

Issues: Group II Written Notice (failure to follow policy), Group III Written Notice (falsification of records) and Termination; Hearing Date: 10/22/08; Decision Issued: 10/30/08; Agency: DCE; AHO: William S. Davidson, Esq.; Case No. 8950; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8950

Hearing Date: October 22, 2008
Decision Issued: October 30, 2008

PROCEDURAL HISTORY

The Grievant received a Group II Written Notice on August 27, 2008 for:

Failure to comply with established written policy-Using a state vehicle to commute to and from work without obtaining proper authorization from the Agency Head, Cabinet Secretary and OFMS Director to do so for the period March 24, 2008 to April 4, 2008, as specified in Chapter 11, Section 2.2-1179 of the Code of Virginia. An investigation by the Office of the State Internal Auditor has substantiated this charge that for the period March 24, 2008 thru April 4, 2008 you used a state vehicle to commute to and from work. You did not complete the OFMS form CP-3 which requires the signature of the Agency Head, Cabinet Secretary, and OFMS Director in order to authorize and employee to use a state-assigned vehicle to commute. The investigation revealed that during the period in question, you parked the state vehicle in the [building] parking area which is where you were supposed to be parking your personal vehicle. Furthermore, records show that you did not access the [name of deck] parking area where the state vehicle is supposed to be parked during this period. This substantiates that you did in fact commute using the state vehicle for the period of March 24, 2008 to April 4, 2008.

The Grievant received a Group II Written Notice on August 27, 2008 for:

Falsifying state records as listed in DHRM Policy 1.60 (Standards of Conduct). An investigation by the Office of the State Internal Auditor has substantiated the charge that you did not reimburse the State for miles you commuted during the period of March 24, 2008-April 4, 2008, although required to do so by the Code of Virginia and the OFMS. You also falsified the DCE "Assigned Vehicle Mileage Reporting" form, a State document, by not reporting commuting miles during the period of March 24, 2008-April 4, 2008.

Furthermore on July 3, 2007, DCE Central Office staff was issued a memo from the Superintendent regarding the official use of State vehicles. The memo stated that all vehicles assigned to the agency have assigned parking in the downtown

parking areas and those vehicles are to be left at the Central Office when employees are not in travel status. The memo further clearly provided that the state vehicles are not personal vehicles and that state vehicles are assigned only for the purpose of carrying out the agency's business and not for personal convenience. The investigation revealed a pattern of your reporting on "Assigned Vehicle Mileage Report" forms, state business related mileage which was actually for your personal use of the vehicle for commuting. The period of time covered by the investigation was March 24 to April 4, 2008 and the mileage determined to have been misreported was 217 for the period March 24, 2008 to April 4, 2008, from your home to the DCE Central Office.

Pursuant to the Group II Written Notice, the Grievant received no punishment. Pursuant to the Group III Written Notice, the Grievant was terminated on August 27, 2008. On August 27, 2008, the Grievant timely filed a grievance to challenge the Agency's actions. On September 19, 2008, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On October 22, 2008, a hearing was held at the Agency's location.

APPEARANCES

Assistant Attorney General on behalf of the Agency
Grievant
Witnesses

ISSUE

1. Did the Grievant fail to comply with established written policy by not having a completed OFMS form CP-3 fully executed for the use of his state vehicle?
2. Did the Grievant falsify a state record when he filed his March, 2008 Assigned Vehicle Mileage Reporting Form?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a “super personnel officer” and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency’s decision.

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 Agency provided the Hearing Officer with a notebook containing nineteen (19) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing thirty-two (32) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

This matter is driven more by the interpretation of various state policies than it is by the evidence presented. The evidence, as presented by both sides, was surprisingly uncontradictory. In most cases, both the Agency’s evidence and the Grievant’s evidence was similar and it was solely a matter of how you interpreted state directives regarding personal use of vehicles as those directives applied to the evidence.

