

Issues: Two Group II Written Notices with Termination (failure to follow policy);
Hearing Date: 03/01/18; Decision Issued: 03/20/18; Agency: DMV; AHO: Jane E.
Schroeder, Esq.; Case No. 11163; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

DECISION OF THE HEARING OFFICER

In the matter of Case #11163

Case Heard: March 1, 2018

Decision Issued: March 20, 2018

PROCEDURAL HISTORY

The Grievant was employed by the Agency. On December 19, 2017, the Agency issued two Group II Written Notices to the Grievant for failure to follow instructions or policy. The Grievant was terminated. The Grievant filed a Grievance on January 11, 2018. The relief requested by the Grievant was to have the decision to terminate employment reversed and her employment reinstated.

A pre-hearing conference was held on February 2, 2018. The date and place of the hearing were subsequently set for March 1, 2018. One week prior to the hearing, the Agency submitted the list of witness and copy of exhibits. The Grievant submitted no documents. The case was heard on March 1, 2018, beginning at 9:30 a.m., and concluding at 11:52 a.m. The Grievant did not appear.

An advocate appeared for the Agency. The Agency's Exhibits 1-9 were entered into evidence. Two witnesses for the Agency testified. The hearing was recorded on a digital recorder and stored on two compact disks.

APPEARANCES

Advocate for the Agency

Witnesses for Agency: 1. Deputy Director for the Agency
 2. Customer Services Manager

Witnesses for Grievant: none

ISSUE

Whether the two Group II Written Notices Issued to the Grievant on December 19, 2017 and subsequent termination should be sustained, modified or revoked.

BURDEN OF PROOF

In disciplinary actions, the agency must present its evidence first and the burden of proof is on the Agency to show by a preponderance of the evidence that its action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence

which shows that what is sought to be proved is more probable than not (Grievance Procedure Manual). This case is a disciplinary action. In this case, the agency must prove that it is more likely than not that the Grievant failed to follow instructions or policy. The agency must prove that issuing two Group II Written Notices and termination of the Grievant was warranted and appropriate.

FINDINGS OF FACT

1. The Grievant was employed by the Agency for more 10 years. In her position as Front Counter Customer Service Representative (“CSR”), she was responsible, among other duties, to assist customers in vehicle titling and licensing transactions.¹ The Agency has a Vehicle Licensing Guide including a six-page section on Titling a Motor Vehicle, a four-page section on Evidence of Ownership to Title a Motor Vehicle, and a nine-page section on Odometer Reading Disclosure, Discrepancies and Corrections.²

2. On October 3, 2017, the Grievant processed two customer transactions involving the titling of a vehicle. The first transaction was the processing of an application by Customer A for Virginia Certificate of Title and Registration of a car with a previous Certificate of Title from Indiana. The second transaction was the processing the transfer of the new Virginia Title from Customer A to his father, Customer B.³

Transaction 1: Application by Customer A for Virginia Title for vehicle with Indiana Title

3. The Customer Service manager testified the Indiana title is the first document that the CSR should review to determine if the transaction will be processed. If there are errors or omissions on the back of out-of-state title or the attached Reassignment Form or Bill of Sale, the customer is to be advised to resubmit the application for a title after the errors or omissions are addressed.⁴ In this case, the Grievant processed the application for a title without the needed information from the customer. The specific errors are addressed as follows:

A. The front of the Indiana title issued on March 2, 2017, listed the owner(s) name as XXX Financial Services, Los Angeles, CA, with a mailing address as XXX Automotive Services of Nashville, IN. On the back of the Indiana Title, “Any person signing on behalf of a company must state their position.” The seller had signed his name, but did not fill in the blank asking for “Position” and the blank asking for “Dealer Number (if applicable)”. These items should have been included since the owner listed on the front of the title was a business.⁵

¹ Testimony of Customer Service Manager

² Exhibit 5, pages 30-48.

³ Testimony of both witnesses; Exhibit 4, pages 17, 18, 25, 26.

⁴ Exhibit 5, page 32: Front Counter CSR, 2.

⁵ Exhibit 4, page 18.

