

Issues: Group II Written Notice with Suspension (failure to follow policy), and Group II Written Notice (failure to follow policy), and Termination (due to accumulation);
Hearing Date: 08/28/09; Decision Issued: 09/01/09; Agency: DMV; AHO: Frank G. Aschmann, Esq.; Case No. 9076, 9135; Outcome: Group II with Suspension – No Relief – Agency Upheld in Full, Group II with Termination – grievance withdrawn by grievant during hearing.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case Nos. 9076 & 9135

Hearing Date: August 28, 2009
Decision Issued: September 1, 2009

PROCEDURAL ISSUE

Grievant stated that she was not given exhibits and documentation in a timely fashion during the first steps of the administrative process. No procedural issues raised in regard to this Due Process Hearing. The first steps of the administrative process are not issues of this Hearing.

APPEARANCES

Agency Counsel
Agency Representative
Three Agency Witnesses
Grievant

ISSUES

Did the Grievant fail to perform her duties satisfactorily and violate Agency policy, on March 28, 2008 and April 10, 2009 and access family records in violation of Agency policy such as to warrant disciplinary action under the Standards of Conduct?

FINDINGS OF FACT

On May 1, 2009, the Agency issued a Group II Written Notice to the Grievant. The notice terminated the employment of the Grievant effective the day it was issued. The Grievant filed a grievance for this notice which is case number 9135. During the hearing the Grievant withdrew her request for a hearing of this matter and accepted the consequences of the personnel action.

On January 8, 2009, the Agency issued a Group II Written Notice to the Grievant. The notice gave the Grievant a five day suspension. The Grievant filed a grievance for this notice which is case number 9076.

On March 28, 2008, the Grievant was working in a customer service position for the Agency. A customer entered her facility and she assisted the customer. The customer owed a

\$500.00 fee and was subject to insurance reporting requirements. At the time the customer appeared in the facility a transaction for \$500.00 was recorded in the computer system of the Agency. It was then deleted. The Grievant issued a temporary pin number to the customer which would allow him to access the Agency system through the internet.

Approximately one half hour later the customer accessed the Agency system through the internet from a private location. The customer entered information which posted as a back dated sale of a vehicle to February 15, 2008. This did not alter the fees or insurance requirements of the customer. During the same period of access to the system the customer again back dated the sale to February 10, 2008. This caused the system to update and remove the fee and insurance requirements from the customer's record.

The customer had never actually sold the vehicle. The customer admitted that he had used the internet to access the Agency system and make changes to the records to cause the system to make a read out that would show he did not owe the fee and was not subject to the insurance requirements. The customer stated that the Grievant had provided him with the information needed to access the system and told him what to do to cause the changes to the record. The customer stated he had come in to the facility intending to pay the fee but had explained that he did not get the notices timely because his mail was being delivered to a different address from where he lived. The customer stated that the Grievant had taken pity on him and told him, "this is your lucky day" and she would give him one "get out of jail free card."

The Grievant contends that she would never use the phrases the customer attributes to her as they are out of character for her. The Grievant states she never intentionally gave anyone a way out of a situation. The Grievant states she only told the customer that he needed to prove he had sold the car by February 15, 2008 to avoid the fee and did not direct him to make the changes. The Grievant admits she does not remember the particular customer. The Grievant was not requested to respond to the March incident until December. The Grievant states she was not informed who the customer was at the time the response was requested and thus she had to respond in general terms.

During the investigation of the customer transaction from March 28, 2008, an Agency Investigator ran a check on the transaction record of the Grievant. It was discovered that the Grievant had accessed her daughter's records on January 5, 2006 for approximately one minute. The Grievant admits accessing her daughter's records. Grievant states she did so to clear a lock in the system. There are dummy numbers which can be used to clear a lock in the system.

APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with 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 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 1.60. 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 of Conduct 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. The Agency uses these policies for its Standards of Conduct.

The Standards of Conduct require an employee to meet or exceed established job performance expectations. The Grievant's Employee Work Profile required her to follow all Agency policies.

The Agency prohibits accessing records except as necessary to perform duties. The Agency further prohibits an employee from accessing family member's records. The Grievant violated these policies when she accessed her daughter's records. Even if it was for the purpose of clearing the system there was another process which could have been used and therefore it was not necessary to access her daughter's records to perform this function. The obvious appearance of impropriety as a conflict of interest in handling family records makes this a serious matter even though the time of access was only one minute and it occurred several years earlier.

The Agency has extensive and detailed regulations which govern the requirements for insurance. In this matter the customer was in violation of regulations which required him to pay the \$500.00 fee and comply with additional requirements in the future. The Grievant had a duty to assist the customer comply with these regulations when he appeared in the facility. Agency policy required the Grievant to fulfill her duties in a manner which protected the interests of the Agency.

While, the exact words that past between the customer and the Grievant may be debated, the evidence shows clearly that the customer obtained the information he needed to alter the records from the Grievant. Whether the Grievant used the words "your lucky day" or "get out of jail free" are not critical to this decision. What is critical is whether the Grievant acted in a manner which protected the interests of her employer. The customer came into the facility wanting to pay his fee and clear the problem. This is reflected in the fact that a transaction for \$500.00 was entered as well as by the customer's statement. The encounter started out as an

attempt to pay and changed when the customer received information which lead him to believe he could avoid the fee and insurance requirement. He then left and used the information he had obtained at the facility from the Grievant to make record changes which circumvented the requirement to pay a fee and meet future insurance obligations. Providing the customer with a method to avoid the fee and insurance requirements was not protective of the Agency's interests. The Grievant can not recall exactly what occurred in this regard and only offered supposition as a counter.

The Grievant provided the customer with a temporary pin number and thereby clearly facilitated the act of the customer to alter the records. Giving the pin number indicates that the Grievant had provided the customer with the information about making changes to the records as that would be the purpose for accessing the system through the internet for which the pin was needed. The first date used, February 15, 2008, is corroboration of the customer's story as it reflects his lack of understanding with the system and thus tends to show he was trying to follow information given to him. Accessing the system with the pin number was obviously an idea given to him when he came to the facility. The timing and his actual appearance in the facility first show it was not the original idea of the customer. The customer got the information he needed to complete the scheme from the Grievant. Providing this information to the customer was not acting in a manner which protected the interests of the Agency and is thus a violation of policy.

The Grievant's argument that she only provides information and has no control over how people go out and use it is disingenuous. Had the Grievant performed her duties properly taking the money from the customer and processing the transaction when the customer came into the facility without giving him information which provided him with a scheme to avoid his responsibilities there would have been no record alteration by the customer. Providing the customer, who had no prior intent, a method for circumventing the system was an act against the interests of the Agency.

The Grievant violated Agency policy in her transaction with the customer and in accessing family records. These violations are serious violations which warranted the issuance of the Group II Written Notice.

The Grievant's withdrawal of her request for a hearing and acceptance of the consequences in the matter of case number 9135 render any further discussion or findings on the issues contained therein moot.

DECISION

In grievance number 9135 the grievance is dismissed after having been withdrawn by the Grievant and the disciplinary action of the Agency is affirmed.

In grievance number 9076 it is held that the Agency has met its burden and the disciplinary action of the Agency is affirmed.

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. 14th Street, 12th Floor, Richmond, VA 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, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804) 786-0100.

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 contrary 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.

Frank G. Aschmann
Hearing Officer