Virginia Code Section 2.2-1179 provides in part as follows:

No passenger type vehicle purchased or leased with public funds shall be used to commute between an employee’s home and official work station without the prior written approval of the Agency Head and, in the case of vehicles assigned to the Centralized Fleet, **the Director shall issue regulations governing such use of vehicles** and shall ensure the costs associated with such use shall be recovered from the employees... (Emphasis added)

The Director is the Director of the Department of General Services. The Director has promulgated an Office of Fleet Management Services-Policies and Procedures Manual. Section 3 of that Manual provides in part as follows:

The following are the types of home to office travel which do not require a request for approval to commute:

- (A) Employees who only travel between home and office when in travel status as defined in the State Travel Regulations;
- (B) Employees who only travel between home and office the evening preceding a trip or the morning following a trip.¹

On July 12, 2005, Governor Mark R. Warner signed Executive Order 89 which dealt with the purchase, assignment and use of state owned vehicles. That Executive Order provided in part as follows:

The Head of each and every Agency or Institution of the Commonwealth shall limit authorization of commuting in vehicles to those employees whose job duties meet the requirements set forth in the Code of Virginia as well as policies and procedures established by direction of this Executive Order. The Director of the Department of General Services shall develop and publish uniform regulations for this purpose. Use of state owned vehicles for commuting shall be authorized only when it is the most cost effective or practical alternative, or as an employee's job duties affecting public health, safety and emergency response may require. **For the purpose of this Executive Order and as used in Section 2.2-1179 of the Code of Virginia, "Commuting shall mean driving between home and office where such driving is not connected to a departure for or return from a trip on official state business."** (Emphasis added)²

The Office of Fleet Management Services Policies and Procedures Manual defines commuting as follows:

Use of a state owned or leased vehicle by an employee for travel between home and office, while not in "travel status."³

¹ Grievant Exhibit 1, Tab 5, Page 1

² Grievant Exhibit 1, Tab 7, Pages 2-3

³ Agency Exhibit 1, Tab 7, Page 2

On November 8, 2006, the Director of Administrative Services of the Agency sent an e-mail to many employees of the Agency, including the Grievant, which stated in part as follows:

....It is perfectly acceptable to drive the vehicle home when leaving directly to a field site the next morning. There is no commuting considered in such a trip.⁴

On November 14, 2006, the same individual sent another mass e-mailing and that e-mail stated in part as follows:

If you are traveling outside the Richmond Metro are, you may take the vehicle to your residence to begin your trip.⁵

On July 3, 2007, the Head of this Agency sent a mass e-mail and it stated in part as follows:

All Central Office staff are reminded that unless you are leaving directly from home to travel the next business day, you are not to drive a state vehicle home.⁶

The primary question before the Hearing Officer is how to interpret Code Section 2.2-1179, the Governor's Executive Order, and the various other regulations and/or directives regarding commuting. All witnesses, both those for the Grievant and the Agency, agreed to two (2) basic facts. If the employee was "in travel status," he did not need to have pre-approved forms signed. If he was leaving from home to go to a work site outside of his work area then he could drive the state vehicle home the prior evening. Further, when he finished business outside of the work area, he could drive the state vehicle home and return it to work the next morning. The Agency's primary witness testified that on at least three (3) of the days in question, the Grievant was "in travel status" and therefore did not need any prior approval. For the remaining days in question, the issue is whether or not the employee needed to leave directly from his house to go to an offsite location or, as Executive Order 89 set forth, was the offsite visit connected to the employees driving the next day?

In any event, the Agency presented as an Exhibit, the Grievant's Cardholder Transaction History Report. This document showed the times the Grievant signed into the garage area and the building where the car was parked and times that he left.⁷ There is no dispute that the Grievant parked the state car that he was authorized to use in the parking spot that was for his personal vehicle. The Office of the Comptroller performed an investigation in this matter.⁸ The Investigator who testified regarding that investigation stated that he never saw the Grievant drive his state issued car on personal business. He merely noted the times that it was parked in the Grievant's personal parking spot and the times that it left. No evidence was introduced to show the Grievant using his state issued car for personal business.

⁴ Agency Exhibit 1, Tab 15

⁵ Agency Exhibit 1, Tab 16

⁶ Agency Exhibit 1, Tab 17

⁷ Agency Exhibit 1, Tab 12

⁸ Grievant Exhibit 1, Tab 1

The Grievant filed with the Investigator a response attempting to answer all of the Investigator's questions.⁹ The Grievant also filed with his Supervisor answers to all of the questions raised by this Investigation.¹⁰ Upon cross-examination, the Investigator agreed that on all days in question, March 24, 2008 through April 4, 2008, the Grievant was either in travel status or was leaving from his home to go to an offsite location and therefore was justified in driving the vehicle home that evening. With those concessions, it became obvious that the thrust of this case was reduced to a much simpler issue. Did the Grievant have to travel directly from his home to the offsite workplace or could he return to his office and then go directly to the offsite workplace without violating Policy?

