

Issues: Group II Written Notice (failure to follow instructions), Group III Written Notice (making a false statement), Group III Written Notice (theft), Group III Written Notice (damaging State property), and Termination; Hearing Date: 06/20/13; Decision Issued: 09/09/13; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 10094; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 09/20/13; EDR Ruling No. 2014-3717 issued 11/06/13; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 09/20/13; DHRM Ruling issued 11/15/13; Outcome: AHO's decision affirmed; Judicial Review: Appealed to Chesapeake Circuit Court; Outcome: Remanded to AHO on 06/09/14; Remand Decision issued 04/23/15; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request on Remand Decision received 05/07/15; EDR Ruling No. 2015-4152 issued 06/15/15; Outcome: AHO's Remand Decision affirmed; Administrative Review: DHRM Ruling Request on Remand Decision received 05/07/15; Outcome: DHRM Response issued 08/06/15 – declined to review (no policy violation cited); Judicial Review: Remand Decision appealed to Chesapeake Circuit Court (08/20/15); Outcome pending.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10094

Hearing Date: June 20, 2013
Decision Issued: September 9, 2013

PROCEDURAL HISTORY

On March 27, 2013, Grievant was issued a Group III Written Notice of disciplinary action for making a false official statement. On March 27, 2012, Grievant was issued a Group II Written Notice for failure to follow instructions and/or policy. On March 27, 2013, Grievant was issued a Group III Written Notice with removal for theft. On March 27, 2013, Grievant was issued a Group III Written Notice with removal for damaging State property or records.

Grievant timely filed a grievance to challenge the Agency's actions. The matter proceeded to hearing. On May 8, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing began on June 6, 2013, but could not be concluded that day. The hearing was continued until June 20, 2013, and concluded that day.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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 actions, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

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

The Virginia State Police employed Grievant as a Special Agent in its high technology crimes unit. He had been employed by the Agency for approximately 15 years and was promoted to Special Agent in March 2010. The purpose of his position was:

The employee in this position is aware of and is proactive in ensuring a strong internal control environment to include: potential risks are reduced or communicated to management; data and reports are accurate and reliable; department assets are safeguarded to prevent waste, loss, unauthorized use or misappropriation; department objectives are achieved by maximizing operation efficiency and effectiveness; and applicable laws, regulations, and policies are consistently followed.¹

Forty-five percent of Grievant's Core Responsibilities included:

¹ Agency Exhibit 11.

Conducts High Technology Crime Investigations such as computer fraud, computer trespass, computer invasion of privacy, theft of computer services, or any other crime exclusively utilizing the internet. Also, investigates online child exploitation cases to include the possession, manufacture, and distribution of child pornography.²

Grievant had prior active disciplinary action. On July 28, 2010, Grievant received a Group II Written Notice for failure to follow established written policy.

In October 2008, Grievant began working as part of the High Tech Crimes Unit. In September 2010, Grievant began reporting to First Sergeant H who worked in a different locality from Grievant. First Sergeant H supervised eight employees. He met with each Special Agent every 120 days to review their case load and progress. First Sergeant H observed Grievant was having difficulty processing his caseload. His degree of focus on Grievant's work performance exceeded his focus on the work performance of his other subordinates.

The Federal Agent worked for the federal Immigration and Customs Enforcement (ICE) division and often worked jointly with Grievant to investigate cases. On March 22, 2011, First Sergeant H counseled Grievant about Grievant's "heavy reliance" on ICE and advised Grievant to handle his own investigations. On June 6, 2011, First Sergeant H counseled Grievant that Grievant needed to stop routinely taking federal cases and if the case was to be taken federal, First Sergeant H and Grievant needed to discuss this matter first.

On February 21, 2012, Grievant received a Notice of Improvement Needed/Substandard Performance advising him, in part:

[Grievant] failed to submit criminal investigative reports in accordance with CJIS Manual.

[Grievant] failed to submit accurate SP-102s and SP-110s.

[Grievant] failed to submit other state police reports and correspondence accurately and in a timely fashion (i.e. – SP-106, SP-127A, SP-299).

