Issue: Group III Written Notice with termination (falsification of State documents); Hearing Date: 10/07/02; Decision Date: 10/09/02; Agency: Dept. of Motor Vehicles; AHO: David J. Latham, Esq.; Case No.: 5526; **Administrative Review: Hearing Officer Reconsideration Request received 10/18/02; Reconsideration Decision Date: 10/22/02; Outcome: Insufficient basis to warrant changing original hearing decision**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5526

Hearing Date: October 7, 2002
Decision Issued: October 9, 2002

PROCEDURAL ISSUE

Due to availability of participants, the hearing could not be docketed until the 32nd day following appointment.[1]

APPEARANCES

Grievant
Attorney for Grievant
Four witnesses for Grievant
Human Resource Generalist
Legal Assistant Advocate for Agency
Four witnesses for Agency

[1] § 5.1, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual* requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

ISSUES

Did the grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice and termination from employment issued for falsification of state documents on June 1, 2002.[2] Following a denial of relief at the third resolution step, the agency head qualified the grievance for a hearing.[3]

The Virginia Department of Motor Vehicles (hereinafter referred to as agency) has employed the grievant as a generalist for ten years. The grievant has one active disciplinary action – a Group I Written Notice for inadequate job performance.[4]

On December 3, 1992, grievant signed a written agency policy that provides, in pertinent part: "… our policy will be that no employee processes any transaction that they personally bring into the office."[5]

On May 29, 2002, the brother of grievant's housemate came to her house and asked that grievant title and register a used pick-up truck he had just purchased. He gave grievant the title, an emissions test form and some money for the fees.[6] Grievant asked what county he lived in (a necessary element to register a vehicle) and he responded with the name of a county (hereinafter county 1). He then went home. Later that evening the brother's wife called and spoke with grievant's housemate because grievant had already gone to sleep. She asked the housemate to tell grievant to register the vehicle in a different county (hereinafter county 2) from the one her husband had told grievant. The housemate did not relay the message to grievant the next morning before grievant left for work.

When a title changes hands, the new purchaser is required to provide both the address of his residence, and the location in which the vehicle will be principally garaged.[7] These locations may be different. Certain counties in

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[2] Exhibit 7. Written Notice, issued June 14, 2002.
[3] Exhibit 8. Grievance Form A, filed July 3, 2002.
[4] Exhibit 9. Written Notice, issued March 5, 2001.
[5] Exhibit 11. Policy Statement Number SBO-038, effective January 22, 1985.
[6] The brother of grievant's housemate neither reads nor writes (although he can sign his name) and attended school only until 7th grade. His wife handles all business matters for him.
[7] Exhibit 2. Certificate of Title.

Virginia require a vehicle emissions test for vehicles garaged inside their borders. County 1 does not require an emissions test; County 2 requires the test. Although the brother lives in County 2, he has horses boarded at a stable in adjoining County 1. He intended to store hay in the pickup truck and leave it at the stable.[8]

When grievant came to work on May 30, 2002, she gave the title to a coworker and asked her to process the transaction. The brother's residence had been filled in on the title showing that he lived in County 2. The section reflecting where the vehicle was to be principally garaged was blank. When the coworker began to process the transaction, and entered the brother's residence in County 2, the computer prompted indicating that an emissions test was required. The coworker asked grievant for the emissions test form, which grievant handed her. The coworker examined the form and told grievant that it was for a car of a different make – not a pickup truck.[9] At this point grievant recalled that the brother had told her that he lived in County 1, and she so advised the coworker. Grievant also wrote the four-letter abbreviation for County 1 on the title in the space for location where vehicle is principally garaged. The coworker then processed the transaction to completion and gave the paperwork and license plates to grievant.

The housemate's brother retrieved the new title and license plates from grievant and took them home on the evening of May 30, 2002. Later that evening, the brother's wife called grievant and told her she wanted the vehicle shown as being garaged in County 2. Grievant told her that she might have to obtain an emissions test (a fee of $8.00) but the wife was adamant that she wanted the truck shown as garaged in County 2. On the following morning, May 31, 2002, grievant entered the computer system at the agency and changed the record to indicate that the truck was registered in County 2.

The coworker who had processed the transaction on May 30, 2002 thought it was unusual that grievant had given her an incorrect emissions test form and then abruptly changed the county of registration. On the morning of May 31, 2002, she checked the computer record again and found that grievant had changed the county entry to County 2.[10] She reported the matter to her supervisor who then reported it to the district manager.[11] Grievant's supervisor recommended the grievant be discharged for making an illegal transaction.[12] After review by human resources, grievant's supervisor issued a Group III Written Notice and discharged her on June 14, 2002.

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[8] Exhibit 5. Notarized statement of housemate's brother and his wife, June 8, 2002.

[9] Grievant theorized that the brother mistakenly given her an incorrect emissions test form because he cannot read and may have taken the test from the glove box of the pickup truck without asking anyone to ascertain if it was the correct test form. The agency did not rebut this theory.

[10] Exhibit 3. Coworker's written statement, May 31, 2002.

[11] Exhibit 1. Memorandum from supervisor to district manager, May 31, 2002.