During this time frame, the Grievant's step father had died. The Grievant was having trouble sleeping at night and on several occasions awoke early in the morning. When the vehicle was returned on March 24, 2008, it was properly used that morning as the last time it had been used prior to that, the Grievant was finishing business and was allowed to drive the car home.

On March 25, 2008, the Grievant knew that he was going to work at an offsite location (Dillwyn and Roanoke) and therefore it was allowable for him to drive the car home on the evening of March 24th. On his way to Dillwyn, the Grievant discovered that he had left his medication in his office. He returned to his office, took his medication and went to Roanoke. He returned home from Roanoke.

The vehicle was returned on March 26th. The Grievant knew that he was going to work at an offsite location (Dillwyn) on March 27th and properly took the car home with him that evening.

On March 27, 2008, the Grievant went to Dillwyn and returned to his house after the work day directly from Dillwyn.

On March 28th, the Grievant again worked offsite at Dillwyn.

On March 31st, the Grievant again intended to work offsite at Dillwyn. Before leaving for Dillwyn, the Grievant's Supervisor called and instructed him to return to the Central Office.

On April 1st, the Grievant worked offsite at Beaumont and later at Roanoke.

On April 2nd, the Grievant again worked offsite at Beaumont.

On April 3rd, the Grievant worked offsite at Roanoke.

On April 4th, the Grievant returned the vehicle to the Agency.

On several of these mornings the Grievant, rather than sitting at his home waiting to drive to the offsite location, because he had awakened early, drove to work and performed several hours of work prior to them leaving for the offsite location. Both of the Agency witnesses, when asked a hypothetical question by the Hearing Officer, offered their opinions if an employee intended to go directly from home to an offsite location but came into work early to do one or

⁹ Grievant Exhibit 1, Tab 8

¹⁰ Grievant Exhibit 1, Tabs 13-14

two hours of extra work before leaving then such a return to the Agency location would not constitute a violation of the Statutes, the Executive Orders or the Rulings.

Both the Group II and the Group III Written Notices speak to an investigation and a time frame of March 24, 2008 through April 4, 2008. The Agency, admitted in its Direct Examination, that there was no document filed by the Grievant that in any way falsified data for any time frame in the month of April, 2008. The Grievant did file an Assigned Vehicle Mileage Reporting Form for the month of March, 2008.¹¹ In that form, the Grievant reported traveling 1,727 miles. On August 14, 2008, the Grievant submitted to the Agency Head a document titled Employee Accounting for Mileage. In that document for the month of March, 2008, the Grievant was able to verify that he had driven the state vehicle 1,736 miles. No evidence was introduced by the Agency to contradict the Grievant's numbers as ascertained in this document.¹² While there is a variance of 9 miles, the Hearing Officer finds that a variance of approximately one half (½) of one percent (1%) does not in any way reach a level of falsification.

The Grievant's role in the Agency is that of being the legal officer who makes interpretations of Statutes, Executive Orders, Rules, Policies and Regulations. The Grievant interpreted the Governor's Executive Orders to mean that a vehicle can be taken home if the employee knew that the next day he would have offsite work to perform. The Agency wants to interpret the Governor's Executive Order to mean that the employee must go directly from his home to the offsite location, with no exceptions. The problem with this interpretation is that the Governor's Executive Order does not use the word "directly." It merely states if the offsite location is "connected" then the employee may take the vehicle home. When the Hearing Officer asked both of the Agency witnesses hypothetical questions, they seemed to indicate that there were exceptions to their own interpretations. For instance, when posed with the hypothetical question that the employee forgot a key file that he needed, would it be a violation to drive back to the office and pick up the file and then go directly to the offsite location or should he simply go to the offsite location knowing that he was without an important file? Both of the Agency witnesses indicated that, while that may be a technical violation, they would expect the employee not to make a wasted trip. Likewise, when asked if the employee was directed by his superior to return to the workplace, would that be a violation of policy? Again, they both indicated that the employee should follow his superior's instruction and that it would not be a violation of policy in that matter. Indeed, this happened on one of the days in question. Finally, when asked if an employee simply awoke early in the morning and decided to come to work to get other matters done and then proceed to the offsite location, would that be a violation? The Investigator who prepared the report in this matter indicated that, **while that might be a technical violation, it certainly would not justify termination and would probably only justify a counseling session.** (Emphasis added)

Accordingly, the evidence that was presented to the Hearing Officer shows a Grievant who took a state vehicle home with the intention of going immediately to offsite locations. On some days he did that, on some days he was doing that when directed by his superior to return to work and on some days he came in to work very early in the morning to accomplish work where he had awakened and decided that his time was best served by doing other work before proceeding to the offsite location.