[Grievant] failed to properly prepare for a meeting with a Commonwealth's Attorney.

The Improvement plan stated, in part:

[Grievant] needs to demonstrate an ability to work autonomously, with little supervision, and remain focused on the objective of the High Tech Crimes Division.

[Grievant] needs to ensure that each criminal investigation is investigated thoroughly from start to finish, ensuring each case is brought to a „logical“ conclusion, and ensure no case is prematurely closed.

² Agency Exhibit 11.

[Grievant] needs to utilize sound investigative practices when obtaining information for a criminal investigation.

As part of the investigation, [Grievant] needs to ensure all needed information for prosecution is obtained, prepared, and presented to [the] Commonwealth's Attorney in a timely/organized fashion when requested.³

During their meeting to discuss the Notice of Improvement Needed/Substandard Performance, First Sergeant H advised Grievant that he was to work all assigned cases through the State system. The only exception would be if Grievant contacted First Sergeant H and obtained approval. Grievant was reminded that he continued to rely too heavily on ICE.

On February 22, 2012, Grievant called First Sergeant H by telephone. Grievant said that First Sergeant H had told Grievant to "sever ties" with ICE. First Sergeant H told Grievant that was not his instruction but First Sergeant H expected Grievant to work his cases from start to finish and that his heavy reliance on ICE must cease.

On February 22, 2012, Grievant submitted a memorandum to the Agency Head seeking transfer to another position within the Agency.⁴ On March 2, 2012, Grievant amended his request for transfer to include two additional positions.⁵

On March 2, 2012, Grievant met with Captain M to discuss his concerns about First Sergeant H and the Lieutenant. Captain M asked Grievant if he wished to file a complaint regarding the First Sergeant H or Lieutenant. Grievant indicated he did not wish to do so at that time. On March 5, 2012, Captain M sent Grievant memorandum instructing him to contact the Internal Affairs Unit or Captain M if he wished to file a complaint against his supervisors at the High Tech Crimes Unit.

During their meeting on March 2, 2012, Grievant complained to Captain M that he had developed a close relationship with ICE but he was told by the First Sergeant H to "sever their ties." Grievant believed this was an example of the Lieutenant forcing First Sergeant H to "nitpick" him. Captain M told Grievant that the instruction centered on First Sergeant H's need to effectively assess Grievant's individual performance.

On March 5, 2012, Captain W acknowledged receiving Grievant's request and informed Grievant, "you should be aware that your request does not obligate the Department to transfer you. *** [A]ll transfer requests are given due consideration; however, terminations on transfers or assignments are made by the Superintendent as deemed to be in the best interest of the Department."⁶

³ Agency Exhibit 13.

⁴ Grievant Exhibit 1.

⁵ Grievant Exhibit 2.

⁶ Agency Exhibit 15.

On March 23, 2012, Sergeant S met with Grievant to interview him regarding allegations made about First Sergeant H. Grievant told Sergeant S that he believed First Sergeant H had overstepped his authority by scheduling a meeting with supervisors in the federal Immigration and Customs Enforcement (ICE) division. Grievant said he had developed a close working relationship with one of the ICE agents and First Sergeant H used that meeting to break apart the working relationship. Grievant said First Sergeant H told Grievant he could no longer speak to outside agencies and he could no longer work with the ICE agent.

On March 29, 2012, Grievant filed complaints with Internal Affairs regarding Captain M, the Lieutenant and First Sergeant H.

On March 29, 2012, Grievant submitted a memorandum to Sergeant S of the Internal Affairs division expressing his complaint against the First Sergeant H. Grievant alleged that the First Sergeant H "singled me out for harassment."⁷ As part of his complaint, Grievant wrote that he met with the First Sergeant H on February 21, 2012. Grievant wrote, in part:

[First Sergeant H] again called me back in his office and told me that I needed to sever my ties with ICE. I asked him what he meant. He said I needed to cut my ties with ICE and that it was no longer the [Grievant's first name] and [Federal Agent's first name] show. He said to me, as he placed his two index fingers on his desk and separate them, "You guys need to sever your ties; it's no longer a [Grievant's first name] and [Federal Agent's first name]; It is a [Grievant] show."

