

COMMONWEALTH OF VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re: Department of Motor Vehicles

Case Number: 11973

Hearing Date: June 22, 2023

Decision Issued: August 28, 2023

PROCEDURAL HISTORY

DMV terminated Grievant's employment effective March 9, 2023, for falsification with respect to oral and written statements grievant made regarding a co-worker's smart watch. Grievant worked for DMV for 24 years and had no active record of prior discipline.¹ Grievant was performance rated in 2022 as "fully successful". The hearing was held virtually on the Zoom platform hosted by the agency's counsel.

APPEARANCES

Grievant

██████████ ██████████ ██████████ for Grievant
██████████ ██████████ ██████████ for DMV

Five (5) witnesses for the Agency

Two (2) witnesses for Grievant

ISSUES

¹ Grievant's 2022 Employee Work Profile indicates the issuance of four counseling memoranda for unacceptable communication/workplace behavior and time and attendance.

As of March 9, 2023 , Grievant was a Customer Service Generalist Senior at a high-volume Customer Service Center (CSC) in ██████████ ██████████. According to Grievant’s Employee Work Profile,

“the Customer Service Generalist Senior performs senior-level work that requires knowledge of advanced licensing processes to resolve customer requests. Provide guidance to Generalists and wage employees in resolving complex customer applications and requests. Performs customer service transactions, administers vision, knowledge and road tests for driver licensing, and issues DMV and non-DMV credentials. Performs senior level functions to include open/close functions and may perform essential CSC functions as assigned in the absence of management staff. All programs and services are administered in a customer service-focused manner and in accordance with statutory and administrative procedural requirements such as the Motor Vehicle Code of Virginia, DMV policies, procedures, rules and regulations, the Privacy Protection Act and the Freedom of Information Act.” (Agency Ex. 7)

DMV has adopted a Code of Conduct that DMV employees are expected to follow that includes core values of :-

Trustworthiness – Inspiring the confidence of others through ...reliability, dependability, and honesty.

Respect – recognizing and appreciating the value and importance of other individuals and the agency.

Accountability – taking ownership for our actions and decisions.

Integrity - always doing the right thing, and

Teamwork – working together to achieve common goals. (Agency Ex. 4)

DMV employees are expected to, among other things, “uphold the laws, regulations, executive orders, and directives of the United States and the Commonwealth of Virginia; adhere to all policies and procedures of the Department of Motor Vehicles and other state agencies as appropriate and guard against conflict of interest or the appearance of impropriety...” (Id)

In a memorandum dated March 10, 2020, to all employees the DMV Commissioner ██████████ ██████████ reminded employees that “**Dishonesty in any form will result in job loss**” (Agency Ex. 6)

DMV typically discharges employees that are determined to be dishonest. All agency executives and documents confirmed this fact. (See, for example Testimony of ██████████ ██████████ et al) (Agency Ex.11)

According to Grievant’s 2022 work profile/performance evaluation, Grievant’s duties included daily Customer Service functions such as opening and closing the office, document verification, and balancing daily revenue and managing petty cash. Also, Grievant had the important responsibility for **coaching current and new team members**. (Agency Ex. 8) As such, Grievant was obligated to provide, always, a positive role model for team members to emulate, and at a minimum, to be honest and to always tell the truth.

Grievant failed to answer honestly questions regarding her possession of a coworker’s smart watch and her employment was terminated after she was put on notice of the charges against her and given an opportunity to respond to the charges.

The Written Notice in excruciating detail informed Grievant of the charges against her and Grievant submitted a written detailed response . (Agency Ex 1)

On 12/28/2022, one of Grievant’s coworkers left a smart watch in a drawer at the information desk. (Testimony of coworker ██████████) The following day (12/29/2022), Grievant was assigned to work at the service counter and found the watch in the drawer . Grievant was required to turn the watch over to the Assistant Manager or place it in the room that housed lost and found items and document it in the lost and found ledger. (Agency Ex. 1 at 17)(Grievant’s testimony) Grievant did neither, instead she put the watch in her pocket.

At approximately 5:34 p.m. after DMV had closed for the day, the owner of the watch contacted Grievant, by phone, and inquired whether Grievant had seen the watch. Grievant replied “yes”, “I just give it to M..r”, the Assistant Manager. (Agency Ex. 9) **That statement was false and Grievant knew it was false.**

Within minutes thereafter, Grievant’s coworker contacted the Assistant Manager and inquired whether he had the watch as he was assured by Grievant. The Assistant Manager told Grievant’s coworker that he had not seen the watch but went to the information desk, where it was left, to search for it. It was not there.

