Issue: Group III Written Notice with Termination (failure to follow policy and falsification of a State document); Hearing Date: 10/05/10; Decision Issued: 12/07/10; Agency: VDOT; AHO: Neil A.G. McPhie, Esq.; Case No. 9411; Outcome: Full Relief; **Administrative Review: EDR Ruling Request received 12/21/10; Outcome pending; Administrative Review: DHRM Ruling Request received 12/21/10; Outcome pending.**

In the matter of Case No. 9411

Hearing Date: October 5, 2010
Decision Issued: December 7, 2010

APPEARANCES

Grievant
Attorney for Grievant
Representative for Agency
Three witnesses for Agency

ISSUES

Was the Virginia Department of Transportation (hereinafter VDOT or "the Agency") justified in terminating Grievant after 24 years of discipline-free service pursuant to the Department of Human Resources Management Policy 1.60, Standards of Conduct for two alleged infractions:
1. Grievant's "failure to comply with Workforce Safety and Health, Motor Vehicle Crashes and Convictions of Moving Traffic Violations Policy (leaving the scene of an accident)" that grievant had on May 14, 2010 while operating a pickup truck that was assigned to her, and
2. Grievant's "falsification of a report to management" regarding a presumed fictitious May 17, 2010 accident. (See, June 16, 2010 Notice of Termination).

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. In *Tatum v. VA Dept of Agriculture & Consumer Servs,* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003), the Virginia Court of Appeals 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 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.*

RELEVANT POLICIES

1. DHRM Policy 1.60 was admitted into evidence as Agency Exhibit 6. It's purpose "is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace…when conduct impacts an employee's ability to do …her job and …influences the agency's overall effectiveness." The intent of the policy is "that agencies follow a course of progressive discipline" designed to help employees become fully contributing members of the organization …" and "to enable agencies to fairly and effectively discipline and … terminate employees whose conduct … does not improve or where the misconduct … is of such a serious nature that a first offense warrants termination". (Pol. at p. 1)

The progressive nature of the "disciplinary system typically involves the use of increasingly significant measures" in the form of counseling for minor offenses and written notices for more serious offenses. (Pol. at p. 6 -7). The Group III Written Notice that Grievant received in this case, is reserved for "acts of misconduct of such a severe nature that a first occurrence normally should warrant termination … unless there are mitigating circumstances" (Pol. at p. 9). Grievant's supervisor testified that the Group III Written Notice and termination was appropriate because grievant was a supervisor, her actions were distrustful and unethical, and she was charged (but not convicted) of misdemeanor offenses regarding the two accidents. Agency officials dismissed the impact of Grievant's medical condition on her actions, in large part, because they did not understand the nature of the disease.

2. The written notice cites Grievant's failure to comply with a "Workforce Safety and Health, Motor Vehicle Crashes and Convictions of Moving Traffic Violations Policy" regarding leaving the scene of the May 14 accident. Remarkably, no policy by that name was proffered or admitted into evidence. Nevertheless, all parties agree that the Office of Fleet Management Services Policies and Procedures Manual, (hereinafter referred to as the OFMS policy) admitted without objection as Agency Exhibit 3, is the referenced policy. This Policy, issued by the Department of General Services, applies to vehicles owned and operated by agencies, such as the pickup Grievant was driving when she had her accidents. The Grievant, and agency witnesses testified that Grievant was required not only to report the accident to the Department of State Police, as set forth in Agency Exhibit 3, but also to her supervisor. (Agency Ex. 3 at p. 12)

FINDINGS OF FACT

Grievant was placed on administrative leave with pay on May 18, 2010 pending the result of an agency investigation into two accidents involving her assigned agency vehicle, the first on Friday May 14, 2010 and the second on Sunday May 16, 2010. The investigation concluded that Grievant had deliberately failed to report the first accident and concocted the second accident in an elaborate ruse to cover up the first accident. Grievant was thereafter issued a Group 111 Written Notice on June 16, 2001 and her employment was terminated.