On March 12, 2012, I received a phone call from [Federal Agent], ICE, who shared with me that the [Lieutenant] and [First Sergeant H] had made an appointment with [Federal Agent's] supervisor. They met on March 12, 2012, to discuss the issues concerning me. [Federal Agent] informed me that [Lieutenant] and [First Sergeant H] spoke with his supervisor in which they informed him that although myself and [Federal Agent] had conducted a lot of good investigations with ICE, they felt that I was lacking in other areas of the job for the VSP. [Federal Agent] told me that his supervisor did not get the impression they were bad mouthing me. I contacted [First Sergeant H] and advised him of the phone call that I received and questioned why he or [Lieutenant] could not have talked to me the way they talked to the ICE supervision. [First Sergeant H] did not answer my question; however, he proceeded to lie to me and told me that ICE had contacted the State Police for the meeting, which was not the case. [Lieutenant] and [First Sergeant H] made the appointment,

⁷ Grievant Exhibit 5.

explained to ICE supervision that I needed to work on other aspects of my position, and that I relied too heavily on ICE.⁸

Grievant also wrote in the March 29, 2012 memorandum to Sergeant S that he went to Ms. P and asked her to look over a report he was about to submit for review but she refused to do so. Ms. P told Grievant that she had been advised by the First Sergeant H not to look over any of Grievant's paperwork. First Sergeant H's actions caused Grievant stress and showed continuing hostility towards Grievant. Grievant wrote that he called First Sergeant H and asked First Sergeant H if he blocked Grievant's access to Ms. P. First Sergeant H said "I didn't make the call, [Captain R] made that call", according to Grievant.

On April 6, 2012, First Sergeant H met with Grievant to discuss Grievant's case load and progress. First Sergeant H told Grievant that too many of Grievant's cases were turned over to the Federal Agent to be completed. First Sergeant H told Grievant it was Grievant's responsibility to work his own cases and, if necessary, only have ICE assist. He said that Grievant should obtain search warrants and seize evidence and then send it to the Agency's laboratory, not the ICE laboratory for evaluation. First Sergeant H advised Grievant that "we should start using the State Police Computer Evidence Recovery Unit for examinations on department cases to justify their presence."⁹

While Grievant was working on January 18, 2011, Grievant downloaded a video depicting child pornography using File Sharing Software. Grievant identified the Internet Protocol address for the computer for which the file was downloaded and then issued an administrative subpoena to obtain subscriber information for that IP address. Mr. W subscribed to that IP address. Grievant continued to monitor the IP address for an additional year to determine if there was any further illegal activity by someone using the IP address. No additional illegal activity occurred with respect to that IP address. Grievant spoke with the Assistant Commonwealth's Attorney about the evidence he had and concluded that the Commonwealth's Attorney would not prosecute without additional evidence. Because of concerns about lacking probable cause for the investigation, he decided to speak with Mr. W directly to determine the circumstances surrounding the downloading of child pornography.

On April 26, 2012, Grievant and the Federal Agent conducted a "knock and talk" by going to Mr. W's residence to speak with him about possible questionable Internet activity. Grievant knocked on the door to Mr. W's residence. Mr. W opened the door. Grievant explained why Grievant and the Federal Agent were present and asked if there were any computers in the house. Mr. W said that there was one computer upstairs and another one was a laptop belonging to his 21 year old son, Son A. Mr. W said that he, Son A, and Son D, age 16, lived in the house. Grievant explained about the internet

⁸ Grievant Exhibit 5.

⁹ Grievant Exhibit 9.

activity he observed for Mr. W's IP address. Grievant asked Mr. W to "preview" the computer. Mr. W said "sure." Grievant used forensic previewing software to preview Son A's computer. No child pornography was found on Son A's laptop computer.