It is undisputed that the watch was not at the information desk because Grievant had pocketed the watch and went to the restroom, and since it was the end of the workday, would be leaving the facility soon.

Not finding the watch at the information desk, the Assistant Manager began walking back to his desk. As he was doing so, at approximately 5:41: 16 p.m. he saw Grievant leave the restroom that was located on the other side of the service counter and proceed in the direction of his desk. At approximately 5:41:19-22 p.m. , the Assistant Manager spoke to Grievant from across the counter and asked her if she had seen the watch. Grievant replied she had left the watch on his desk. **That statement was false and Grievant knew it was false because at that time, the watch was still in Grievant’s pocket.**

Grievant and the Assistant Manager proceeded to his desk, Grievant inside the service counter and the Assistant Manager outside the counter. Grievant got to the Assistant Manager’s desk seconds before he got there. At approximately 5:41: 22 p.m., the agency security camera captured Grievant reaching into her pocket, removing the watch and placing it on the Assistant Manager’s desk at approximately 5:41: 22 p.m. Within seconds later, at approximately 5:41:37 p.m., the Assistant Manager reached his desk, and the watch was now on his desk. It was not there seconds before.

On January 6, 2023, Grievant was interviewed by DMV officials to include [REDACTED], [REDACTED] and the Assistant Manager. [REDACTED] impressed upon Grievant to tell the truth about what occurred. Grievant said a number of things that were false, the most significant being that Grievant put the watch on the Assistant Manager's desk before she went to the bathroom. (Agency Ex 1 at p. 18) (Testimony of [REDACTED] and [REDACTED]) That statement was false and Grievant knew it was false.

On January 12, 2023, Grievant responded in writing to the due process letter that contradicted the video tape evidence. Grievant's explanation is evasive and unconvincing. Grievant replied, in pertinent part:

Thank you for giving me the chance to explain what I recall happened with [my coworker's] watch that was left at the information desk. This happened two weeks ago and at the same time I had a lot of things going on in my personal life that were on my mind including issues with my son, my health, my family, my car, etc. Being a single parent and having to take care of so many things by myself is really hard. The issue with the watch happened at the end of the day and I was thinking about what I needed to do after work rather than focusing my attention on the watch. Let me first say it was never my intention to not (sic) return the watch. It did not belong to me, and I told [my coworker] and [the Assistant Manager] that I had found it in the drawer at the information desk.

What I recall is slightly different from what you shared in your message based on the video recordings. I have not seen the video recordings you referenced but if the video shows my actions differently from what I recall it is due to everything else going on in my life. I am not a thief, or a liar and I never intentionally planned to keep the watch or say things that were not true.

From what I recall, on 1/28/23² I was sent to the information desk. I noticed a watch in the drawer, but I left it there. The security guard even mentioned to me that there was a watch in the drawer, so others knew it was there too.³ At the end

² It is undisputed that the actual date is 12/28/23, therefore this is clearly a typo.

³ The security guard disputes Grievant's testimony that he knew there was a watch in the drawer. The Hearing Officer credits the testimony of the security guard on this point.

of the day after DMV closed, I had to go to the bathroom so badly. I remembered the watch was in the drawer so I took it with me and planned to put it on the desk that in the back where [the Assistant Manager] was sitting⁴ that day but [the Assistant Manager] wasn't at the desk when I got there. I didn't want to leave the watch on the desk with no one there and I didn't have time to write a note because I really had to go to the bathroom badly so I took it to the bathroom intending to put it on the desk when I returned from the bathroom. When [the Assistant Manager] wasn't at the desk I quickly changed my mind about leaving the watch unattended because I had to go to the bathroom so bad. Being at Info all afternoon with no bathroom break made me really have to go to the bathroom bad to the point I thought I would have an accident. Since no one was at [the Assistant Manager's] desk there was no one to notify that I had the watch in my pocket. My thoughts at the time must have been to take the watch to the bathroom and put it on the desk after I went to the bathroom.

At some point [my coworker] sent me a message asking if I had seen his watch. I replied immediately that I found it in the drawer at Info. I did respond to [my coworker] saying "I gave it to [the Assistant Manager]" but I did not intend to tell [my coworker] that I had actually given the watch to [the Assistant Manager] but my grammar is not always the best. I meant to tell [my coworker] that I was going to give it to [the Assistant Manager], not that I had given it to him at that point in time.

