Grievant has already established that the Agency took disciplinary action against him based on an improper motive (concluding that disciplinary action should be taken prior to knowing facts sufficient to support the issuance of disciplinary action). If the Hearing Officer assumes for the sake of argument that the Agency retaliated against Grievant because of his protected activities, the outcome of this case does not change. Regardless of the number and type of improper motives in this case, there are sufficient aggravating circumstances to counter the mitigating circumstances and uphold the Group III Written Notice.

his salary with the Restaurant is an aggravating circumstance preventing mitigation of the Group III Written Notice.

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**. The Group II Written Notice for failure to comply with the Agency's purchasing policy is **rescinded**. The Group II Written Notice for failure to comply with the Agency's overtime policy is **rescinded**.

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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. 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 email.

3. 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 the Office of Employment Dispute Resolution to 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 email 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 give a copy of all of your appeals to the other party and to EDR. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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 Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case No: 9847-R

Reconsideration Decision Issued: September 17, 2012

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant seeks reconsideration. Most of his arguments were addressed in the original decision and need not be restated. Nevertheless, the Hearing Officer will address several of Grievant's arguments.

This case is straightforward. Grievant was untruthful on his application for employment. The application for employment contained a warning that falsification of information may result in his removal. The Agency discovered his falsification of a document and issued him a Group III Written Notice with removal. Despite presenting over a hundred pages of documents as part of his request for reconsideration, Grievant

cannot present one business record showing that he was paid at a rate of $90,000 from the Restaurant.

Grievant seeks recusal of the Hearing Officer for "extreme and pervasive bias." Section II of the Rules for Conducting Grievance Hearings states that a Hearing Officer is responsible for:

> Voluntarily disqualifying himself or herself and withdrawing from any case (i) in which he or she cannot guarantee a fair and impartial hearing or decision, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.

EDR Policy 2.10 provided:

> A hearing officer must voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot guarantee a fair and impartial hearing or decision or when required by the applicable rules governing the practice of law in Virginia. Upon notification that a hearing officer has withdrawn, EDR will notify the parties and reinitiate the process to select a new hearing officer. A request from either party to a grievance for the disqualification of a hearing officer must be in writing and will be addressed as a compliance ruling.

In EDR Director Ruling 2004-934, the EDR Director stated:

> This standard for the disqualification of a judge is an objective one; there must be evidence that would convince a reasonable man that bias exists. In addition, it is well settled that while a judge has duty to recuse himself if his "impartiality might reasonably be questioned," he has a concomitant obligation not to recuse himself absent a valid reason for recusal. The mere fact that a judge has ruled against a party is, by itself, generally insufficient to warrant recusal. (Citations omitted).

Grievant failed to prevail at the hearing because he was untruthful when he completed his application for employment and not because of any bias by the Hearing Officer. Grievant's failure to prevail does not establish bias. No basis for recusal exits.

Grievant argued he was not permitted to call key witnesses. Grievant initially requested over 40 witnesses to appear. During the pre-hearing conference, Grievant explained that many of the witnesses related to four of the written notices presented to him but removed by the Agency during the Step Process. After the Hearing Officer explained to Grievant that he did not need to present testimony regarding written notices reversed by the Agency, Grievant submitted a second list of witnesses. Grievant prevailed on two of the written notices. Most of the witnesses who did not testify would have testified regarding those notices and, thus, their failure to testify did

not affect the outcome of the case. The material witnesses regarding the Group III Written Notice for falsification were Grievant, Grievant's brother and supervisor at the Restaurant, and Dr. L. Grievant testified extensively. Grievant presented his brother's evidence by affidavit rather than through oral testimony subject to cross-examination. The Hearing Officer gave less weight to that affidavit. Dr. L testified. The Hearing Officer has no reason to believe that any of the witnesses who did not testify would have provided material information regarding the Group III Written Notice for falsification.

Although the parties had been limited to 180 minutes for their presentations, the Hearing Officer permitted Grievant to exceed that limit. No time was assigned to Grievant for "tracking down" witnesses. The case was not so complex that it required more than one day of testimony. Grievant fully and fairly presented his defenses at the hearing.