The Federal Agent went to the desktop computer and noticed that File Sharing Software was loaded on the desktop computer. An electronic folder contained the name of Son D. In the folder were titles of images and videos that were indicative of child pornography. Grievant and the Federal Agent interviewed Son D. He admitted to using the File Sharing Software and looking at pornography. He indicated he stopped using the File Sharing Software approximately a year prior when he learned that use of the software was illegal. Mr. W was informed that Grievant and the Federal Agent needed to take the desktop computer and have it erased. Mr. W asked if they could look at the computer at his house, but he was told that an examination was necessary to ensure there were no illegal files on the computer and the examination could not be done at Mr. W's house. Grievant drafted a receipt and give it to Mr. W for his signature. Mr. W signed the receipt and the agents took the computer. Mr. W asked Grievant to return the computer as soon as possible.

The Federal Agent took the computer to his laboratory to examine the contents of the hard drive. On May 3, 2012, the Federal Agency conducted an examination of the computer. Titles indicative of child pornography and adult pornography were all that were located on the computer. The Federal Agency removed the files. He uninstalled the File Sharing Software and deleted the remnants of that software. He ran a program to "wipe" the computer hard drive. On May 4, 2012, Grievant retrieved the computer from the Federal Agent.

Following the forensic analysis by the Federal Agent, Grievant told Mr. W that no prosecution would occur. Grievant told Mr. W that the pornography was "age-appropriate" meaning that Son D was not an adult and he was viewing pornography of a child similar to his age. Grievant did not have the authority to determine whether a prosecution occurred. That authority rested with the local Commonwealth's Attorney.

Grievant sent First Sergeant H an email of his investigative report regarding the knock and talk. First Sergeant H noticed that the Federal Agent had assisted Grievant. First Sergeant H did not know that the Federal Agent would be assisting Grievant with the knock and talk. Grievant wrote in the report that the titles of images and videos on the desktop computer "yielded information of evidentiary value, but since [Son D] was underage and the images would be classified as age appropriate, agents still confiscated the desktop so the [File Sharing Software] and all its images indicative of child pornography can be safely removed." Grievant added, "[s]ince there was contraband on the system, [Mr. W] was advised that the agents needed to take the computer and have it erased. *** [Mr. W] was advised that the titles and images were age appropriate and no charges were going to be placed."¹⁰

¹⁰ Agency Exhibit 18.

On May 4, 2012, Grievant spoke with the Assistant Commonwealth's Attorney who declined to prosecute Son D. Grievant documented this conclusion using a SP-110 form.

Grievant submitted reports to First Sergeant H about the investigation. After reading Grievant's report, First Sergeant H had several concerns: (1) Grievant relinquished the seized computer to the Federal Agent without completing the SP-165 form, (2) the computer was returned to Mr. W but there was no indication of what was found on the computer or if anything had been removed or deleted, and (3) there was no court destruction order granting Grievant the authority to destroy the evidence on the computer's hard drive.

On May 16, 2012, First Sergeant H contacted Grievant and expressed his concerns. He asked Grievant how many images were on the computer seized from Mr. W's home. Grievant stated, "I don't know, [Federal Agent] handled that." First Sergeant H asked what the pictures looked like. Grievant said "teenage girls" I have to talk to [Federal Agent]." First Sergeant H asked if the images were destroyed. Grievant responded "the same day I spoke to [Assistant Commonwealth's Attorney]." First Sergeant H asked under what authority were the pictures destroyed. Grievant responded that there was only one image. First Sergeant H asked if an SP-165 form was completed for the computer. Grievant said "no" and that one was not necessary. First Sergeant H informed Grievant that Grievant would probably need a destruction order but he did not know because the evidence had already been destroyed. First Sergeant H said he wanted to check with Captain M and the Lieutenant.

On May 16, 2012, Grievant called the Assistant Commonwealth Attorney and explained the circumstances. He told her that the First Sergeant H requested that a destruction order be signed even though the titled files were already removed as well as the Software program.

First Sergeant H spoke with Captain M and the Lieutenant and was instructed to call the Assistant Commonwealth's Attorney and determine what information Grievant had given to her in reference to obtaining a prosecutorial decision on case involving Mr. W.

First Sergeant H spoke with the Assistant Commonwealth's Attorney who said that Grievant had already called her regarding obtaining a destruction order. She told Grievant she did not have time to meet with him that afternoon but Grievant insisted on meeting.

