

Issues: Group III Written Notice (falsifying State records) and Termination; Hearing Date: 02/04/09; Decision Issued: 02/06/09; Agency: DMV; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9020; Outcome: No Relief – Agency Upheld in Full.

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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of: Case No. 9020

Hearing Date: February 4, 2009  
Decision Issued: February 6, 2009

**PROCEDURAL HISTORY**

On September 26, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal. The offense was keeping Agency decals, unsecured and without accounting for them, in violation of Agency policy. Grievant timely 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 December 31, 2008, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on January 2, 2009. The hearing was scheduled at the first date available between the parties and the hearing officer, January 29, 2009. However, the parties ultimately agreed to continue the grievance hearing to February 4, 2009. Because of the scheduling availability, for good cause shown, the time for conducting the grievance hearing was extended. The grievance hearing was held on February 4, 2009, at the Agency's regional office.

The Agency submitted an exhibit notebook with numbered exhibits that were, without objection from the Grievant, admitted into the grievance record and will be referred to as Agency's Exhibits, numbered respectively. The Grievant did not submit any documents beyond the Agency's submission. All evidence presented has been carefully considered by the hearing officer.

**APPEARANCES**

Grievant  
Advocate for Agency  
Representative for Agency  
Two witness for Agency (including Representative)

## ISSUES

Did Grievant's conduct warrant disciplinary action under the Standards of Conduct and Agency policy? If so, what was the appropriate level of disciplinary action for the conduct at issue?

The Grievant requests rescission or reduction of the Group III Written Notice with removal.

## BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

## 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.

Department of Human Resource Management ("DHRM") Policy 1.60, Standards of Conduct, defines Group III offenses to include acts and behavior of such a sever nature that a first occurrence normally should warrant termination. Examples of Group III offenses include falsification of records and/or any misuse or unauthorized use of state records. Agency Exh. 6.

### The Offense

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

The Agency employed Grievant as a senior customer service representative in a regional office. Her duties include handling customer transactions for issuing vehicle titles, plates and decals. The job requires ensuring accurate accountability of all assigned non-cash secure assets (e.g., titles, decals, permits, etc.). Further, the job requires such assets to be kept secure at all times. Agency Exh. 4.

The Agency's Customer Service Center Operations Manual (CSCOM) has applicable policies that require the daily accounting and surrender of all decals. Agency Exh. 3. CSCOM-702.1 specifically addresses accounting for surrendered, loose, mutilated, leftover, or missing decals. Such decals must be accounted for and surrendered at the end of each day. The Grievant acknowledged these policies, but she justified her practice of keeping these stray decals on hand for convenience and more efficient customer service.

The management witnesses testified that the Group III written notice was issued because the Grievant deliberately violated known policy for accounting for the assets. The Grievant admitted she kept an envelope of unsecure, unaccounted for license plate decals for use to correct mistakes and to deal more quickly and effectively with customers who return for correct decals. Further, the envelope of the extra decals was kept in an unsecured drawer. At the time of the offense, the envelope contained seventeen decals. The Agency considers this violation tantamount to changing or falsifying state records.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293,299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

I find that the Grievant's admitted conduct satisfies the Agency's burden of proving the offense. The Agency demonstrated a reasonable, measured response to the Grievant's prior Written Notice, specifically putting the Grievant on notice that a subsequent Group II or higher Written Notice would necessarily result in removal. Although there was no evidence of a corrupt failure to account for the Agency's assets according to known policy, the violation was, nevertheless, knowing and intentional. Violation of the applicable policies is appropriately considered a Group III offense under the Standards of Conduct. For this reason, I find the Agency has met its burden of proof.

The Grievant's record contains an active Group II Written Notice issued December 19, 2006. This prior Written Notice states that it was mitigated from a Group III down to a Group II with disciplinary transfer, with the cautionary provision that another Group II or higher Written Notice would result in termination.

#### Mitigation

The agency has proved (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

Removal is the normal disciplinary action for Group III Written Notices unless mitigation weighs in favor of a reduction of discipline. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." Va. Code § 2.2-3005(C)(6). 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.

Since the Agency has already mitigated the prior Written Notice from a Group III to a Group II, with a transfer and caution that another Group II or III Written Notice will result in termination, the Agency has demonstrated a measured disciplinary response. With the agency already having mitigated its cumulative discipline, it would take extenuating circumstances to show mitigation sufficient to reduce the level of discipline further. Under the *Rules for Conducting Grievance Hearings*, an employee's length of service and satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees

with the action. While it is regrettable that a long term employee's employment is terminated from this offense, in this case, the Agency's action of imposing a Group III Written Notice with removal is within the limits of reasonableness. While the hearing officer finds that this Grievant did not act with corrupt motive, in light of the applicable standards, the Hearing Officer finds no evidence that warrants any further mitigation to reduce or rescind the disciplinary action.

### DECISION

For the reasons stated herein, I uphold the Agency's Group III Written Notice with removal.

### APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** 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.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day

following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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

1. The 15 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 DHRM, 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

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Cecil H. Creasey, Jr.  
Hearing Officer