Grievant complained that the Hearing Officer asked questions of witnesses. The Hearing Officer is a fact finder and it may be necessary for the Hearing Officer to ask questions to fully understand the issues in dispute.

Grievant contends there was no evidence to support the Group III Written Notice because he did not sign the application for employment prior to his employment with the Agency. Whether or not Grievant signed the application for employment does not affect the outcome of this case. Grievant completed an application for employment in which he wrote his salary was $90,000 which he knew at that time to be untrue. The disclosure language above the space for his signature served to give Grievant notice of the consequences of his falsification but Grievant's signature was not a pre-condition for the falsification to have occurred. Grievant falsified the application when he wrote $90,000 on the application even though he was not earning $90,000 from the Restaurant. Grievant falsified his application for employment in February 2008 and affirmed that falsification when he signed the application on his first day of employment in April 2008.

Grievant argued he was denied due process. It is clear that Grievant knew the nature of the charges against him and had a fair opportunity to challenge those charges and present any defenses he had to the charges. He presented sufficient evidence to have two of the written notices reversed. Grievant was not denied procedural due process.

Grievant argued that Dr. L established Grievant's salary while relying on his prior Higher Education salary of $98,000. While this may be true, Dr. L reviewed the entire application for employment and discussed the Restaurant with Grievant as part of the hiring process. Grievant falsified his most recent salary at the Restaurant prior to his employment with the Agency and Dr. L relied on Grievant's falsification when establishing Grievant's salary. Whether Dr. L relied on Grievant's falsification, however, is not essential to establish falsification by Grievant. Dr. L's reliance is significant because it showed Grievant's testimony was untrue that he explained to Dr. L the

circumstances surrounding the $90,000 salary figure. Dr. L relied on Grievant's salary representation because Dr. L reviewed the application and spoke with Grievant regarding that application as part of the interview and hiring process. Grievant was untruthful regarding his salary from the Restaurant and he never corrected that falsification.

Grievant argued that under the Agency's policies, its employees should have a reasonable expectation of privacy in both electronic and paper-based environments but limiting access to such data to those employees with a business need to know. Assuming Grievant's interpretation is correct, the Agency's Auditor had a business need to know the contents of Grievant's computer. The Auditor was evaluating transactions made by Grievant as well as other employees. The computer used by Grievant may have had information relating to those transactions. Several portions of the Agency's policies are best described as protecting employee information from disclosure to third parties.[19] The Auditor was not a third party. He was part of the Agency and entitled to review the information on the computer used by Grievant.

Grievant cites several statutes and case decisions to support his analysis. None of those are persuasive and dictate a different outcome in this case.

Grievant argued the Agency violated law by entering his office contrary to 8 VAC 90-10-60 and Va. Code § 23-50.10. 8 VAC 90-10-60 provides:

> No person, either singly or in concert with others, shall willfully:
> 4. Without permission, expressed or implied by the duly assigned occupant, enter any office of an administrative officer, faculty member, or employee, or student office or room. This does not prohibit the right of university law-enforcement officers or maintenance personnel to enter private rooms, offices, or any other university facility to prevent damage to, or protect, persons or property.

It is unclear how this section should be interpreted. It is most likely that this section should be interpreted within the context of the University's pursuit of academic freedom and self-expression. An Agency document quoting the language of the regulation prefaces the regulation with the language:

> Free inquiry and free expression are indispensable to the objectives of an institution of higher education. To this end, peaceful, reasonable, and lawful picketing and other orderly demonstrations in approved areas shall not be subject to interference by the members of the University community. Nor shall any member of the University community be subject

[19] Some of the policies refer to data collection by the Agency. The Agency did not engage in data collection from Grievant when Grievant placed his tax returns on the Agency's computer. The Agency conducted a forensic examination of the computer used by Grievant without knowing what information would be contained on the computer.