Grievant met with the Assistant Commonwealth's Attorney and presented her with a draft destruction order regarding the information on the desktop. She refused to sign the order. Grievant asked to speak with her supervisor, the Commonwealth's Attorney. Grievant told the Commonwealth's Attorney that the property had already been destroyed. The Commonwealth's Attorney signed the draft order.

On May 16, 2012 at approximately 4:30 p.m., Grievant called First Sergeant H and said he had talked with the Federal Agent and now remembered what was on the desktop. Grievant said there were 100 images of adult pornography and three titles of child pornography. Grievant said there were no images of child pornography.

On July 16, 2012, the Medical Doctor¹¹ met with Grievant to perform a psychiatric evaluation of Grievant. As part of that evaluation, Grievant told the Medical Doctor about viewing child pornography and said, "I've had to download up to 39,000 images and hundreds of videos ... I just can't take it anymore."¹² On July 20, 2012, the Medical Doctor wrote an evaluation stating, in part, "I believe that [Grievant] is suffering from Post Traumatic Stress Disorder (PTSD), as a direct result of repetitive exposure to psychologically traumatic images of child pornography, a current requirement of his job working with the High Tech Crimes Division of the Virginia State Police." She added that Grievant "is unable to perform the essential functions of his job as a Special Agent and is, therefore, currently unfit for full duty."¹³ The Medical Doctor recommended not exposing Grievant to child pornography at work and that Grievant should seek out psychotherapy. She indicated she would re-evaluate Grievant in eight weeks.

Grievant began a leave of absence. During that time he had three counseling sessions with the LCSW. On September 10, 2012, the LCSW wrote to the Medical Doctor:

In the course of seeing [Grievant] he was able to successfully transition from a highly agitated state to that of a relaxed and confident man who was determined to return to service in the capacity of a Special Agent, but not in the Department of High Tech crimes.¹⁴

On September 12, 2012, the Medical Doctor met with Grievant to conduct a re-evaluation. On September 12, 2012, the Medical Doctor wrote a letter to Captain W in which she stated, "I believe that [Grievant] has recovered from Post Traumatic Stress Disorder (PTSD), a direct result of repetitive exposure to psychologically traumatic images of child pornography while working in the High Tech Crimes Division of the Virginia State Police. As a result of his restoration to his pre-morbid level of functioning, [Grievant] is able to perform the essential functions of his job as a Special Agent for the Virginia State Police, from a psychiatric standpoint, and is, therefore, currently fit for full duty." The Medical Doctor added, "It is not expected, however, that he is capable of resuming investigations involving child pornography, as this exposure would be expected to trigger symptoms of PTSD."¹⁵

¹¹ The Medical Doctor was selected by the Agency to conduct an evaluation of Grievant.

¹² Grievant Exhibit 10.

¹³ Grievant Exhibit 10.

¹⁴ Grievant Exhibit 11.

¹⁵ Grievant Exhibit 12.

When Grievant returned to work in October 2012, the Agency had removed his responsibility for investigating child pornography case. He was assigned four cases, none of which involved child pornography. He resumed working in the High Tech Crimes Unit and was awaiting transfer.

On October 2, 2012, Grievant travelled from his work location to the Agency's Central Office. Captain M was in the process of reviewing "endorsement" memoranda and investigations regarding possible disciplinary action against Grievant. He received a memorandum from the Lieutenant. Captain M left the memorandum on his desk when he stepped away from his office. Grievant walked down the hallway to Captain M's office to speak with him. The office door was open and the light was on inside the room. Grievant stepped into the office and saw the Lieutenant's memorandum about Grievant on top of Captain M's desk. Grievant questioned why information about him was laying on top of the Captain M's desk where anyone entering the office could see the document. Grievant picked up the document and began to read it. He noticed that the document was written by the Lieutenant and involved a discussion of whether he had post dramatic stress disorder and whether he should be disciplined and suspended. Grievant became irritated. He put the document back down on the desk and walked out of the room. He became even more aggravated that Captain M would leave a document about him on top of his desk in plain view. He felt the Agency was mocking him. He reentered the office and picked up the document. He walked into another office, sat down, and put the document around his leg in his sock. He then pulled the document out of his sock and put it in his folder. He left the office and went to his personal vehicle while carrying the folder. He placed the document in his vehicle and walked back inside the building. He met with another person for approximately 30 or 40 minutes. He returned to his vehicle and drove for approximately 1 hour and 45 minutes to his home. Grievant cried as he drove home. He was frustrated. He felt that the Agency was mocking him by leaving a document about him on top of a desk in plain view. He shredded the document after he reached his home.

