

Issue: Group III Written Notice with Termination (failure to follow instructions and falsifying records); Hearing Date: 03/15/16; Decision Issued: 04/13/16; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 10770; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 04/28/16; EDR Ruling No. 2016-4346 issued 05/26/16; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10770

Hearing Date: March 15, 2016

Decision Issued: April 13, 2016

PROCEDURAL HISTORY

On January 11, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for unsatisfactory performance, failure to follow policy, and falsifying records.

On January 13, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 16, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 15, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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 Department of Motor Vehicles employed Grievant as a Generalist Senior at one of its facilities. Her duties included completing licensing and titling transactions for customers. Her work duties were satisfactory to the Agency.

The Agency typically registers vehicles for up to three years. In some counties such as County 1, however, vehicles could only be registered for up to two years. Under State regulation, vehicles garaged in the jurisdiction (garaged jurisdiction) of County 1 are required to have a vehicle emissions inspection completed every two years. Because vehicle emissions were required every two years for County 1, vehicles garaged in County 1 were eligible only for a two year registration (with limited exceptions). One of Grievant's duties included explaining vehicle emission requirements to customers. She had in-depth knowledge of the requirement for a two year registration in County 1.

On February 9, 2009, the Agency issued a Certificate of Title for a Vehicle to Grievant and her Husband. Grievant and her Husband signed the Certificate on April 7, 2011 as sellers with Grievant being the sole buyer. Grievant wrote that the garaged jurisdiction was County 1. The Agency received the document on April 11, 2011.

On April 11, 2011, the title was reissued in Grievant's name only with a garaged location of County 1. The vehicle passed an emissions test on April 8, 2011. The next

date for an emissions test was April 30, 2013.¹ The Vehicle Emissions Inspection Report states, “you may now register this vehicle for a period of up to two (2) years.”²

On April 21, 2011, registration for the Vehicle was reissued. The garaged location remained County 1.

On October 15, 2011, the garaged jurisdiction for the Vehicle was changed from County 1 to Another State. The Vehicle was not garaged in Another State on a permanent basis. In fact, it remained principally garaged in County 1 and Grievant continued to use the Vehicle to commute to work.

On August 24, 2015, Grievant submitted an Address Change Request to Ms. W at the Agency’s Facility. She changed her address from Address A to Address B in County 1. The form contained a Vehicle Registration Mailing Address section that Grievant left blank.

Ms. W processed the Address Change Request form. Ms. W then printed out the registration card for Grievant’s vehicle. The registration card showed the garaged jurisdiction as being Another State. Grievant had resumed working. Grievant “finished up” with a customer. Ms. W approached Grievant and indicated the form showed the Vehicle being registered in Another State. Grievant said she knew that. Ms. W asked Grievant if she wanted Ms. W to “fix it”. Grievant said “No” because she would “take care of it.” Grievant did not change the garaged location for the Vehicle.

In September 2015, the Manager, Ms. J, spoke with Grievant and said that Ms. W told her that Grievant’s Vehicle was garaged in Another State. Ms. J asked why. Grievant said she was going to change it but did not give a reason why the Vehicle was garaged in Another State. Ms. J told Grievant that she needed to change the garaged location for the Vehicle. Grievant did not make the change.

On November 16, 2015, the Manager spoke with Grievant about her failure to change the garaged jurisdiction for her Vehicle. Grievant explained that she was “going through things with her husband” and questioned why the Agency had the right to check her records. Grievant said she had been paying personal property taxes and wanted to know the difference between her changing jurisdictions and customers changing jurisdictions. Grievant said her Vehicle would not have passed an emissions test and she questioned how she would get to work.

On November 16, 2015 at 8:12 p.m., Grievant accessed the internet and renewed the registration for her vehicle. The new registration expiration date was in April 2019.

¹ Evidence was not presented regarding registration activities in April 2013.

² Grievant Exhibit 1.

On November 16, 2015 at 9:52 p.m., Grievant accessed the internet and changed the garaged jurisdiction from Another State to County 1.

In November 2015, Grievant entered the office where she worked and began waiving her registration form. Grievant announced repeatedly to other employees that she received a three year registration.

Grievant used the Vehicle to commute to work for at least four years without interruption. Grievant paid County 1's personal property taxes on the Vehicle since 2011.

Grievant sent an email to Ms. S on January 5, 2016 seeking relocation to another facility due to work place harassment.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."³ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Connection with Work

In order to take disciplinary action against an employee for behavior occurring outside of an employee's job duties, an agency must establish a connection between the behavior and the employee's work duties with the agency. The Agency has established a connection based on several factors. First, the Agency and State policies placed Grievant on notice of the Agency's expectations. The Agency's Mission is:

DMV promotes security, safety, and service through the administration of motor vehicle and tax related laws.

The Agency's Employee Code of Conduct provides:

DMV employees are expected to adhere to high standards of conduct. ***
[I]t is essential that employees perform their duties and conduct their official affairs in accordance with the following guidelines:

Uphold the laws and regulations of the United States and the Commonwealth of Virginia ***

³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Adhere to all policies and procedures of the Department of Motor Vehicles and other state agencies ***

Guard against conflict of interest and the appearance of impropriety.⁴

DHRM Policy 1.60, Standards of Conduct provides:

Employees who contribute to the success of an agency's mission:

Perform assigned duties and responsibilities with the highest degree of public trust. ***

Make work-related decisions and/or take actions that are in the best interest of the agency. ***

Comply with the letter and the spirit of all state and agency policies and procedures, the conflict of interest act, and Commonwealth laws and regulations. ***

Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties.

