

Issue: Group III Written Notice with termination (criminal conviction for illegal conduct occurring on the job); Hearing Date: 03/26/04; Decision Issued: 03/31/04; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 623



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 623**

Hearing Date: March 26, 2004  
Decision Issued: March 31, 2004

**PROCEDURAL HISTORY**

On September 24, 2003, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*Falsifying a vehicle's sales price which resulted in a criminal conviction for illegal conduct occurring on the job.*

On October 30, 2003, Grievant filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On March 2, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 26, 2004, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Representative  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for a criminal conviction for illegal conduct occurring on the job.

## **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 Department of Motor Vehicles employed Grievant as a Program Administration Manager II until her removal from employment on September 24, 2003. She had been employed by the Agency for approximately 29 years. The purpose of her position was:

The incumbent plans and directs all the programs/services provided by a CSC. Incumbent is responsible for the human resources management of staff, financial and facilities management, operating safety and security of assets. All duties are performed in a customer service oriented manner, in accordance with statutory and administrative procedural requirements such as the Motor Vehicle Code of Virginia, and DMV rules and regulations, the Privacy Protection Act, and the Freedom of Information Act.

She was an exemplary<sup>1</sup> employee without prior disciplinary action.

Grievant was presented with an Allegation of Misconduct memorandum stating:

On September 12, 2002, you knowingly participated in the fraudulent intent to alter or process a title application for a 2001 Freightliner that resulted in the vehicle being titled at a value significantly lower than its market value. This resulted in a reduced sales tax been collected by DMV.<sup>2</sup>

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<sup>1</sup> Agency Exhibit 1, Transcript p. 74.

<sup>2</sup> Agency Exhibit 7.

On September 19, 2003, a jury convicted Grievant of a felony under Va. Code § 46.2-605 for forging or altering an application for a certificate of title issued by the Department of Motor Vehicles. Va. Code § 46.2-605 provides:

Any person who (i) with fraudulent intent alters any certificate of title, salvage/nonrepairable certificate, or registration card issued by the Department or by any other state, (ii) with fraudulent intent, makes a false statement on any application for a certificate of title, salvage/nonrepairable certificate, or registration card issued by the Department or any other state, (iii) forges or counterfeits any certificate of title, salvage/nonrepairable certificate, or registration card purporting to have been issued by the Department under the provisions of this title or by any other state under a similar law or laws or, with fraudulent intent, alters or falsifies, or forges any assignment of title, or salvage/nonrepairable certificate, (iv) holds or uses any certificate, registration card, or assignment, knowing the same to have been altered, forged, or falsified, shall be guilty of a Class 6 felony.

It shall be unlawful for any person to conspire with any other person to violate the provisions of this section.

The jury's guilty verdict imposed a punishment of \$750.<sup>3</sup>

### **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.” DHRM § 1.60(V)(B).<sup>4</sup> Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DHRM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

Group III offenses include:

Criminal convictions for illegal conduct occurring on or off the job that clearly are related to job performance or are of such a nature that to

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<sup>3</sup> Agency Exhibit 2.

<sup>4</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

continue employees in their positions could constitute negligence in regard to agencies' duties to the public or to other state employees.<sup>5</sup>

Grievant was convicted of illegal conduct occurring on the job that related to her job performance as a DMV CSC Manager. The Agency has presented sufficient evidence to support its disciplinary action.

Grievant contends the Agency failed to follow its prior practice of addressing employee behavior as an administrative matter rather than as a criminal matter and that had that prior practice been in place, Grievant would not have been prosecuted. If the Hearing Officer assumes for the sake of argument that Grievant's assertion is true, it has no bearing on the outcome of this appeal. Grievant has not presented any evidence of a policy prohibiting criminal prosecution of employee behavior. The Agency is free to amend its administrative practices as it deems necessary.

Grievant presented evidence suggesting the jury did not receive an accurate account of the facts surrounding Grievant's actions. Grievant argues, for example, that the policy underlying the transaction at issue was vague and varied by DMV facility. She argues that the trial testimony of Mr. G should have been given greater weight by the jury. She asserts that her actions were in reliance on the statements made by the DMV customer and that it was appropriate for her to rely on those statements.

It is not the role of the Hearing Officer to overturn, in effect, the decision of a jury. Although Grievant's arguments and evidence are significant, all of them either were or could have been presented to the jury. The Agency has the right to rely on the conclusion of the jury.

Grievant has been employed by the Commonwealth for approximately 29 years. She is one year short of receiving more favorable retirement benefits. She asks the Hearing Officer to permit her to mitigate the disciplinary action against her in a manner that would enable her to receive better employment benefits. In addition, Grievant contends that the Agency has inconsistently disciplined its employees such that the disciplinary action against Grievant should be mitigated. The evidence presented in this case,<sup>6</sup> showed that the Agency has consistently disciplined employees convicted of fraudulent behavior by removing those employees from employment.

*Va. Code § 2.2-1001* requires the EDR Director to “[a]dopt rules ... for grievance hearings.” The *Rules for Conducting Grievance Hearings* set forth the Hearing Officer's authority to mitigate disciplinary action. The Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of

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<sup>5</sup> DHRM Policy 1.60(V)(B)(3)(I).

<sup>6</sup> Agency Exhibit 4.

improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.” In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

## 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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

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.<sup>7</sup>

[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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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.