Grievant filed a timely appeal pursuant to the expedited grievance procedure. Following failure to resolve the matter at the second resolution step, the grievance was qualified for a hearing.

Grievant worked for VDOT in various jobs for approximately 24 years. At the time she was terminated, she was a construction manager and, amongst other duties, supervised VDOT inspectors and contract employees on interstate projects. Grievant performed her job satisfactorily and had no prior disciplinary actions. Until she was involved in the two accidents at issue in this case, Grievant had an exemplary 30-year driving record. Grievant's direct supervisor is an Area Construction Engineer. She testified that she began supervising Grievant in October, 2009, and had a good professional relationship with Grievant.

Before she was discharged, Grievant had a history of losing consciousness while performing routine tasks, followed by memory loss and disorientation. She testified that she experienced her first blackout on April 26, 2010 at home in her kitchen. She heard a loud roaring sound in her ears, tried to steady herself by grabbing onto a cabinet, fell and broke her ankle. When she came to, she was on the floor staring at the ceiling. She testified that she was disoriented and does not know, with certainty, how long the episode lasted.

The next day, April 27, she was treated in the emergency room of a nearby hospital. Blood tests were inconclusive as to the cause of her falling. She was referred to an orthopaedist for the broken ankle and to her regular doctor to determine what caused her to lose consciousness. Her doctor ran more extensive tests. He suspected seizures or cardiovascular issues. He referred her to a neurologist and a cardiologist. Her ankle was put in a hard cast and she returned to work with minimum restrictions. She reported the incident to her supervisor, including the fact that she had lost consciousness prior to falling, and experienced memory loss and disorientation afterwards.

She experienced a second blackout episode at home on May 8, but avoided injuring herself by quickly getting down to the floor as soon as she heard the roaring sound in her ears.
This testimony regarding the two episodes of blackout followed by disorientation and confusion was uncontroverted and consistent with Agency records. The length of time Grievant was disoriented and confused is hotly contested. As explained more fully below, this conflict is best explained by the medical evidence. Grievant testified that she was extremely concerned that she did not know what caused her to blackout. She took the first available appointment with the neurologist, to whom she was referred, which was in June 2010. Before

she could be seen by the neurologist, however, she experienced her third seizure on May 14, 2010 while operating her VDOT pickup truck.

The First Accident, Friday May 14, 2010

Grievant admitted in testimony, and in her grievance documents, that she caused the May 14 accident, and failed to report it to the state police and to her supervisor, as required by policy. The Agency takes the position that the grievant deliberately failed to report the accident. The Grievant explained that her failure to report the accident was caused by her medical condition. Based on the totality of the evidence, and in particular the uncontroverted medical evidence from two board certified neurologists, I credit the Grievant's version.

Friday May 14 was a regular work day for Grievant. Grievant testified that she drove her assigned pickup to a location on I 95 to inspect the placement of protective barriers around a damaged guard rail. At approximately 2:15 p.m. she was driving back to her office when she stopped at a strip mall, in [County A], to use the restroom and buy a sandwich at a sub shop she regularly frequented. After getting her sandwich, she got back in her truck that, in accordance with VDOT policy was backed into a parking space. She started to pull out of the parking space, heard the now familiar roaring sound in her ears, and, based on the prior incidents, knew she was going to blackout. Her immediate reaction was to try to stop the truck before it hit the vehicles, parked in the opposite side of the aisle in front of her truck. She managed to stop the truck and blacked out. When she began to get her bearings, she was sitting in the truck with the driver's door wide open and with the key in the ignition. She testified that she did not recall stopping the truck, putting the gear in park, and taking the keys out of the ignition because she was disoriented and confused. She remembered getting out of the truck and walking down the driver's side towards the back of the truck. She testified she did not know, at the time, that the truck had hit an unattended car parked next to it on the right. She testified that she has no memory, as others have suggested, of walking around her truck to examine the vehicle that she hit.[1] She testified that she got back into her truck, and, because she was concerned that she might black out again as soon as the truck started to move, drove slowly around the parking lot a couple of times, and drove back to the VDOT parking lot. She parked the truck and did not drive it again until Sunday May 16. She testified that she does not remember going into the office, talking to the VDOT accident investigator, or sending an e-mail to her supervisor.