When I came out of the bathroom I recall the [Assistant Manager] being behind me asking about a watch. He asked me if I found a watch and I told him yes. If the video shows the watch not on the desk and then me getting the watch from my pocket and putting it on the desk I must have realized as I walked up to the desk that the watch was not on the desk where I had intended to put it and it was still in my pocket. I don't recall my every movement from two weeks ago but I can assure you it was never my intention to keep the watch. By this time I had

⁴ Notably, Grievant never convincingly explained why she waited until the end of the day after DMV closed to put the watch on the Assistant manager's desk when she knew it was there hours before and could have telephoned the Assistant Manager, except to generalize that she was busy at the information desk and suddenly remembered that the watch was in the drawer. (Grievant Ex. 1, Memorandum of Conference call with Grievant)

and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989)

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

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints.... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

"In disciplinary actions, the agency must present its evidence first and show by a **preponderance of evidence** that the disciplinary action was warranted and appropriate under the circumstances. Grievance Procedure Manual. **The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline** (GPM) § 5.8.

The Department of Human Resource Management (DHRM) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees. Policy 1.60, effective 3-7-22 (Agency Ex. 3) *"The policy sets forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness."* A legitimate goal of the policy is to *"enable agencies to administer corrective actions or discipline to improve performance or conduct or terminate employees whose conduct and/or performance does not improve... If the misconduct and/or unacceptable performance is of an especially serious nature, a first offense may warrant significant discipline, including termination"*. (Id at p.2,3).

The policy requires that employees “ *[p]erform assigned duties and responsibilities with the highest degree of public trust...and [d]emonstrate respect for the agency and toward agency coworkers, supervisors, managers, subordinates, residential clients, students, and customers’ (id at p. 4)*

The severity of an infraction determines which of three levels of disciplinary actions an agency chooses to administer. Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, ... constitute illegal or unethical conduct; ... or other serious violations of policies, procedures, or laws.” (Id at p. 8,9)

APPLICABLE POLICIES

The Department of Motor Vehicles took disciplinary action in this case pursuant to the Standards of Conduct, Policy 1.60. (Agency Ex. 3)

Grievant Engaged in the conduct described in the Written Notice

Pursuant to the Standards of Conduct, falsification is defined as “[i]ntentionally or with willful disregard make false and misleading statements, **orally or in writing**, in connection with any matter of official interest”. (Attachment A, Policy 1.60 Standards of Conduct at p. 24).

The Findings of Fact that are carefully articulated above demonstrate that Grievant made false and misleading statements to the Assistant Manager, her coworker and other agency officials regarding possession of the coworker’s smart watch. Grievant’s statement to the coworker that she had “just give it to [the Assistant Manager] was false and Grievant knew it was false. Grievant’s response to her supervisor, the Assistant Manager, that she had just left the watch on his desk was false and Grievant knew it was false.

Grievant’s after the fact explanation in the due process response that “I did respond to [the coworker] saying “I gave it to [the Assistant Manager], I did not intend to tell [my coworker] that I had actually given the watch to [the Assistant Manager]but my grammar is not always the best. I meant to tell [my coworker] that I was going to give it to [the Assistant Manager], not that I had given it to him at that point in time,” is contrived, disingenuous and false. The Hearing Officer

carefully observed the Grievant giving testimony and was left with the distinct impression that Grievant's English language skills were very good.

Grievant's after the fact explanation that "if the video shows the watch not on the desk and then me getting the watch from my pocket and putting it on the desk I must have realized as I walked up to the desk that the watch was not on the desk where I had intended to put it and it was still in my pocket" is disingenuous and contrived.

The Agency's discipline was consistent with law and policy.

Grievant, by counsel, has submitted a legal memorandum in support of his client's position. (Grievant Ex. 1) Counsel argues that Grievant's statements about the watch "have nothing to do with official interests, as there is nothing about this information that the government or the agency would rely on for any transaction with the public with this information". "The information also does not serve as the basis for personnel action, vouchers; procurement activities; time or attendance records. As such, this is clearly not about an official record.". (Memo at p. 3) The memo opines that the event "is merely a lost and found incident where there is no written policy for official guidance for employees to follow to avoid arbitrary violation of required protocols". (Id)

Grievant's argument fails for several reasons: First it ignores the fact that In a memorandum dated March 10, 2020, to all employees the DMV Commissioner ██████████ reminded employees that "**Dishonesty in any form will result in job loss**" (Agency Ex. 6) Grievant testified that she was too busy to read the email. That "excuse" did not remove the obligation to read and abide by the Commissioner's statement. Second, it ignores the fact that the Standards of Conduct, defines falsification as "[i]ntentionally or with willful disregard make false and misleading statements, **orally or in writing**, in connection with any matter of official interest". Here the falsification was oral statements and in writing with respect to the due process response. Third, the argument ignores the fact that the agency has a legitimate articulated interest that its employees will always be "reliable, dependable and honest" whether they are handling official agency records or interacting with other employees and

supervisors. This is especially true in Grievant's 2022 work profile leadership role where her duties required her to be a role model for new employees to follow.