Second, Grievant was responsible for applying the Agency's regulations such as the requirement for an emissions permit. Although a private citizen could have achieved the same level of knowledge about registration preconditions, Grievant's position with the Agency afforded her expertise in the Agency's title registration requirements. Third, an employee, Ms. W, notified Grievant of the incorrect garaged jurisdiction for her Vehicle yet she chose to do nothing about it. Fourth, in September 2015, the Manager told Grievant to fix the error yet Grievant ignored the instruction. Fifth, only after the Manager spoke to Grievant again and told Grievant to make the change did Grievant do so. Grievant knew she should not have received a three year registration but obtained one anyway by obtaining the renewed registration first and then changing the Vehicle's garaged jurisdiction and hour and forty minutes later. Sixth, Grievant flaunted her ability to obtain a three year registration by waiving it around in the office for other employees to see. She shared her violation of the Agency's regulations with other employees who were also responsible for enforcing the Agency's regulations.

Falsification of Records

"[F]alsification of records" is a Group III offense.⁵ Falsification is not defined by the Standards of Conduct but the Hearing Officer interprets this provision to require

⁴ Agency Exhibit 6.

⁵ See, Attachment A, DHRM Policy 1.60.

proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

Grievant lived in County 1 and garaged her Vehicle in County 1 continuously since April 2011 when she received her first Vehicle emissions report. The report was set to expire on April 30, 2013. On October 15, 2011, Grievant changed the DMV garaged jurisdiction records to show that her Vehicle was garaged in Another State thereby avoiding a Vehicle emissions test. Grievant was notified by Ms. W that the garaged information was in error on August 24, 2015. Grievant had the opportunity to correct the information but chose not to do so. Grievant was reminded of the error in September 2015 by Ms. J but Grievant chose not to correct the error. Grievant did not correct the DMV record until November 16, 2015 and only after she obtained a three year registration that she knew she was not entitled to receive. The Agency has presented sufficient evidence to show that Grievant falsely reported to the Agency that her Vehicle was garaged in Another State. Even though two Agency employees pointed out the error, Grievant ignored their requests and continued with falsification of the Vehicle's garaged jurisdiction. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for the falsification of records. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that she was unaware of the vehicle being garaged in Georgia because her Husband took care of such tasks. The Vehicle was in Grievant's name and under her control in April 2011. Grievant's Husband did not testify, but if the Hearing Officer assumes for the sake of argument that the Husband made the initial change of garaged jurisdiction, Grievant was notified of the error on August 25, 2015 but took no action to correct the problem. Grievant made the falsification her own by taking no action to correct it.

Grievant argued that when she submitted the Address Change Request she left the Vehicle Registration Mailing Address section unfilled because she wanted to inform the Agency that her vehicle was garaged at her residence in County 1. This argument is unpersuasive. Grievant submitted the form on August 24, 2015. If her intent was to notify the Agency of a change of garaged jurisdiction, she would have informed Ms. W to make the change as Ms. W asked to do.

Grievant argued that her confidential information regarding her Vehicle was improperly accessed by Agency employees. If the Hearing Officer assumes for the sake of argument that this assertion is true, it would not affect the outcome of this case. Grievant's titling information is relevant to the grievance and nothing in policy prohibits an agency from using improperly (or illegally) obtained information to support disciplinary action. The "exclusionary rule" does not apply outside of criminal proceedings.

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 Human Resource Management"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.

Grievant argued that she was singled out for disciplinary action. The evidence showed that the Agency learned of her behavior only because she submitted a change of address that contained incorrect information. The Agency accessed the title information for another employee but concluded there was no basis for disciplinary action. The other employee corrected an error when the error was brought to the employee's attention. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant argued that the Agency failed to inform Grievant of her rights under the grievance procedure and failed to comply with the requirements of the grievance procedure. Employee rights under the grievance procedure are available to State employees through the DHRM website and employees are routinely notified of those policies during orientation. Grievant resigned from her position but then changed her mind. The Agency permitted her to challenge the disciplinary action through the Grievance Procedure. Steps in the Grievance Procedure are bypassed in circumstances where employees are removed from employment. A grievance challenging removal proceeds directly to hearing. Grievant had the opportunity during the hearing to present whatever relevant evidence she wanted to present and argue that the discipline should be reversed. Grievant received sufficient procedural due process in this case.

⁶ Va. Code § 2.2-3005.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁷ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.⁸

Grievant engaged in protected behavior. On December 30, 2015, Grievant submitted a request to Ms. S to be relocated to another DMV office due to work place harassment. Grievant submitted a request for leave on January 4, 2016. She suffered an adverse employment action because she received disciplinary action. Grievant did not establish a connection between her protected activity and the adverse employment action. Grievant was disciplined because of her actions relating to her Vehicle and not as a pretext for retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

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 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

⁷ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

⁸ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. 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.⁹

[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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.