B. On the back of the Indiana title the purchaser is listed as “ZXXX Pre-owned Vehicles”. The printed name of the purchaser was not written next to the signature. Under the section, “First Re-assignment by Registered Dealer Only,” the Seller is listed as ZXXX Pre-owned Vehicles. The purchaser name was listed as CXXX Auto and Shipping Serv. The printed name of the purchaser was not included next to the signature. The CSR Manager testified that the title should not have been processed with the printed names missing.⁶

C. In addition to the Indiana Title, Customer A submitted three other forms. Each of these forms was problematic and should have alerted the Grievant to follow agency policy to reject the application or at least alert the CSR Manager:

a. The State of Maryland Form VR-182: Dealer’s Bill of Sale and/or Re-assignment for new and Used Vehicles (“Reassignment” herein) with a date of sale of April 3, 2017. The Reassignment should have referred to the Indiana title. However, the title listed was a different number and from the state of New Jersey, not Indiana. The mileage is listed as 155413. Customer A is listed as the buyer. The form shows that Customer A bought the vehicle from CXXX Auto and Shipping Serv. The Bill of Sale shows a different seller. The certified selling price is listed as “resale.” A dollar amount should have been written, since this was a sale to a person (Customer A) and not a dealership.⁷

b. A Bill of Sale from PXXX Auto Auction with a sales date of April 1, 2017. The Bill of Sale shows the consignor as ZXXX Pre-owned Vehicles, not CXXX Auto & Shipping Serv. as listed in the Reassignment form. The Bill of Sale had no Buyer Information listed, and the printed purchaser’s name was missing. The sale price was listed as \$4725. The mileage is listed as 155402.⁸

c. The State of Maryland Form VR-181: Bill of Sale Notary Form with a date of April 3, 2017. The mileage to be notarized on this form was listed as 155413. The date for the buyer section is missing. The Bill of Sale Notary Form was not notarized.⁹

D. The actual Odometer reading on the front of the Indiana title on 2/10/17 was 155,214 miles.¹⁰ The back of an Indiana Title is a form used to transfer the ownership to a new owner. The instructions at the top of the page state that the seller is responsible for completing the form. Under the instructions, there are six blank boxes for the seller to write the actual mileage from the odometer. Instead of numbers, the letters “EXEMPT” were written in the boxes. Below the boxes

⁶ Exhibit 4, page 17, 18. Testimony of CSR Manager.

⁷ Exhibit 4, page 19.

⁸ Exhibit 4, page 20.

⁹ Exhibit 4, page 21.

¹⁰ Exhibit 4, page 17.

was written “155,402.”¹¹ In this case, the vehicle in question was less than ten years old and was not exempt from listed the actual mileage in the boxes provided. The CSR Manager testified that this error alone should have alerted the Grievant that this application should not have been processed until corrected by the customer.

4. The Application for Certificate of Title and Registration submitted by Customer A had several areas of concern.

- The Purchase Date is listed as October 1, 2017 from PXXX Public Auction. But the Bill of Sale from PXXX does not list Customer A as the buyer.
- The Sales Price was originally written as Gift. That was crossed out and \$4250 was written. That amount is different from the \$4725 from the Bill of Sale.
- The odometer reading of 143,875 is substantially less than the odometer reading of 155214 on the Indiana title.
- On the bottom of the second page of the application, the Grievant was to write the proof of address. She wrote “MD DL#”, but did not write the Maryland Driver’s License number.
- There were six places on the application (shown by circles on Exhibit 4, pages 22 and 23) that the Grievant either allowed the customer to submit an altered form or that Grievant altered the customer’s application form by blacking out information.¹²

Transaction 2: Transfer of the new Virginia Title from Customer A to his father, Customer B

5. On the front of the new Virginia Title issued on October 3, 2017 to Customer B, the odometer mileage is printed as 155413. On the bottom of the same page, the odometer reading is written as 143,875. On the back of the title, the top section, Section B: Dealer Reassignment, is sometimes used by the CSR managers to correct errors that the Customer Service Representative finds and brings to the CSR manager’s attention. In this case, this section was used by the Grievant, not the CSR manager, to have the customer change the odometer error. If a CSR manager would have been consulted, as per policy, the CSR manager’s initials would have been written on the back of the title in the top left corner. There were no such initials. The CSR manager testified that she was not consulted about the change by the Grievant, nor was the assistant CSR manager on duty consulted.¹³

¹¹ Exhibit 4, page 18

¹² Exhibit 4, pages 22 and 23.

¹³ Exhibit 4, pages 25 and 26. Testimony of CSR Manager.