[12] Exhibit 6. Memorandum from supervisor to district manager, June 10, 2002.

APPLICABLE LAW AND OPINION

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

Code § 2.2.3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

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

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[13]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training[14] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. One example of a Group III offense is falsifying any

[13] § 5.8, Grievance Procedure Manual, Department of Employment Dispute Resolution, July 1, 2001.

[14] Now known as the Department of Human Resource Management (DHRM).

records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents.[15]

Grievant alleged that the district manager wanted to discharge her because grievant currently has legal custody of the district manager's granddaughter. Grievant infers that the discharge was pretextual and that the district manager hoped that grievant's unemployment would result in the court removing the granddaughter from grievant's custody. Testimony on this issue was conflicting and inconclusive. While it certainly would have been prudent for the district manager to completely recuse herself from any participation in this disciplinary action, this issue is not before the hearing officer. Even if the district manager had a pretextual reason for discharging grievant, the agency has the burden of proof to show that grievant's actions warranted discipline. If the agency successfully shoulders that burden, the pretextual issue is moot.

Grievant argues that the agency's case must rise or fall on the sole question of whether grievant falsified state documents because the written notice cites as the offense only, "Falsification of state documents." The written notice in this case was incomplete because it failed to give an explanation of the evidence. However, this deficiency is not fatal because the agency gave grievant a full description of the offense in the supervisor's memorandum to grievant on June 5, 2002.[16] From this memorandum, grievant knew that the offense included both writing on the title document on May 30, 2002, and altering the computer record on May 31, 2002. This complete description of the offense fulfilled the due process requirement to give grievant a full explanation of the reason for discipline. The falsification of any state records, whether paper or electronic, is a Group III offense.

The preponderance of the evidence does not establish that grievant falsified anything on the title document for the following two reasons. First, grievant acknowledges that she wrote the four-letter abbreviation for County 1 on the title document. She denies writing anything else on the title. The hearing officer does not profess to be a handwriting expert, however, there are obvious and marked dissimilarities between the two four-letter abbreviations, and the signature and address on page two of the title. Among these are the formation of dots over the letter "i", the penmanship style of the letters "r" and "f", and the curl (or lack thereof) on the end of each word. The hearing officer is satisfied that the grievant did not write anything other than the two four-letter county abbreviations on the title document.

Second, the undisputed evidence establishes that grievant reasonably believed that the customer (housemate's brother) lived in County 1. Prior to this incident, she knew that his house was in a rural area but did not know which county it was located in. He told her on May 29, 2002 that he lived in County 1.

[15] Exhibit 10. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.
[16] Exhibit 4. Memorandum from supervisor to grievant, June 5, 2002.

It is undisputed that the brother and his wife live very close to the county line separating County 1 from County 2.[17] Further, based on the demeanor and testimony of the brother during the hearing, the hearing officer finds credible that he is unaware of which county he lives in. When grievant told this to her coworker on May 30, 2002, she had no information to the contrary. Therefore, the agency has not shown, by a preponderance of evidence, that grievant deliberately falsified the title document.

As to grievant's change of the computer record on May 31, 2002, grievant's supervisor testified that grievant told her she knew she wasn't supposed to make the change. Grievant did not rebut this testimony. There was mixed testimony as to whether agency policy prohibits such a change under the circumstances of this case. On one hand, testimony established that a customer may return to the agency at any time after registering a vehicle and declare a change in the garaging location. Agency policy is to make whatever change the customer declares irrespective of whether the circumstances are suspicious. On the other hand, the agency policy that prohibits an employee from processing transactions they bring in applies to the instant case. The grievant should have reported the county change to another employee for processing. Grievant's decision to make this change herself was a violation of policy bulletin SBO-038. Failure to follow written instructions is a Group II offense.[18]

However, the agency has not demonstrated that grievant intended to falsify the record. Rather, she was attempting to correct the record according to what the customer (housemate's sister-in-law) told her was the actual location of their residence. Throughout this hearing, the consistent testimony of several witnesses established that the agency emphasizes customer satisfaction and accepting at face value whatever the customer states. Employees are trained to make whatever changes customers ask for without question. In this case, the circumstances suggest the possibility that the customer could have been attempting to avoid the emissions test fee by first registering the vehicle in County 1 and, the next day, switching the registration to County 2.[19] However, the agency has not demonstrated, by a preponderance of evidence: a) that the customer was attempting to circumvent the fee, or b) that grievant conspired with the customer or deliberately attempted to facilitate circumvention of the $8 fee.

The agency presented by telephone a rebuttal witness in an attempt to discredit grievant's written statement that she had never attempted to defraud anyone.[20] The witness renewed his automobile registration in March 1999 and inferred, solely from grievant's posture and expression, that she was offering to do something improper for him. Grievant denied the allegation. The witness'

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[17] Exhibit 5. Notarized statement of brother and his wife, June 8, 2002.
[18] Exhibit 10. *Ibid.*
[19] Once a vehicle is registered, a change in location (even if made the next day) does not trigger the requirement for an emissions test until the registration is renewed one or two years later.
[20] Exhibit 5. Memorandum from grievant to supervisor, June 10, 2002.

testimony was given no evidentiary weight in making this decision because of its remoteness in time, and the agency's failure to corroborate the allegation.

