

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 08/21/13; Decision Issued: 09/09/13; Agency: DBHDS; AHO: William S. Davidson, Esq.; Case No.10145; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 10145

Hearing Date: August 21, 2013  
Decision Issued: September 9, 2013

**PROCEDURAL HISTORY**

A Group III Written Notice was issued to the Grievant on June 25, 2013, for:

Nature of Offenses: Multiple Failures to Follow Policy, Unauthorized Removal of State Property, Falsification of Records. On June 2, 2013, [Grievant] self-authorized his own private use of a van, University Transit Service (UTS) van #8. He checked out the van as both customer and department representative. On the department's internal documentation, he falsely documented that the van was in use by a university department and referenced an event number for an unrelated charter in October 2012 when in fact [Grievant] used the van for a personal trip to Cambridge, MA. When the trip was discovered on his return to work date (June 5, 2013), [Grievant] noted that he intended to use the van as a regular charter customer which is contradicted by the fact that there was no charter set up in advance of the trip and he had indicated on the department's internal documentation that the charter was for a different event. Given the trip was personal in nature and crossed state lines, and given that [Grievant] is in control of booking vehicles, to eliminate conflict of interest, [Grievant] should have known to seek supervisory approval for the trip in advance. Written policy requires charter customers who are not paying with an account code to pay 10% of the estimated cost of the trip in advance. However, [Grievant] did not make the deposit and only paid for the trip after he had been confronted about the trip on June 5, 2013.<sup>1</sup>

Pursuant to the Group III Written Notice, the Grievant was terminated on June 25, 2013.<sup>2</sup> The Grievant filed a grievance to challenge the Agency's actions. This Grievance Form A was neither dated nor signed by the Grievant.<sup>3</sup> On July 30, 2013, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On August 21, 2013, a hearing was held at the Agency's location. As the Hearing Officer was going to be out of the country for two (2) weeks immediately after the hearing date, both the Agency and the Grievant, by counsel, agreed to an extension of time for the filing of the Hearing Officer's Decision.

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<sup>1</sup> Agency Exhibit 1, Tab 2, Page 1

<sup>2</sup> Agency Exhibit 1, Tab 2, Page 1

<sup>3</sup> Agency Exhibit 1, Tab 1, Page 1

## **APPEARANCES**

Attorney for Agency  
Agency Party  
Attorney for Grievant  
Grievant  
Witnesses

## **ISSUE**

1. Did the Grievant fail to follow policy?
2. Did the Grievant remove state property without authorization?
3. Did the Grievant falsify records?

## **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. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>4</sup> 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. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) 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 the appropriate sanction, independent of the Agency's decision.

## **BURDEN OF PROOF**

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<sup>4</sup> See Va. Code § 2.2-3004(B)

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. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.<sup>5</sup> However, proof must go beyond conjecture.<sup>6</sup> In other words, there must be more than a possibility or a mere speculation.<sup>7</sup>

### **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 Agency provided the Hearing Officer with a notebook containing eleven (11) tabs and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing fifteen (15) tabs and that notebook was accepted in its entirety as Grievant Exhibit 1.

Prior to the commencement of evidence being taken in this matter, the Agency and the Grievant entered into a stipulation. It was stipulated that the Grievant took Van #8 from its location in Charlottesville to a location in Massachusetts and then returned. It was stipulated that this was done in order to move his fiancée and some of her belongings from that location in Massachusetts to Charlottesville. The Grievant is the Charter Services Manager for this Agency. In that capacity, he filled out a Charter Services Damage Form on June 2, 2013.<sup>8</sup> On that form, the Grievant signed both as the person who was going to be taking and using the vehicle and as the person who approved the use of the vehicle.

The Grievant also filled out a UTS Van Rental Slip (“The Charter Slip”) indicating that the vehicle was being checked out on June 2, 2013, and would be returned on June 4, 2013.<sup>9</sup> The Charter Slip also indicated that the van was going to be used by the “Bio Department” and that the event number was 38404. There was no dispute by the Grievant that the event number was wrong or that the department designation was wrong. The Grievant produced no evidence to suggest why these two (2) facts were in error.