On October 3, 2012, First Sergeant W called Grievant asked if Grievant was okay. Grievant said he was not okay. Grievant told First Sergeant W what he had done. Grievant said he wanted to talk with Captain M and asked First Sergeant W if he wanted to go with Grievant to speak to Captain M. First Sergeant W said he would go with Grievant.

On October 4, 2012, Grievant met First Sergeant W in the morning a local restaurant. First Sergeant W untruthfully told Grievant that First Sergeant W had been ordered to install cameras in Captain M's office. First Sergeant W told Grievant that Grievant had been "set up" by Captain M.

Grievant drove to meet Captain M at Captain M's office. Grievant told Captain M what he had done. Grievant apologized. Only later did Grievant learn that Captain M had not placed cameras in his office and that First Sergeant W had deceived him.

Grievant received psychological testing for Post Traumatic Stress Disorder. On November 20, 2012, Dr. W drafted an evaluation stating, in part:

He is experiencing numerous triggers for posttraumatic symptoms. He has difficulty with attention, hyper alertness, and a heightened startle response. He is anxious, irritable and feels constantly „on edge.“

My evaluation indicates that [Grievant] is currently experiencing all of the symptoms of a diagnosis of Post-Traumatic Disorder, including, but not limited to an ongoing stressor, which has produced recurrent and intrusive recollections of the child pornography he has had to review for his work with the State Police.

It is my opinion that [Grievant's] actions of taking the document and shredding it is directly connected to his post traumatic stress disorder and his acute distress and anxiety. It is apparently out of character for his behavior and appears to be the result of the stress of prematurely returning to work and being exposed to the "triggers" of his current work environment. It is unlikely that he was fully recovered from his prior diagnosis of post traumatic stress disorder.

Based upon the current evaluation, it is my further opinion that [Grievant] is not currently able to perform as a Special Agent in the State Police. He is in need of a period of at least eight to ten weeks to obtain treatment before he should be reconsidered for a return to work. The evaluation should be conducted independently from the State Police. It is also clear that when he returns to work he should be seriously considered for transfer to another unit because the unit itself is an emotional trigger for his distress and may continue to cause PTSD reactions.¹⁶

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." General Order 12.02(11)(a). Group II offenses "include acts and behavior which are more severe and/or repetitive nature and are such that an additional Group II offense should normally warrant removal." General Order 12.02(12)(a). Group III

¹⁶ Grievant Exhibit 17.

offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” General Order 12.02(13)(a).

Group III for Making a False Statement

The Agency alleged Grievant misrepresented the facts of an investigation to obtain a desired outcome in trying to correct deficiencies in the investigation he was conducting such as evidence destruction. The Agency’s allegations rest on Grievant’s interaction with the Assistant Commonwealth’s Attorney and the Commonwealth’s Attorney. Neither of these two individuals testified. The hearsay evidence presented by the Commonwealth was not sufficient for the Hearing Officer to determine the full extent of the interaction between Grievant and the Assistant Commonwealth’s Attorney and the Commonwealth’s Attorney.

Group II Written Notice for Failure to Follow Instructions and/or Policy.

“Failure to follow a supervisor’s instructions, perform assigned work or otherwise comply with applicable established written policy” is a Group II offense.¹⁷

The purpose of General Order OPR 6.00 is to “establish procedures and guidelines for property management; found, recovered, and evidentiary property; evidence security; inventory; and seized assets.” This policy provides:

1. In order to maintain uniformity and provide an effective monitoring process, instructions contained herein shall apply to all employees when involved in the security and inventory of accountable property, including found, recovered, and evidentiary property.