The accident was investigated by the [County A] Police, the District Safety Manager and Grievant's supervisor. Unknown to Grievant, the accident was witnessed by two persons who were in the sub shop that grievant had just left. The police officer told VDOT investigators that one witness had identified Grievant as the driver of the VDOT truck. The witnesses told the officer that after the accident, Grievant got out and walked around the truck, examined the damage to the other vehicle, got back into her truck, drove around the parking lot twice, then left. There was no evidence presented regarding the perception, by the witnesses, of Grievant's demeanor and appearance. This is understandable, because the witnesses and the officer were not trying to determine whether grievant was coherent and fully aware, but whether she was

[1] The vehicle she hit was a green 1992 Toyota Camry with an unpainted hood that sustained approximately $350 to the headlight and bumper on the driver's side. (Agency Ex. 1)

trying to find the driver of the parked car that she hit. Based on the eye witnesses' observations, and unaware of Grievant's medical condition, the investigating police officer indicated to VDOT officials that he would seek a warrant for Grievant's arrest for leaving the scene of an accident.

The next day, May 15, 2010, the District Safety Manager, a former police officer experienced in accident reconstruction, inspected the truck and took pictures (Agency Ex. 8). The truck was parked in the VDOT parking lot where Grievant had parked it the day before. It was backed very close to another VDOT vehicle on the passenger side which made it difficult to observe the damage and take pictures. The Safety Manager testified that he did not know which vehicle parked first. He observed that Grievant's truck was damaged on the passenger side from beside the door to the bed. He concluded that the damage occurred as Grievant was pulling out of a parking space and turned to the right too soon. He informed Grievant's supervisor of his conclusion. (Agency Ex. 2)

The Second Accident, Sunday May 16, 2010.

Grievant was instructed by her supervisor to prepare an agenda for an important meeting scheduled for early on Monday, May 17. The purpose of the meeting was to coordinate a significant work order addition to an interstate paving contract between Grievant's team and the contractor's construction management team. Grievant had not prepared the agenda before she left work on Friday and, to catch up on her work, she came to the office on Sunday May 16 to prepare the agenda. When she had done so, she e-mailed the draft agenda to her supervisor to review and edit. Rather than sit around the office and wait for her supervisor to respond, she decided to get a cup of coffee at a [convenience store] that she and her crew frequented daily. She drove to the [convenience store] in her pickup truck.[2] She testified that she parked her truck in the back of the [convenience store] parking lot because construction vehicles typically park in the back, the front lot was small, and it was easier to back into a parking spot in the back lot.

After she got her coffee, she was pulling out of the parking lot just as the driver of a car parked next to her was pulling out of the lot, and the two vehicles collided. Grievant followed procedure, called the state police to report the accident, and stayed on the scene to be interviewed by the state trooper that investigated the accident. According to his report, Grievant said "I was pulling out of the [convenience store] parking lot after getting a cup of coffee and he pulled out too and hit [the] passenger side of my truck I got out to check for damage and to speak with the driver. He drove off. It was an older model American car. The driver was male, possibl[y] Indian or Hispanic. [He] had a flag hanging from the rear view mirror." (Agency Ex.1) The trooper indicated in his report that the crash could have occurred as described by the Grievant.(Agency Ex. 1) The Grievant's hearing testimony was consistent with the police report. The Grievant testified that the other driver was irate and left the scene

[2] Agency officials testified that by using her VDOT pickup to run a personal errand, Grievant had violated the vehicle official use policy. OFMS Policy states that "[d]rivers shall use state owned vehicles or official state business only" (Agency Ex. 3 at p. 8) Grievant supervisor testified that she did not charge Grievant with that violation to avoid piling on.

when she told him she had to report the accident to the state police and she went to the glove box of her truck to get contact information for the state police. Grievant testified that, for the first time, she saw the damage to the passenger side of her pickup and, because she had no memory of the Friday accident, assumed that the damage was caused by this accident. Later that day, Grievant reported this accident to her supervisor and the next day, to the Safety Officer. She indicated in her e-mail and oral reports that the damage to her truck was caused by the Sunday accident. (Agency Ex. 2) She repeated this assertion when she met with her supervisor on Monday May 17, after the scheduled business meeting.