6. The CSR Manager requested an investigation of these two transactions by the Law Enforcement Division of the Agency. The Investigative Findings from the Law Enforcement Division noted that, in the second transaction, the title was processed at 16:52 with an odometer reading of 155,413 and the new title was issued in the name of Customer B. After the transaction was concluded, the Grievant changed the odometer reading in the Agency computer system to 159,413, with no record a new title printed. The Grievant was interviewed on October 16, 2017, and acknowledged those facts. Customer B was contacted by the Law Enforcement Division to confirm that the title he had showed 155,413 as the odometer reading.¹⁴

7. Both the Deputy Director and the CSR Manager testified that changing of the odometer on title in the computer system after the customer had left is a serious violation of policy. The customer has possession of a title that has the wrong odometer reading. The management of the Agency must then contact the customer and have a new title issued.

8. After concluding that Grievant did not follow instructions and policy for these two transactions, the management sent the Grievant a due process letter on November 18, 2017 with a subject line: **Substandard Performance Concerns/Request for Response**. The Agency allowed the Grievant to respond to the Agency's concerns. The Grievant responded by email on November 22, 2017: "I am writing in response to your request...pertaining to the incident of my titling a vehicle on Oct 3, 2017. I sincerely apologize for my oversight and mishap. I was severely fatigued and just made some honest mistakes."¹⁵

9. The Agency issued a separate Group II Written Notice to the Grievant on December 17, 2017 for each of the two transactions.¹⁶

10. On January 11, 2018, the Grievant filed Dismissal Grievance Form A.¹⁷ A hearing was conducted on March 1, 2018 to determine whether the two Group II Written Notices and the termination should be sustained, modified or revoked.

11. The CSRs, including the Grievant, were trained to follow the Agency Vehicle Licensing Guide in processing transactions, including titling a motor vehicle, evidence of ownership, and odometer reading. The Agency had a particular concern about CSRs accessing the customer's record after the customer had left the counter. The Commissioner of the Agency sent out three emails, including one in April 2017 that warned employees that such acts would result in immediate

¹⁴ Exhibit 3, page 11 and 12.

¹⁵ Exhibit 7, pages 63-65.

¹⁶ Exhibit 1, pages 1-2.

¹⁷ Exhibit 8, pages 8 and 9.

dismissal. The Deputy Director also sent out an email regarding accessing a customer's record when the customer is not there. The CSR Manager reviewed these emails with the CSRs.¹⁸

12. On July 28, 2014, the Grievant was given a Written Counseling for Substandard Performance: Failing to Follow Policy after having two meetings with the management team which addressed an instance when the Grievant accessed a customer's vehicle record after the customer left and the Grievant changed the odometer branding from "actual" mileage to "exceeds". The Grievant was reminded in the Written Counseling that the Grievant had signed and dated the Agency Information Security Policy (AD-806) and Acceptable Use Policy and User Agreement Acknowledgement which states: "Do not create, access, alter, delete or release any records that [the Agency] maintains except as necessary to perform your assigned duties." "Moreover, CSCOM-301 clearly states that CSC Management/Designee are the only authorized personnel allowed to delete titles from inventory. It must be stated that your actions...are a clear violation of policy. Changing/altering/deleting a customer record and reprocessing a transaction when the customer is not standing in front of you is a violation of policy."¹⁹

13. On March 3, 2015, the Grievant was given a written counseling memo from management informing her that she need improvement in unsigned vehicle applications, titled/registered in wrong name, and mileage discrepancy.²⁰

14. On March 28, 2015, the Grievant was given a written memo from management regarding Substandard Performance Concerns.²¹

15. On May 4, 2015, the Grievant was given a written counseling memo from management regarding failing to follow policy. The Grievant created a customer record without proof of address. The Grievant was counseled that she must comply with policy regarding records.²²

16. On June 12, 2015, the Grievant was given a written memo from management regarding her failure to follow policy and procedure when the Grievant incorrectly processed a driver license application and vehicle transaction including recording mileage on a vehicle different from what the customer stated on the title and failure to seek management input or notify management of any discrepancies.²³

¹⁸ Exhibit 5, pages 30-48; Testimony of Deputy Director and CSR Manager

¹⁹ Exhibit 6, page 61.

²⁰ Exhibit 6, page 60.

²¹ Exhibit 6, page 59.

²² Exhibit 6, pages 57-58.