On June 4, 2013, the Grievant’s immediate supervisor needed the use of this particular van. When he attempted to locate the van, he found that it was missing. His first attempt to

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<sup>5</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>6</sup> *Southall, Adm’r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>7</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

<sup>8</sup> Agency Exhibit 1, Tab 3, Page 5

<sup>9</sup> Agency Exhibit 1, Tab 3, Page 2

locate the van was to look in a Log Book. During that process, one of the Grievant's subordinates, who works in this Department, indicated that the Grievant was in possession of the van. At the same time as this witness was determining that subordinates within this Department knew that the van was in the Grievant's possession, he noticed the Charter Slip on a white board. The Charter Slip indicated, in his opinion, that the van was in the possession of the Biology Department. He then went to the FLEX System to see if an entry had been made there. The FLEX System is a system used by this Agency to manage the chartering of its vehicles. If a person chooses or wishes to charter one of these vehicles, appropriate documentation is filled out; the charter is approved by someone such as the Grievant; a Charter Slip with event number is issued; and the charter is then fulfilled. In this matter, the Agency knows who is chartering the vehicles and for what time period.

When this witness checked the FLEX System, he found that the event number on the Charter Slip related to a charter in October of 2012, and for a department that was not the Biology Department. At this point, he deemed that Van #8 was missing; was not in the FLEX System; and, even though his subordinates had indicated to him that the Grievant was in possession of the van, he felt that the van was being used in an unauthorized way.

Subsequent to this time frame, the Grievant returned the van on or about the afternoon of June 4, 2013, or the early morning of June 5, 2013. This witness testified that he saw the van in its normal location at approximately 8:00 a.m., on June 5, 2013, and that it had been freshly washed.

The Agency called the Human Resources Generalist, who was present when the Grievant was first confronted with this matter. The Human Resources Generalist stated this meeting took place at 1:00 p.m., on June 5, 2013. This witness further stated that he knew this because he checked his calendar to be certain. When the Hearing Officer pointed out to him that the other Agency representative at that meeting indicated that it took place at 9:00 a.m., the Human Resources Generalist then became very general in his answer and stated that the time may have been 9:00 a.m., but he was no longer certain.

The Grievant paid for the use of this vehicle. There was dispute as to whether he paid for it prior to knowing that there was a problem or subsequent to knowing that there was a problem. The Agency did not meet its burden of proof on the issue of when payment was made.

The Written Notice raised the issues of failure to follow policy; removal of state property without authorization; and falsification of records. The Grievant's immediate supervisor testified that the Grievant violated a policy of appropriateness of renting; failure to pay the fee; removal of State property; and falsification of records. The director of this Agency testified that, in her opinion as Director, the Grievant failed to put the event in the FLEX System; failed to pay in advance; filled out the Damage Form found at Agency Exhibit 1, Tab 3, Page 5, as both the person who was chartering the vehicle and the person who approved it; used State property in an unauthorized manner; and falsified the Charter Slip.

The Agency introduced no written policy regarding whether or not the Grievant could charter a van to himself. Agency witnesses talked about, "best practices," but could produce no documentation or policy stating that was a violation of a written policy. By failing to introduce a policy that clearly or even inferentially states that the Grievant could not charter a van to himself,

the Agency has not borne its burden of proof that State property was removed without authorization.

As stated earlier in this Decision, the Agency has not borne its burden of proof as to whether or not the Grievant paid prior to or subsequent to this issue arising. Further, the Grievant introduced evidence of times where payment was received after the completion of the charter. There was much testimony regarding the failure of this van being put into the FLEX System. The testimony from the Director was that the FLEX System is important because it allows the Agency to track its vehicles. That is a valid consideration, however, in this matter, several Agency employees, including the NTS Supervisor, were aware that the Grievant had Van #8.

Regarding the issue of falsification of records, the Grievant admitted that he filled out the Charter Slip with the inaccurate event number and the inaccurate department designation.<sup>10</sup> The Grievant's sole justification regarding this issue was that he simply made a mistake. The Grievant is the manager of the Charter Services Department. The Grievant is fully aware of how the FLEX System works and that the FLEX System produces the event number. The Hearing Officer finds it unlikely that the Grievant merely misconstrued a five digit number and a department designator. It is clear that this charter was never in the FLEX System and the Grievant offered no reasonable explanation as to how he came to put a five digit number on a charter for June of 2013, that was in fact a valid charter number for a charter that took place in October of 2012. Further, the Grievant offered no explanation as to how he came up with the Biology Department as the department on the charter.

Accordingly, the Hearing Officer finds that the Agency has borne its burden of proof regarding falsification of records.

### **MITIGATION**

*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 Employment Dispute Resolution..."<sup>11</sup> 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

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<sup>10</sup> Agency Exhibit 1, Tab 2, Page 3

<sup>11</sup> Va. Code § 2.2-3005

## DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof in this matter and that termination of the Grievant was appropriate.

## APPEAL RIGHTS

You may file an administrative review request 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. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

2. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

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 of the original hearing decision. A copy of all requests for administrative review must be provided 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 administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>12</sup> 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.<sup>13</sup>

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<sup>12</sup>An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>13</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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]

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William S. Davidson  
Hearing Officer