That Monday, the Safety Officer inspected Grievant's pickup truck for additional damage. Finding none, he concluded that grievant had fabricated the Sunday accident. He reported his conclusions to Grievant's supervisor. He also talked to the state trooper investigating the Sunday accident and told him of the hit-and run investigation in [County A]. Upon learning of the Friday accident, the trooper indicated that he would file charges against Grievant if he determined that she had filed a false report regarding the Sunday accident. That same day, Grievant was placed on administrative leave with pay[3] and ultimately discharged on June 16, 2001. And three days after the Safety Officer shared his conclusions with the state trooper, charges were brought against Grievant in [County B].

Grievant was not convicted of any charges

On May 29, 2010 Grievant was charged in [County A] with leaving the scene of the 5/14 accident without making a reasonable effort to find the driver of the unoccupied car or reporting the accident within 24 hours to the police, a Class 1 misdemeanor. On July 12, 2010, the case was *nolle prosequi* on the prosecution's motion. (Respondent's Ex. 5) The Grievant testified that the Commonwealth attorney declined to prosecute the case based on Grievants' excellent driving record, medical diagnosis of epileptic seizures, and evidence that her doctor had stopped her from driving. This testimony was unrebutted.

On May 23, 2001, Grievant was charged, in [County B], with filing a false report regarding the May 16 accident, also a Class 1 misdemeanor. On August 23, 2010, the case was *nolle prosequ*i on the prosecution's motion. (Respondent's Ex. 4) Grievant testified that the Commonwealth's attorney declined to prosecute the case based on her excellent driving record, medical diagnosis of epileptic seizures, and evidence that she was not presently operating a motor vehicle. This testimony was unrebutted.

[3] Grievant was not told why she was placed on administrative leave. Approximately two weeks after she was on administrative leave, she learned for the first time that [County A] had issued a warrant for her arrest in connection with the Friday May 14 accident. She contacted [County A] Police and after speaking with the investigating officer, reviewing witness statements and pictures of her pickup truck, concluded that the predominant amount of damage to her truck was caused by the Friday accident. Grievant gave forthright and candid testimony at the hearing acknowledging that she was involved in a accident on Friday May 14. "I think the way the [Safety Officer] described it is pretty accurate…I don't recall it but I have no reason to believe it did not happen. I am the only one who drives this truck". (Hearing Testimony Tape 5) She maintained, however, that the truck was involved in the Sunday accident.

Grievant's medical condition

On June 17, 2010, the day after the Agency terminated her employment, Grievant was diagnosed as suffering from a [condition] that was causing her blackouts and memory loss. The diagnosis was rendered by a board-certified neurologist. In a Declaration offered by Grievant, and admitted into evidence without objection as Respondent Ex. 1, the doctor stated that he began treating Grievant in June 2010 for "sudden loss of consciousness in April 2010, followed by repeated episodes of loss of consciousness in June." (¶ 4) He explained that "[o[n June 17, 2010, [Grievant] underwent an electroencephalogram (EEG) to test and record electrical activity in her brain….(¶ 5) The doctor has extensive experience and training in conducting and interpreting EEG's. … The doctor concluded that Grievant's "symptoms and the results of the EEG are consistent with complex partial seizures, which most commonly arise from the temporal lobe." (¶ 8)

In a second declaration, the doctor elaborated on the memory loss and confusion that follow a seizure episode.[4] He stated that "[p]ersons who experience a complex partial seizure are typically amnestic in the aftermath of the seizure. This amnesia can, in some cases, last for many hours after the seizure. (¶ 4) Moreover, he explained, "[p]ersons who experience a complex partial seizure typically have no recollection of how long their seizure lasted, and may have a skewed and inaccurate sense of the passage of time in the aftermath of the seizure." (¶ 5) The neurologist prescribed …medication to prevent additional seizures. Grievant testified that she had not had a seizure since being on the medication.
Agency witnesses testified that they had no medical training in[Grievant's condition]. Yet despite the fact that, by their own admission, they do not understand the symptomology of the disease, they did not proffer any medical evidence in the case.

