

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

DECISION OF HEARING OFFICER

In re: Department of Motor Vehicles

Case Number: 11509

Hearing Date: June 12, 2020

Decision Issued: August 18, 2020

PROCEDURAL HISTORY

Grievant, a 32-year career supervisory employee of the DMV appeals the decision to terminate his employment based on three separate Group 111 Notices. The agency asserts that each group notice is independently sufficient to justify Grievant's termination.

On March 10, 2020. Grievant was issued three Group 111 Notices and removed from his position as a customer service manager based on an investigation into reports that vehicles were apparently being stored and sold by Grievant on DMV's customer service center property that Grievant managed.

Specifically, the first Group 111 Notice -Termination for violations of law-alleged that Grievant had demonstrated by his actions regarding the vehicles "willful disregard for the laws DMV administers and enforces" therefore he was "unsuitable to serve as a DMV manager".

The Second Group 111 Notice -Termination for Policy Violations- (A. Inappropriate Accessing of Records; B. Inappropriate Removal of a "Held" (Title stop) ; and C. Failure to Enter into Friends and Family Log all Trip Permits).

The Third Group 111 Notice – Making False and Misleading Statements to Law Enforcement and Management – during the official DMV investigation.

On or around March 13, 2020, Grievant timely filed a grievance. (Grievance Form A) Effective April 7, 2020, the Department of Human Resource Management (DHRM) assigned the matter to the undersigned Hearing Officer. Due to the covid 19 pandemic and the resulting shutdown of most state operations, the hearing was ultimately held on June 12, 2020 at a DMV location.

APPEARANCES

Grievant with advocates

Agency legal counsel

Six witnesses for the Agency; four testified in-person and two remotely

Four witness for the Grievant testified remotely

ISSUES

1. Whether Grievant engaged in the behavior described in the written notices?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g. free of unlawful discrimination) and policy?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, aggravating circumstances existed that would overcome the mitigating circumstances?

EXHIBITS

The Agency submitted a three-ring binder containing 32 exhibits numerically tabbed. One additional exhibit was submitted by the Agency and assigned the number 33. Grievant submitted a binder containing 8 exhibits numerically tabbed. All exhibits were admitted without objection.

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. Grievant has the burden of raising and establishing any affirmative defenses to the discipline and any evidence of mitigating circumstances related to the discipline. (GPM § 5.9)

FINDINGS OF FACT

After carefully reviewing the evidence presented and observing the demeanor of each witness that testified in person, the Hearing Officer makes the following findings of fact.¹

As of March 10, 2020, when Grievant received the three Group 111 Notices and his employment terminated, he was a DMV Customer Service Manager leading a high-volume Customer Service Center (CSC) in Northern Virginia. He supervised approximately 15 people at his CSC. (Testimony of [REDACTED]) He had 32 years of service to DMV. There were no active Group Notices in his employment record.

The Customer Service Manager organizational objectives are to hire, train, mentor, and guide CSC staff members to serve customers in a timely manner, comply with all state, federal, and Motor Vehicle Code of Virginia, rules, policies, and procedures, and ensure effective delivery of customer service operations. (Agency Ex. 13)

In his position as Customer Service Manager, Grievant was “responsible for managing the customer service center functions (facilities, staff, services, safety, security, assets, information, and finances) in accordance with statutory and agency administrative rules, regulations, and procedures. (Id)

In December 2019, Grievant’s customer service center was undergoing construction renovation. On December 13, 2019, the contractor reported to the Deputy Director, Facilities Services in Richmond, Va. that five vehicles and a trailer in the CSC parking lot “will become a major issue on Monday, December 16 when

¹ Because of covid related protocols, 7 witnesses testified remotely.

we commence demolition work on the exterior of the building”. The contractor provided pictures of the vehicles and noted that the CSC security guard informed him that the vehicles appeared to have been abandoned for months. Two of the vehicles did not have tags.(Agency Ex. 15)

Recognizing the urgency to have the vehicles promptly removed, the Deputy Director asked the CSMA Director, Customer Service Management in Richmond whose vehicles they were, and “why we have what appears to be abandoned vehicles in the parking lot”(Agency Ex. 16)

Shortly thereafter Grievant told two separate managers in his chain of command that four of the vehicles belonged to residents of an adjacent apartment complex and (on 12/13) he is asking them to move the vehicles and (on 12/16) had asked them to move their vehicles. (Agency Ex. 15, 16 & 17)

The trailer belonged to DMV and one vehicle belonged to a DMV employee who commuted to work at the Pentagon CSC. The investigation therefore focused on the four vehicles that Grievant said were owned by residents of the adjacent apartment complex.(Id) (Testimony of [REDACTED] [REDACTED] [REDACTED] [REDACTED])

The ownership information provided by Grievant was demonstrably false and intended to mislead. The investigation revealed that Grievant owned two of the vehicles, a 2013 Nissan Altima, and a 2003 Infinity G35. Two vehicles, A Sequoia SUV and an Oldsmobile were owned by associates of Grievant, [REDACTED] [REDACTED]. His explanation that when he was asked by two different DMV managers about the apparently abandoned vehicles, they were inquiring about different vehicles was totally unconvincing to the agency and the Hearing Officer.