> to limitation or penalty solely because of the lawful exercise of these freedoms. However, those involved in picketing and demonstrations may not engage in conduct that violates the rights of any member of the University community.
>
> These rules shall not be construed to restrain controversy or dissent, or to prevent, discourage, or limit communication between and among faculty, students, staff, and administrators. The purpose of these rules is to prevent abuse of the rights of others and to maintain public order appropriate to the University.[20]

It is difficult for the Hearing Officer to believe that this section of regulation was intended to prohibit the Agency from conducting audits of its employees by entering their offices to obtain Agency documents and equipment. Grievant's action of placing his tax returns on the Agency's computer was not related to the Agency's mission.

If the Hearing Officer assumes for the sake of argument that Grievant had an expectation of privacy and that the Agency violated that expectation, there is no evidentiary rule that would require exclusion of the evidence presented by the Agency. With respect to mitigation analysis, the Agency's action would not provide a basis to reduce the disciplinary action because DHRM Policy clearly defines falsification of records as a Group III offense.[21] Mitigating the disciplinary action could only be accomplished by creating an exclusionary rule that does not exist.

Grievant argued that he did not sign the certification indicating he had received DHRM 1.75. On April 10, 2008, Grievant signed a "Policy Checklist for New Hires" acknowledging that he was aware of certain policies including "Commonwealth of Virginia Policies … Use of the Internet and Electronic Communications Systems."[22] The Policy Checklist for New Hires served as an adequate substitute for the certificate attached to DHRM Policy 1.75. Grievant had adequate notice of DHRM Policy 1.75 indicating that he should not have any expectation of privacy with respect to data created with the Commonwealth's equipment.

Grievant argued that the Agency did not consider progressive discipline. DHRM Policy 1.60 encourages agencies to engage in progressive disciplinary action, but does not require it.

Grievant argued that because he was employed on April 1, 2008, he could not have signed his Application for Employment because he was no longer an applicant. The phrase "Application for Employment" describes a document that existed when he created it in electronic form in February 2008 and submitted it electronically to the

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[20] http://www.provost.vcu.edu/pdfs/rulesandprocedures.pdf

[21] If Grievant asserts that he had the right to rely on the Agency's policy creating a right of privacy, he should also have relied on the DHRM Policy 1.75 removing any such right of privacy. Grievant cannot chose to rely on one policy while ignoring another policy of which he had notice.

[22] Agency Exhibit 1, p. 9.

Agency. The Agency printed his electronic document and had Grievant sign the document. Whether or not Grievant had begun working for the Agency or the Agency had printed his application the fact remains that Grievant falsified a record held by the Agency.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied.**

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

October 17, 2012

[Grievant]

RE: **Grievance of [Grievant] v. Virginia Commonwealth University**
Case No. 9847

Dear [Grievant]:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review within 15 calendar days from the date the decision was issued if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Office of Employment Dispute Resolution (EDR) to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

We are aware that you filed an appeal with the Office of Employment Dispute Resolution (OEDR) regarding the hearing officer's decision and raised the same issues you raised with DHRM. Those issues are as follows:

1. Length of Hearing
2. Witness Issues
3. Hearing Officer Questions
4. Appearance of Bias
5. Improper Collection of Data
6. Findings of Fact and Witness Testimony
7. State Application Arguments
8. Improper Motive
9. Inconsistent Discipline

We also are aware that OEDR has ruled on the above issues. Please note that we have no authority or basis to intercede in or modify that Office's conclusions regarding its review of the hearing officer's decision.

Finally, in each instance where a request is made to this Agency for an administrative review regarding policy issues, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. While you identified two policies that are applicable to your case - DHRM Policy No. 1.60 and DHRM Policy No. 1.75 – you provided neither sufficient evidence nor persuasive argument in either your original or follow up appeal on how these policies were either misapplied or incorrectly interpreted. Rather, it appears that you are disagreeing with how the hearing officer assessed the evidence and with the resulting decision. We must therefore respectfully decline to interfere with the application of this decision.

Sincerely,

Ernest G. Spratley
Assistant Director
Office of Equal Employment Services

cc: Sara R. Wilson, Director, DHRM
Christopher M. Grab, Sr. Consultant (via email)
Kawana Pace-Harding, Director of Employee Relations (via email)