ANALYSIS

VDOT was not justified in terminating grievant for failure to report the May 14, 2010 accident.

It is clear that Grievant's … episodes resulting in blackout and memory loss began in April 2010, before she was discharged, when she fell in her kitchen and broke her ankle. Grievant reported the April blackout to her supervisor, including the fact that she blacked out before she fell and experienced memory loss and disorientation afterwards. Her supervisor testified that she was aware that grievant broke her ankle when she fell, but denied that Grievant told her of any other medical condition until after she was involved in two accidents in May, 2010. Both witnesses gave credible testimony at the hearing. However, I credit Grievant's version on this point. She gave candid straight-forward answers to all questions. She strikes me as the type of

[4] This Second Declaration was filed after the hearing to permit Grievant the opportunity to address the issue of how long Grievant could reasonably be expected to shake off the effects of a seizure episode. The agency did not object to the ruling and the exhibit. Grievant also filed a Declaration by another board-certified neurologist that corroborated the Second Declaration.

person who would give a detailed account of the events leading up to breaking her ankle, including the fact that she blacked out. Both witnesses testified that they had a good professional working relationship. Indeed, her supervisor testified that she did not have hard feelings or distrust of grievant prior to the two accidents in May. Therefore Grievant had no incentive to lie, obfuscate or to evade. Thus, it is more likely than not, that the Agency focused only on the broken ankle because there was a medical diagnosis confirming that injury. The Agency did not focus on the fact that grievant had not only blacked out, but experienced memory loss and disorientation in the aftermath of the fall, because Grievant's doctors were, as yet, unable to diagnose the … condition that caused the blackout and memory loss. Clearly, Agency officials knew, or should have known, or at least suspected, that Grievant was experiencing a serious medical condition before terminating her. Nevertheless, the Agency continued to let Grievant operate her assigned pickup truck oblivious of the potential risk of harm to Grievant and to the travelling public. On April 14, 2010 that risk materialized, she suffered [a] seizure and crashed into a parked vehicle.

The Agency raises several points to support their contention that Grievant knew she had a minor accident with her vehicle and tried to conceal that fact by deliberately staging another accident. First Agency officials argue that eye witnesses saw Grievant crash into the parked vehicle, get out of her truck and examine the damage to the other vehicle, then drive off without making any attempt to locate the other driver or leave a note. Agency officials never interviewed the witnesses. Indeed, they still do not know the identities of the witnesses. There was no evidence presented regarding the witnesses' perception of Grievant's demeanor and appearance. Their testimony therefore shed no light on whether grievant was dazed and disoriented when they observed her. The medical evidence, on the other hand, clearly supports Grievant's description of her state of mind. According to the treating neurologist, Grievant's "symptoms and the results of the EEG are consistent with complex partial seizures…." Moreover, he said, "[s]ome patients who suffer complex partial seizures may appear to be fully conscious during the seizure, and some wander around, unaware of what they are doing." (Declaration [S] at ¶¶ 8, 9)

Second, Agency officials assert that Grievant was not credible because she changed her statements, ranging from 5 to 30 minutes, regarding how long she was disoriented after the accident. The medical evidence supports the grievant on this point. Both neurologists state that "[p]ersons who experience a complex partial seizure are typically amnestic in the aftermath of the seizure. This amnesia can, in some cases, last for many hours following the seizure." Such persons, "typically have no recollection of how long their seizure lasted, and may have a skewed and inaccurate sense of the passage of time in the aftermath of the seizure." (Second [S] Declaration at ¶¶ 4, 5) (Declaration [C] at ¶¶ 5, 6)