According to Grievant's 2022 work profile/performance evaluation, Grievant's duties included the important responsibility for coaching current and new team members. (Agency Ex. 8) As such, Grievant was obligated to provide, always, a positive role model for team members to emulate, and at a minimum, to be honest and to always tell the truth.

Counsel also argued that Grievant was denied procedural due process . Counsel did not disclose the alleged procedural deprivations and there was no evidence to support that claim. Grievant was notified of the charges against her, she responded to the charges, and she had the within hearing, and was represented by counsel of her choosing.

Counsel also argued that the agency's decision to terminate Grievant's employment "was a pretext for discriminatory conduct by DMV officials based upon her age (age 50), race (Hispanic), sex (female), retaliation and as well as the creation of a hostile work environment because of this discrimination" None of these conclusory allegations were supported by evidence.

A Title V11 hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment. To establish a Title V11 hostile work environment claim, Grievant must show that there is: (1) unwelcome conduct; (2) based on Grievant's race or sex or age; that is sufficiently severe or pervasive enough to alter Grievant's conditions of employment and to create an abusive work environment; and (4) that is imputable to the employer. See. Reid v. Delco Nonwovens, LLC, 154 F. Supp. 3d 273 (W.D. North Carolina 2016); McDougal-Wilson v. Goodyear Tire and Rubber Co., 427 F. Supp 2d 595 (2006). No such evidence was established in this case. Grievant testified that the Assistant Manager picked on her but did not pick on people who came from his home country, Afghanistan. (Recording at 43:56)

To establish a prima facie case of discrimination in the enforcement of employee disciplinary measures, Grievant must show: (1) that [Grievant] is a member of a class protected by Title V11, (2) that the prohibited conduct in which [Grievant] engaged was comparable in seriousness to misconduct of similarly situated employees outside the protected class, and (3) that the disciplinary measures enforced against [Grievant] were more severe than those enforced against those other employees. See, *Reid v. Delco, supra.*, *Wilson v. Goodyear Tire and Rubber, supra.*

Grievant has failed to identify similarly situated employees outside her protected class who lied or were otherwise dishonest with their supervisors and were not fired.

Grievant may establish a claim of discrimination by demonstrating through direct or circumstantial evidence that her age (age 50), race (Hispanic), sex (female), and retaliation, motivated DMV to terminate her employment. Because Grievant has asserted no direct evidence of retaliation, Grievant must proceed under the McDonnell Douglas burden shifting framework. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792(1973)

To make out a prima facie case of retaliation under the burden shifting framework, Grievant must show (1) that Grievant engaged in protected activity; (2) DMV acted adversely by terminating Grievant's employment; and (3) the protected activity was casually connected to Grievant's termination. *Holland v. Washington Homes, Inc.*, 487 F. 3d 208, 218 (Fourth Circuit 2007). "Protected activity" in a Title V11 retaliation case "includes opposing discriminatory practices or participating in any manner in a Title V11 investigation, proceeding or hearing" *Kubicko v. Ogden Logistics Services*, 181 F. 3d 544, 552 (4th Cir. 2006). To be protected activity, Grievant's complaints, if any, must be of an "unlawful employment practice or actions [Grievant] reasonably believe[d] are unlawful" violations of Title V11. *Jordan v. Alternative Resources Corp.*, 458 F. 3d 332.338 - 39 (4th Cir 2006. Grievant has not filed an EEO complaint or otherwise opposed an employment practice of the DMV.

There were no mitigating circumstances justifying a reduction or removal of the disciplinary action.

In hearings contesting formal discipline, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (11) the behavior constituted misconduct, and (11) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated unless under the record evidence, the agency's discipline exceeds the limits of reasonableness."(GPM at § 5.9).

The Standards of Conduct Policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that compel a reduction to promote the interests of fairness and objectivity or based on an employee's otherwise satisfactory work performance; or (2) an employee's long service or otherwise satisfactory work performance.

Grievant had 24 years of service to DMV when Grievant was fired. This is a significant length of employment and should not be dismissed lightly. At the time of termination, Grievant was performing successfully. Nevertheless, the agency had put its employees on notice that dishonesty would result in termination even for a first offense. And the evidence is clear that dishonest employees are fired for a first offense. And as management witnesses testified it would be difficult if not impossible to trust Grievant going forward as a DMV employee.

DECISION

The disciplinary action of the Agency is upheld and Grievant's claim for relief is denied.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution (EDR)
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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁵



Neil A.G. McPhie
Hearing Officer

⁵ [See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].