6. Inventory of Property Acquired (SP-165/CETS)

- a. An Inventory of Property Acquired Form (SP-165) or CETS-generated Inventory of Property Acquired Form,¹⁸ must be prepared as soon as possible for each item of property acquired, regardless of where the item is stored or whether or not the item is ever brought to the office.

The Agency has a Computer Evidence Recovery Section (CERS). The primary purpose of this section is “to provide computer evidence recovery services, forensic examination services, and expert testimony to Virginia law enforcement agencies through in-depth forensic examinations of computer data stored or seized during the course of a criminal investigation.”¹⁹

¹⁷ See, General Order ADM 12.02 (12)(b)(1).

¹⁸ The Computerized Evidence Tracking System is a computerized system which uses a software program designed to specifically document the receipt, transfer, and disposition of evidence/property. The CETS form is synonymous with the SP-165.

¹⁹ Agency Exhibit 39.

General Order OPR 6.02 governs Computer Evidence Handling Procedures. The purpose of the policy is to “provide computer evidence recovery services, forensic examination services, and expert testimony to Virginia law enforcement agencies through in-depth forensic examinations of computer data stored or seized during the course of a criminal investigation.” Under this policy:

4. Computer evidence seized requiring forensic examination will be submitted to the Virginia State Police CERS for examination. Exceptions must be approved by the Director of the Bureau of Criminal Investigation.
5. Computer forensic examinations will be conducted according to the CERS Procedures Manual and CERS Quality Assurance Program Manual.
6. Submission of Evidence to CERS
 - a. Officers submitting evidence for examination:
 - (1) Will ensure that the evidence is turned over to CERS personnel responsible for receiving evidence.
 - (2) Will submit a completed CERS Request for Forensic Examination form (SP-276).
 - (3) Will properly and legibly complete the following areas of the SP-276. ***
 - (4) Will provide a copy of the search warrant, acknowledgment of consent, or other documentation which authorizes the forensic examination of the evidence.
 - (5) Must complete a local agency case information sheet (for non-VSP cases.)

First Sergeant H instructed Grievant to work his cases from start to finish. First Sergeant H told Grievant repeatedly that he depended too much on the Federal Agent to complete his investigations. First Sergeant H instructed Grievant to end his heavy reliance on ICE to enable First Sergeant H to evaluate independently Grievant’s work performance. First Sergeant H instructed Grievant that he was to use the Agency’s CERS laboratory for forensic analysis of computers instead of giving evidence to the Federal Agent and letting the Federal government perform the analysis. First Sergeant H’s instruction was consistent with General Order OPR 6.02 which requires computer evidence to be submitted to the CERS for examination.

Grievant conducted a “knock and talk” as part of an investigation of child pornography. The case originated from Grievant’s work and was his assignment and responsibility. He asked for and received assistance from the Federal Agent in the same manner as he had done many times in the past. He obtained a computer from Mr. W and instead of having the forensic analysis performed by the Agency, he

permitted ICE to complete the assessment. Grievant failed to comply with First Sergeant H's instruction because he did not work the case himself from start to finish, he relied too heavily on the Federal Agent for assistance, and he failed to deliver the computer to the appropriate Agency staff for forensic analysis. Grievant failed to comply with General Order OPR 6.02 because he permitted Mr. W's computer to be examined by the Federal Agent.

When Grievant took the computer from Mr. W, he did not establish a "chain of custody" by completing the necessary SP-165 form. Grievant failed to comply with General Order OPR 6.00. The fact that the Federal Agent took the computer does not diminish Grievant's responsibilities. Grievant had been instructed not to let the Federal Agent take computers for analysis.

Grievant argued that the computer was not evidence because there were no images of child pornography on it, only titles of files relating to child pornography. This argument is not supported by the evidence. Grievant wrote in his report that the computer "yielded information of evidentiary value." The computer itself and any files stores on the computer hard drive could have been presented in a criminal trial depending on the outcome of the forensic examination. The outcome of the forensic examination was not known at the time the computer was taken. If Grievant had been certain no evidence would have resulted from the forensic examination, he would not have taken the computer.