The Nissan Altima had no tags and was titled to Grievant on June 29, 2018; The Infiniti G35 was not titled in Virginia and had a West Virginia Ride Away Pre Owned Auto sales tag on it; the Oldsmobile Cutlass had an inactive title on file and the tags had expired in April 2015; and the plate on the Sequoia expired in June 2019, and the decal on the tag was issued to a 2004 Ford. (Agency Ex. 17, 27)

Further information from the contractor heightened DMV's concern that Grievant was not only storing, but possibly selling vehicles on DMV property.

On or about December 16, 2019, an individual approached a contractor involved with the CSC renovations asking for Grievant, by name to purchase the Infiniti G35 owned by Grievant. (Agency Ex. 8, 17) (Testimony of ██████████)

The investigation that followed was predicated on DMV's legitimate concern that Grievant was storing and selling cars on DMV's property. The investigation, was not, as suggested by Grievant, intended to target him for termination.

On or around December 18, 2019, Grievant was interviewed by DMV Special Agent ██████████ regarding the four vehicles in question. (Agency Ex. 27) The interview was recorded. (Agency Ex. 28)

He told Agent ██████████ that he put the West Virginia Ride Away tag on the Infiniti but did not buy the car in that state. (Id)

Grievant was less than forthright in responding to where he purchased the Infiniti. First, he said he did not remember, then he said he purchased the Infiniti from the owner. Only when ██████████ disclosed that he had spoken with the owner, Grievant admitted that he purchased the car from ██████████, the owner of a repair shop Grievant does business with. (Id)

The prior owner of the Infiniti told ██████████ he sold the car for \$500 to \$600. The \$500 purchase price corroborated the \$500 purchase price on the Virginia title Grievant obtained for the vehicle. (Id) Grievant later claimed he paid nothing for the car.

Grievant also admitted the Infiniti had been on the CSC parking lot for "a couple of weeks" (Id). Further investigation revealed that the cars were on the CSC parking lot for a couple of months.

The Toyota Sequoia and the Oldsmobile were owned by ██████████, a mechanic at a repair and shop and the owner ██████████.

Grievant was re-interviewed by Special Agents [REDACTED], on January 6, 2020 to clarify information that had come to light since the first interview. (Agency Ex. 27) The interview was also recorded. (Agency Ex. 28)

Upon further examination including an audit of DMV's records, DMV discovered that Grievant had accessed the vehicle record of the individual from whom Grievant would purchase the Nissan Altima several weeks later. During the second interview Grievant was asked several times why he had accessed the Nissan vehicle record. Each time Grievant maintained that he had no recollection of doing so. Grievant accessed the record four times, first on 2-12-18, then on 2-21-18, again on 3-9-2018, and finally on 3-12-2018. On none of these dates were there any transactions associated with the accesses. According to DMV's records, the owner was not in the CSC on any of the dates Grievant accessed the vehicle records. (Agency Ex. 23, 24)

According to DMV's records Grievant purchased the Nissan Altima on April 4, 2018. (Agency Ex. 18) ([REDACTED] testimony) That same day a "held" (or stop) previously placed on the title to the Nissan was removed by an Assistant Manager subordinate of Grievant without having adequate documentation to warrant removal.² That Assistant Manager was severely disciplined. (Agency Ex. 29, Testimony of Assistant Manager). That Assistant Manager testified that she was instructed by Grievant to remove the title stop. (Id)³ In the second interview with DMV investigators, Grievant claimed he did not know how the held was released. Grievant's professed ignorance is belied by the fact that his subordinate described the integral role Grievant played in getting a clean title to facilitate his purchase when there was an original Virginia title issued in 2015 and still unaccounted for.

² The Title Held procedure gives people an opportunity to register a vehicle and get license plates to operate a vehicle in Virginia. The procedure does not authorize DMV to issue a Virginia title until all titling requirements are met. (Agency Ex. 9). If DMV releases a title without adequate documentation it may be susceptible to a suit under the Virginia Tort Claims Act. (Testimony of [REDACTED])

³ The investigating officer reported that the Assistant Manager told him that Grievant did not ask her to release the title. (Agency Ex. 27). The Assistant Manager disputes that recordation. She testified she told the investigator "it didn't go like that". She testified she researched the California record, discovered the held and reported her findings to Grievant who told her to release the title. Based on the totality of the evidence, the Hearing Officer credits her hearing testimony which is consistent with her due process testimony that she was instructed by Grievant to release the title without adequate documentation.