Third Agency officials argue that Grievant seemed normal when she talked to the Safety Officer, and sent an e-mail to her supervisor on the afternoon of May 14, after she returned to the office. Again the medical evidence explains that the appearance of being normal is consistent in the aftermath of a seizure. (Declaration [S] at ¶ 9)

Fourth, Agency officials argue that they acted properly in terminating Grievant because the police charged her with a Class 1 misdemeanor for leaving the scene and not reporting the accident to the police. What Agency officials ignore, however, is the fact that, after learning of Grievant's excellent driving record and medical diagnosis, the Commonwealth Attorney declined to prosecute the case.

Far from supporting the agency's position, the evidence in this case demonstrates that Agency officials find it hard to believe or accept that behavior which looks deliberate may not be.

VDOT was not justified in terminating Grievant for "falsification of a report to management" regarding the May 17, 2010 accident

On Monday May 17, 2010, Grievant transmitted an e-mail to Agency management, informing them that her pickup was side-swiped, the previous day, at a [convenience store] in [County B]. The e-mail stated that "[d]amage is to the passenger side behind the door and before you get to the rear wheel well." (Agency Ex. 2) An agency investigation concluded that the report was "totally fabricated" and Grievant was charged with "falsification of a report to management."

To sustain a falsification charge, the Agency must prove by preponderant evidence that Grievant knowingly supplied incorrect information with the intention of defrauding, deceiving or misleading the agency. *See, Naekel v. Department of Transportation, 782 F.2d 975, 977 (Fed. Cir. 1986*).[5] Accordingly, the issue before the Hearing Officer is whether Grievant reported false or misleading information in her e-mail transmittal and, if so, did the Grievant have the intent to deceive the Agency. Intent is a state of mind which is generally proven by circumstantial evidence. *Riggin v. Department of Health and Human Services, 73 M.S.P.R. 50, 52 (1982*). Thus, a Hearing Officer may consider plausible explanations for a Grievant's provision of incorrect information in determining whether the misrepresentation was intentional. *See, Nelson v. U.S. Postal Service, 79 M.S.P.R. 314*. Likewise, the absence of a credible explanation for the misrepresentation can constitute circumstantial evidence of intent to deceive. Id. Intent may also be inferred when a grievant makes a misrepresentation with a reckless disregard for the truth or with a conscious purpose to avoid learning the truth. Id.

The evidence supports a finding that the information Grievant provided to VDOT was incorrect but not defrauding, deceptive or misleading. The agency argues that Grievant knew her truck was damaged on Friday, May 14 2010 and not on Sunday May 17, 2010 as she reported. Grievant argues that she saw the damage to the truck, for the first time, when she was hit in the [convenience store] parking lot on May 17. Grievant admitted that the predominant amount of the damage occurred in the Friday accident. Grievant has provided a plausible, medically supported reason for her lack of memory. She testified that she had no memory of a Friday accident until approximately two weeks after she was terminated when she talked to the police officer investigating the Friday accident. According to the treating neurologist, Grievant's

[5] Other Hearing Officer Decisions apply the same test based on dictionary definitions of falsification. See eg., Case No. 8975.(Black's Law Dictionary defines "falsify" as "To counterfeit or forge; to make something false; to give a false appearance to anything.") (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.")

"symptoms and the results of the EEG are consistent with complex partial seizures…." (Declaration [S] at ¶ 8) Both neurologists state that "[p]ersons who experience a complex partial seizure are typically amnestic in the aftermath of the seizure. This amnesia can, in some cases, last for many hours following the seizure." (Second [S] Declaration at ¶ 4) (Declaration [C] at ¶ 5) Grievant has demonstrated, through her unrebutted medical evidence, that she had a complex partial seizure on May 14 and had no independent memory of the accident.