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice and termination from employment issued on June 7, 2002 is VACATED. In it place, the agency shall prepare a Group II Written Notice for failure to follow established written policy. The Written Notice shall be retained in the grievant's personnel file for the period specified in Section VII.B.2 of the Standards of Conduct.

The grievant is reinstated to her position. The agency shall pay grievant full back pay and benefits retroactive to the date of discharge.

APPEAL RIGHTS

You may file an administrative review request within **10 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.

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

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-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.[21]

[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]

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David J. Latham, Esq.
Hearing Officer

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5526

Hearing Date:	October 7, 2002
Decision Issued:	October 9, 2002
Reconsideration Received:	October 18, 2002
Reconsideration Response:	October 22, 2002

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 10 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request. A copy of all requests must be provided to the other party and to the Director of the Department of Employment Dispute Resolution (EDR).[22]

[22] § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

OPINION

The agency has challenged the hearing officer's conclusion that the agency has not borne the burden of proving that grievant intended to falsify agency records.

There is no question but that the testimony in this hearing was conflicting. This hearing occurred more than four months after the events that precipitated disciplinary action. Many of the questions asked of witnesses included a specific date as a point of reference. However, in reviewing the conflicting testimony, it appears that the dates confused some witnesses. Witness testimony became more definite when questions were posed in relationship to specific events rather than to dates.

The totality of the evidence established with certainty that the customer's wife made calls to grievant on two successive nights. On the first night (day one), the customer's wife was not able to speak with grievant because she was sleeping. She asked grievant's housemate to tell grievant that the car should be registered in County 2. The housemate failed to relay the message to grievant the next morning. It was on this morning that grievant told her coworker to register the car in County 1 (because she hadn't received the message). It was not until that second night (day two), that the customer's wife received the registration and realized that the vehicle was not garaged in County 2. She called grievant and asked her to change the vehicle to County 2, which the grievant did on the following day (day three). The agency's computer records establish that grievant made the change to County 2 on May 31 (day three), and that the vehicle was registered by a coworker on the preceding day of May 30 (day two). Therefore, day one must have been May 29.

If the <u>first</u> call had been made on the evening of May 30, one must then conclude that there was a conspiracy among three people – grievant, her housemate, and the customer – to falsify the records, to falsify the housemate's testimony and to defraud the agency. Moreover, if the first call had been made on May 30, there would not have been any need for a second call. Thus, the three involved would have had to conspire prior to the hearing to fabricate a story about the second call. While such a scenario is possible, it is difficult to believe that all three would engage in such a conspiracy to avoid an emissions test. The testimony of the three regarding the substance of the calls was generally consistent with each other. When stories have been fabricated, cross-examination usually uncovers inconsistencies; despite skillful cross-examination in this case, no such inconsistencies were uncovered (other than confusion about dates). The hearing officer finds it more likely than not that there was no conspiracy to falsify testimony. The agency did not prove that there were not two calls on successive nights.

The agency suggests that grievant's behavior on May 30 was suspicious because the emissions test was for a Mazda sedan, not a pickup truck of another brand, and that the customer does not own a Mazda. If, as was testified to, the customer took documents from the glove box of the pickup truck, the Mazda emissions test would logically have belonged to the person from whom he purchased the truck. Thus it was the previous owner of the truck – not the customer – who may have owned a Mazda. If the agency had demonstrated that the customer owned a Mazda, that would have lent credence to the fraud theory. However, since the customer apparently did not own a Mazda, the emissions test could have belonged to the pickup truck's prior owner.

It is undisputed that the customer had not performed an emissions test on the pickup truck. It is also undisputed that the customer is not literate and that he may have believed the form in the glove box was for the truck. There is no evidence to support the agency's assertion that grievant knowingly gave her coworker the Mazda emissions test form hoping to pass it off as the test form for the pickup truck. Again, while it is possible that grievant could have done so, the agency has not borne the burden of proof on this point; speculation about what she could have done is insufficient.

Finally, the agency argues that the customer's vehicle was illegally registered. However, the customer testified that the agency's telephone representative in Richmond advised her that an emissions test was not necessary as long as the vehicle was garaged in County 1. The agency neither rebutted this testimony during the hearing nor submitted any evidence with its reconsideration request to demonstrate that this is not a correct statement of agency policy. The undisputed evidence is that the pickup truck is <u>garaged</u> in County 1 and therefore, does not require an emissions test, even though it is registered in County 2.

The hearing officer does not conclude that grievant absolutely did not commit the offense alleged by the agency. However, it is concluded that the agency has not borne the burden of proof to <u>demonstrate</u> that grievant engaged in a deliberate attempt to commit fraud. The agency has proven a failure to follow established written policy and therefore a Group II offense is sustained.

The agency's challenges to the hearing officer's decision, when examined, simply contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, or the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

DECISION

The hearing officer has carefully reviewed the agency's request but concludes that there is insufficient basis to change the Decision issued on October 9, 2002.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 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 EDR or HRM, 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.

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David J. Latham, Esq.
Hearing Officer