

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 03/29/10; Decision Issued: 04/14/10; Agency: DMV; AHO: John R. Hooe, III, Esq.; Case No. 9290; Outcome: No Relief – Agency Upheld.

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

**DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER**

**In the matter of : Case No. 9290**

Hearing Date: March 29, 2010  
Decision Issued: April 14, 2010

**PRELIMINARY MATTERS**

During a telephone pre-hearing conference conducted on March 17, 2010 it was agreed by the Grievant and the Agency's representative that the hearing in this matter would be conducted on March 29, 2010 commencing at 10:00 a.m. at the [Agency's] Customer Service Center Conference Room.

It was further agreed that a copy of all exhibits a party intends to introduce at the hearing and a list of witnesses to be called would be provided to the Hearing Officer and to the other party no later than Thursday, March 25, 2010 at 5:00 p.m.

**APPEARANCES**

Grievant  
Representative for Agency  
Three Witnesses for Agency

**ISSUES**

1. Did the Grievant commit the offense set out in the written notice, namely: violate existing policies VLIC-116B, CSCOM 205.2 and VLIC 102? If so, what was the appropriate level of disciplinary action for the conduct at issue?

2. Should mitigating factors result in less severe discipline?

**EXHIBITS**

The Agency Exhibits admitted into evidence were contained in a single notebook with the following contents:

- Tab 1 - Grievance form A and attachments
- Tab 2 - Amended Group II Written Notice dated February 1, 2010 (amended as to suspension dates)
- Tab 3 - Notice of intent to issue standards of conduct notice/letter of allegation dated November 17, 2009 with attached documentation
- Tab 4- Grievant's response to notice of intent to issue standards of conduct notice /letter of allegation with attachment
- Tab 5- Employee work profile dated April 13, 2009
- Tab 6- Performance evaluation dated January 14, 2009
- Tab 7- Counseling memo dated November 10, 2009 regarding lien omission
- Tab 8- Active Group II Written Notice dated September 22, 2008
- Tab 9- DMV Vehicle Licensing Guide ("VLIC") 116B-Lien Omission From Title
- Tab 10- DMV Customer Service Center Operations manual ("CSCOM") 205.2-Administrative-Staff Lien Omissions
- Tab 11- Department of Human Resource Management Policy No. 1.60-Standards of Conduct and Attachment A

The Grievant introduced a packet of unnumbered Exhibits.

Each party reviewed the exhibits introduced by the other party with no objections being raised to the introduction of any exhibits.

### **FINDINGS OF FACT**

The Grievant timely appealed the Written Notice citing this Grievant for a Group II offense and suspending the Grievant for a period of ten days.

The evidence established that on October 30, 2009 the Grievant processed a title for a customer, failed to record a lien on the title and issued the customer a clear title. The evidence further established that when the Grievant discovered the failure to record the lien, the Grievant did not notify management as required by existing policy (VLIC-116B,CSCOM 205.2 and VLIC 102) (Agency Exhibits 9 and 10), but instead added the lien to the customer's record. The Grievant did not dispute these allegations.

The evidence further established that at the time the alleged offense occurred, the Grievant was subject to an active Group II Written Notice issued on September 22, 2008. (Agency Exhibit 8)

The testimony of the Agency witnesses, the testimony of the Grievant and the exhibits filed by the parties indicated that the Grievant at the time the offense occurred (October 30, 2009) was suffering from various medical and emotional problems and was under the influence

of prescribed medications to address pain. The grievant testified that the combination of the pain, the medication and her emotional state resulted in her exercising poor judgment.

The Grievant requested that the Group II Written Notice be reduced to a Group I Written Notice with no suspension and restoration of back pay and benefits.

### **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 (A) 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.

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 Human Resource Management promulgated Standards of Conduct Policy No. 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 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 to provide appropriate corrective action.

The Agency Exhibit at Tab 11, Standards of Conduct, Policy: 1.60 made clear that the Grievant's conduct was correctly categorized as a Group II offense in that the Grievant's offense is of a more serious nature and could significantly impact the business operations of

the Agency. The Standards of Conduct indicate that a second active Group II Notice should normally result in termination; however, when mitigating circumstances exist, an employee may be suspended for up to thirty work days.

The Agency's witnesses and the Written Notice for the October 30, 2009 offense (Exhibit 2) indicates that the Agency did consider mitigating circumstances, including the Grievant's largely good record of service and her medical and emotional problems. As a result of the mitigating circumstances, the Grievant was neither terminated nor suspended for the possible thirty days suggested by the Standards of Conduct.

The Agency demonstrated by a preponderance of the evidence that the Grievant's act was of such a serious nature that it should be considered at least a Group II violation. The Agency further demonstrated that the Group II Written Notice was issued while another Group II Written Notice was active, the earlier notice having been issued on September 22, 2008 (Agency Exhibit Tab 8).

### **DECISION**

The Agency's action is upheld.

### **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, Department of Employment Dispute Resolution Main Street Centre 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 5 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes **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.

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John R. Hooe, III  
Hearing Officer