¹¹ Agency Exhibit 1, Tab 13

¹² Grievant Exhibit 1, Tab 14, Page 6

The Hearing Officer believes that the interpretations of the Statute, the Governor's Executive Order, the various Regulations on this matter and the e-mails sent out by the Agency leaves sufficient ambiguity so that nothing that the Grievant did rose to the level of violating any policies regarding the state vehicle. If the vehicle was properly being used for offsite visitation, no forms needed to be secured prior to such use. Further, the Hearing Officer has been presented no evidence to show that the vehicle was used for personal use. The Agency asked about one (1) time frame of approximately one (1) hour where the vehicle left the state parking lot and was returned and the Grievant candidly stated that he did not know what he was doing in that time slot and the Agency had no evidence to indicate what he was doing. The Agency has the burden to prove that the vehicle was used for personal use and it does not meet that burden by simply showing that the vehicle left the parking lot and then returned to the parking lot.

The Grievant, as part of his evidence, presented several prior Hearing Officer Decisions. In cases 5737, 7919 and 7893, prior Hearing Officers have dealt with the issue of falsification of state records.¹³ In those three (3) prior Decisions, the Hearing Officers have looked at various definitions of the word "falsify." Black's Law Dictionary defines "falsify" as:

To counterfeit or forge; to make something false; to give a false appearance to anything.

The word falsify may be used to mean being intentionally or knowingly untrue, made with intent to defraud. Washer v. Bank of America Nat. Trust & Savings Ass'n 21 Cal 2d 822, 136 p.2d 297, 301.¹⁴

The New Webster's Dictionary and Thesaurus defines falsify as:

To alter with intent to defraud, to falsify accounts, to misrepresent, to falsify an issue, to falsify the course of justice.¹⁵

The Hearing Officer finds that the Agency has not proven that the Grievant intended to defraud or deceive or to falsify any document. All the Hearing Officer heard in the presentation of evidence was that there was the possibility of a conflict in interpretation in the rules regarding vehicles and a nine (9) mile discrepancy on a mileage report. The witnesses for the Agency acknowledged that the Governor's Executive Order would supercede and overrule any interpretation issued by the Agency Head or any other Agency Heads. The Grievant, uniquely was the person who would interpret these Rules and Regulations and the Governor's Executive Order. At worst, he has misinterpreted them. At best, he has correctly interpreted them and has committed no violation of any policy. In fact, the Hearing Officer finds that the Grievant's interpretation is more likely the correct interpretation of these various documents.

MITIGATION

¹³ Grievant Exhibit 1, Tabs 25-27

¹⁴ Grievant Exhibit 1, Tab 25, Page 11

¹⁵ Grievant Exhibit 1, Tab 26, Page 5

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the Agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution...”¹⁶ 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

The Agency Head testified that he did not consider mitigation at all in this matter because of the Grievant's position. The Grievant presented to the Hearing Officer several examples of similar allegations that were mitigated (see Grievant Tabs 24 and 25). While the Hearing Officer does not have to reach mitigation because of his earlier rulings, the Hearing Officer notes that he can find no basis for denying mitigation based simply on the position in the Agency of the Grievant.

DECISION

For reasons stated herein, the Hearing Officer finds that the Grievant committed no violation that justified the issuance of the Group II Written Notice or the Group III Written Notice. The Hearing Officer orders that the disciplinary action be rescinded; that the Grievant be reinstated to his former position or, if occupied to an objectively similar position; that the Grievant be paid full back pay from the date of his termination to the date of his reinstatement; and that all of the Grievant's benefits and seniority be restored.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

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

2. If you believe the hearing decision is inconsistent with state policy or Agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th Street, 12th Floor

¹⁶Va. Code § 2.2-3005

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 Street, Suite 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 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party and to the EDR Director. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹⁷ You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁸

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

William S. Davidson
Hearing Officer

¹⁷An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁸Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.