²³ Exhibit 6, page 56

17. On July 14, 2015, the Grievant was given a written counseling memo from management for failure to follow policy and procedures regarding two transactions that the Grievant processed. In the first transaction the Grievant failed to notify management and get authorization prior to voiding a processed transaction. In the second transaction, the Grievant recorded the mileage as 23156 despite the customer's documents stating the mileage was 3949.²⁴

18. On October 14, 2016, the Grievant was given a verbal counseling with a follow-up email regarding job performance. The Grievant had altered the odometer reading and had missing paperwork. On January 4, 2017, the Grievant was given a verbal counseling with a follow-up email regarding job performance when she entered the wrong odometer reading type. On March 21, 2017, the Grievant was given a verbal counseling with a follow-up email regarding job performance when there was an odometer reading alteration. On June 29, 2017, the Grievant was given a verbal counseling with a follow-up email regarding job performance when the odometer was entered incorrectly.²⁵

19. On September 29, 2015, the Grievant was issued a Group II Written Notice (with an inactive date of September 29, 2018) for attendance/excessive tardiness and unsatisfactory performance.²⁶

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code ' 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia. It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions for a grievance 2-1201 and §53.1-102.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 government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

The Operating Procedure, “*Standards of Conduct*,” under Code of Virginia §2.2-1201 and §53.1, sets forth the Standards of Conduct and disciplinary process that the Agency must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace or outside the workplace when the conduct impacts an employee’s ability to do their job, or influences the agency’s overall effectiveness.

Standards of Conduct provides a set of rules governing the professional conduct and

²⁴ Exhibit 6, pages 54-55.

²⁵ Exhibit 6, pages 50-53.

²⁶ Exhibit 9, pages 92-94.

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 and to provide appropriate corrective action. Unacceptable behavior is divided into three groups, according to the severity of the behavior, with Group I being the least severe and Group III being the most severe.

Section 2.b. provides that Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws.”²⁷

In the present case, the Grievant was issued two Group II Written Notices for unsatisfactory performance and failure to follow policy and procedures regarding two transactions on October 3, 2017.

Under the Standards of Conduct, a second active Group II Notice normally should result in termination. The Grievant had an active Group II Notice from September of 2015. Grievant was terminated.

In the Rules for Conducting Grievance Hearings, Section VI., Scope of Relief, B. Disciplinary Actions, section 1: Framework for Determining Whether Discipline was Warranted and Appropriate²⁸ states as follows:

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with the law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).²⁸

Using this framework, this Hearing Officer will analyze this case.

(i) Whether the employee engaged in the behavior described in the Written Notice

The evidence is clear that the Grievant improperly processed the transfer of title in Offense 1.

²⁷ Exhibit 8: Standards of Conduct: page 75

²⁸ Rules for Conducting Grievance Hearings, VI.B1. Effective Date 7/1/2012.

She processed an out-of-state title with too many errors to be properly processed. She did not follow policy when she did not call her manager regarding the many errors on the paperwork. In Offense 2, the Grievant had the customer complete section B on the back of the title without authorization from management. Even more egregious, the Grievant changed the odometer reading on the record once the customer had left the counter. The employee engaged in the behavior described in the Written Notice.

(ii) Whether the behavior constituted misconduct

The Grievant failed to comply with written policy. This offense is one type of offense that is listed as a Group II offense in the Standards of Conduct. The Grievant violated the Standards of Conduct. The Grievant's behavior constituted misconduct.

(iii) Whether the disciplinary action taken by the agency was consistent with the law and policy

The Grievant had had many counseling sessions and written memos regarding violations of policy similar to the present violations. The Grievant had a previous Group II Notice that was still active when she was issued the two Group II Notices issued on December 19, 2017. The Standards of Conduct for the Agency states that the second Group II Notice normally should result in termination. The disciplinary action taken by the agency was termination. This disciplinary action was consistent with the law and policy.

Mitigating Circumstances

According to 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. A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness.²⁹ The Grievant in this case was an employee with a record of many errors and many written and verbal counseling. The Agency reviewed the mitigating statement provided by the Grievant that she was severely fatigued and made some honest mistakes. The Agency did not accept the Grievant's actions were mitigated by fatigue or honest mistake. Even if the Grievant were fatigued, the deliberate act of going into the record to change the customer's odometer reading does fall under fatigue or honesty. The Grievant was given two Group II Written Notices and was terminated. This Hearing Officer finds that the agency's discipline of imposing two Group II Written Notices and termination did not exceed the limits of reasonableness.

DECISION

The two Group II Written Notices issued to the Grievant on December 19, 2017 are upheld. The disciplinary action of termination is upheld.

²⁹ Rules for Conducting Grievance Hearings Section VI.B.2. p. 17

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

March 20, 2018

Jane E. Schroeder
Jane E. Schroeder, Hearing Officer

[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.