The agency argues that grievant had to have seen the damage to the truck before she drove it on Sunday, because she was required, by policy, to inspect it for damage prior to moving. OFMS Vehicle Use Policy states, in pertinent part, that "[a]ll state drivers **should** perform a walk around visual inspection of a state vehicle prior to moving…" (Agency Exhibit 3, § 2:11 A at p. 8) (emphasis added) On its face, the policy suggests, but does not require an inspection. Moreover Grievant testified that she did not follow the policy because she was unaware of it and never saw other drivers making such inspections. Indeed, Grievant's supervisor testified that she does not always perform a visual inspection before she operates a VDOT vehicle.

The Agency argues that the Sunday accident never happened because the Grievant hid the damage on Friday by parking it very close to another vehicle and there was no additional damage to the truck. In support of this argument, the Agency presented pictorial evidence of the damage to the truck the day after it was involved in the Friday accident. There were no pictures taken of the truck after it was involved in the Sunday accident. As stated earlier, Grievant agree that most of the damage occurred in the Friday accident. The pictures show the truck parked very close to another VDOT vehicle. The Safety Officer who took the pictures, however, testified that he did not know which vehicle was parked first. Moreover, he conceded under cross examination that it is possible to have an accident with no body damage.

The Agency argues that the Sunday accident was fabricated because Grievant was charged in [County A] with filing a false police report which is a Class 1 misdemeanor. It is true that Grievant was charged with Class 1 misdemeanors in both accidents, but the cases were *nolle prossed*. What is more revealing is that the Commonwealth declined to prosecute the case after Grievant provided evidence of her good driving record and medical diagnosis of complex partial seizures..

The Agency argues that the accident was concocted by Grievant because there were no witnesses. The evidence Agency officials offer on this point is that Grievant parked her truck in the rear of the [convenience store] parking lot where there were no surveillance cameras and Grievant had to walk to the store over gravel with a cast over her broken ankle. Grievant plausibly explained that she parked her truck in the rear because the front lot was small, it was easier to back in and most construction vehicles parked there. Grievant testified that the other driver fled the scene after she told him that she had to report the accident to the state police. The agency offered conjecture but no hard evidence to support their position. Clearly, the investigating officer credited Grievant's version of the accident. He determined that the accident could have occurred as Grievant had reported. His view changed only after he talked to the Safety Officer.

The Agency also argues that Grievant created an alibi to work in the office on Sunday May 16 because she could have transmitted the draft via her blackberry, she had no permission to work outside her regular schedule, there was no reason to drive her VDOT pickup truck to run a personal errand, and no reason to buy coffee at the particular [convenience store] because there were other places closer to the office to buy coffee. This is merely conjecture. Grievant, on the other hand, offers plausible reasons for her actions. She worked on Sunday to meet a deadline imposed by her supervisor. The prior approval policy was to manage overtime and she was not claiming overtime. She did not use the blackberry because it was new and unfamiliar, and had a smaller key board than the office desk top computer. And she went to the particular [convenience store] because she frequented it daily and presumably liked their coffee.

In summary, the Agency's arguments do not present any plausible reasons as to why Grievant would risk her 24 year career with the Agency over an accident that caused minimal damage to her state vehicle, and go to extraordinary lengths to cover up the accident by concocting a fictitious accident.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reversed**. The Agency is directed to reinstate Grievant to the same or similar job to the one she held prior to her termination,[6] pay her **back pay** less interim earning and restore her full benefits. Grievant's attorney is directed to submit a petition to the Hearing Officer for reasonable attorneys' fees within 15 calendar days from the issuance of this opinion, in the manner and form prescribed by §7.2 (e) of the Grievance Procedure Manual.

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

[6] Grievant is realistic about getting her old job back. She testified that her disease and nature of the work make it unlikely that the Agency would reinstate her to that position. She believes that she could work in other areas of the Agency because of her experience, skills and training. The Hearing Officer offers no view on where Grievant should be placed on reinstatement.

Human Resources Management, 101 N. 14th Street, 12th 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, Main Street Center, Suite 301, Richmond, Virginia 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 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.

ENTER:

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Neil A. G. McPhie, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).