Grievant argued that he called First Sergeant H and asked permission to use the Federal Agent to assist him as he had done in the past. This argument fails. First Sergeant H's instruction was not to "sever ties" as it was interpreted by Grievant, but rather for Grievant to significantly reduce his dependence on the Federal Agent so that his work could be evaluated independently. Grievant received this instruction many times over a several month period of time. Grievant knew or should have known to avoid relying on the Federal Agent as he had done in the past. Grievant did not violate First Sergeant H's instruction simply by having the Federal Agent participate in the investigation. Grievant violated the instruction by the extent of the Federal Agent's participation. In essence, Grievant converted an investigation that was supposed to be his investigation with limited assistance from the Federal Agent to a joint investigation with significant participation by the Federal Agent.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Grievant has a prior active Group II Written Notice. Upon the accumulation of two active Group II Written Notices, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Group III Written Notice for Theft

"Theft or unauthorized removal of state records or state or employee property" is a Group III offense.²⁰ On October 2, 2012, Grievant entered the office of Captain M and

²⁰ General Order 12.02 (13)(b)(7).

took a memorandum written by the Lieutenant about pending disciplinary action against Grievant. The memorandum was the property of the Agency and in the possession of Captain M. Grievant did not have the authority to take the document. He attempted to hide the document on his body in order to avoid detection thereby establishing that he knew his behavior was wrong. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for theft. That notice, however, is subject to mitigation as discussed below.

Group III Damaging State Property or Records

“Willfully or negligently damaging or defacing state records or state or employee property” is a Group III offense.²¹ On October 2, 2012, Grievant was in possession of a document belonging to the Agency. He was not authorized to be in possession of the document and was not authorized to destroy it. He shredded the document. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. That notice, however, is subject to mitigation as discussed below.

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 Human Resource Management”²² Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

When an employee has a medical condition that he or she claims should mitigate disciplinary action, the question becomes whether the medical condition merely explains or actually caused the inappropriate behavior. Grievant presented evidence to show that his inappropriate behavior was caused by his medical condition of having PTSD. Grievant testified that he viewed child pornography for several years and that he found it disturbing and that it affected his emotional well-being. Dr. W testified that Grievant’s action of taking and shredding the document was directly connected to his Post Traumatic Stress Disorder and his acute distress and anxiety. Taking disciplinary action

²¹ General Order 12.02 (13)(b)(6).

²² *Va. Code § 2.2-3005.*

against Grievant for behavior caused by his medical condition exceeds the limits of reasonableness. The Group III Written Notice for theft and the Group III Written Notice for destruction of State property must be reversed.

Grievant presented evidence regarding a meeting between Captain M and the Lieutenant on March 27, 2013. An employee in the office next to Captain M and the Lieutenant overheard portions of their conversation. She heard them boasting that they were going to fire Grievant. They made fun of Grievant by saying they had their guns ready and were going to hide under desks from Grievant. A few minutes later, Grievant and his attorney entered a room to meet with Captain M and the Lieutenant. After Grievant and his attorney left the building, Captain M and the Lieutenant continued talking about Grievant. Captain M laughed and said "We got him good."

When an agency takes disciplinary action for an improper purpose, that disciplinary action may be subject to mitigation. Laughing and boasting of the removal of a co-worker is unprofessional behavior. Although the behavior of Captain M and the Lieutenant may have been unprofessional, the behavior occurred after the Agency had determined to take disciplinary action against Grievant. There is insufficient evidence to support the conclusion that the Agency took disciplinary action against Grievant because of a dislike of Grievant rather than because of a legitimate objective of addressing Grievant's work performance.

No mitigating circumstances exist to reduce the Group II Written Notice for failure to follow First Sergeant H's instruction and Agency policy.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for making a false statement is **rescinded**. The Group II for failure to follow a supervisor's instructions and failure to follow policy is **upheld**. The Group III Written Notice for theft is **rescinded**. The Group III Written Notice for destruction of State property is **rescinded**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

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.

[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