The investigation also revealed that Grievant accessed the driver's record of a former DMV Assistant Manager who had telephoned the CSC for information in her vehicle record. There was no transaction associated with this access. And experienced DMV managers testified that his explanation for accessing the record before he called her to tell her he could not help her made no sense and violated DMV policies. (██████████ testimony)

Grievant's explanations of these incursions into vehicle records are not independently corroborated by documentary or testimonial evidence. According to DMV witnesses, all of whom are experienced long-term career employees, any such incursion must be supported by proper documentation of a valid DMV business reason for the incursion.

DMV maintains sensitive data of Virginia citizens which are accessed daily. Grievant (and other CSC employees) signed each year a "CSC Employee Operational Security Acknowledgement. (Agency Ex. 10) That agreement obligated him to access vehicle records only for a legitimate business purpose. He was specifically prohibited for example from accessing the records of friends and family. (ID)

The DMV Commissioner has made it abundantly clear that going into a DMV record without a valid DMV business reason is grounds for dismissal, even for a first offense. (Agency Ex. 10)(██████████ testimony)⁴

DMV records clearly indicate that on February 12, 17, 21 2018 and March 9, 12 Grievant accessed vehicle records that were not tied to a transaction. (Agency Ex. 24 & 26) (██████████ testimony). The records he accessed on those dates were vehicle records of his business associates.

⁴ A customer seeking service at any CSC is first required to stop at the information desk where the purpose of their visit is identified, their identity is confirmed, and they have the necessary documents for the transaction. The customer is given a numbered ticket and waits until that number is called. The ticket is assigned to a CSC agent who provides service to the customer. The customer cannot choose which agent he wants to serve him. Where a transaction does not occur, the ticket is closed out and there is no record tying the customer to the ticket.

The Hearing Officer concludes that Grievant was accessing vehicle records for his friends and business associates and failed to follow DMV's procedures which he is required to follow.

During the second interview on January 6, 2020, Grievant was again asked about the West Virginia dealership placard that was displayed on the Infiniti. Grievant offered several new and differing versions of how the placard ended up on his vehicle. First, he said he had no idea where it came from. Then he said the placard could have been in the CSC. Finally, he claimed that a repair shop in Baltimore placed it on his car when he took it in for repairs so they could drive it back to Grievant's home when the repairs were completed. (Agency Ex. 27) This interview was also recorded (Agency Ex. 28)

Additionally, Grievant admitted to using the West Virginia dealer placard to drive his Infiniti without a registration from his home to the CSC on multiple occasions. By so doing, Grievant violated Virginia Code §46.2-600 which states in pertinent part:

[E]very person who owns a motor vehicle... shall, before it is operated on any highway in the Commonwealth, register with the Department and obtain from the Department the registration card and certificate of title for the vehicle .

To facilitate the movement of vehicles that are not yet registered, Virginia has established a trip permit procedure that Grievant is familiar with and is required to follow. Va. Code §46.2-651 sets forth in pertinent part:

The Department may, on application on forms provided by the Department, issue a trip permit to any owner of a motor vehicle...which would otherwise be subject to plates but is not currently registered....The permit shall be valid for three days and shall show the registration or permit number, the date of issue, the date of expiration, the make of vehicle, the vehicle identification number, the beginning point and the point of destination. The fee for the permit shall be five dollars.

Grievant secured 8 trip permits to move his cars (the Nissan and the Infiniti). Nevertheless, despite the clear language in the statute, and Grievant's heightened obligation as a DMV CSC manager, to follow the law, Grievant failed to follow the statutory procedure. The investigation revealed that Grievant kept his cars at the CSC for several months and drove them to and from the CSC multiple times. Trip permits are one-way permissions with a point of departure and a point of destination. Grievant used them as two-way permits.

In addition, the evidence is clear that Grievant abused the trip permit process by failing to fill out the Friends and Family Log when securing trip permits that were processed at his CSC. He did fill out the Friends and Family Log for one permit when he was temporarily assigned to a different CSC when his CSC was being renovated.

Grievant admits that "[he] is aware of the proper use of a trip permit and its limitations as it relates to an unregistered vehicle". Nevertheless, he feigned confusion of the one-way use of the permits to the investigators when he was questioned in the second interview. (Agency Ex. 28) He argues that "whenever I purchased a trip permit for my vehicles, there has always been a friends and family log form completed and signed". His argument is not supported by the record.

Grievant's intentional and blatant disregard of the law and policy is shocking given his leadership position at the CSC and the 32 years he worked for DMV.

The record in this case indicates that between October 2017 and May 2019 Grievant was written up by his manager generally for unsatisfactory job performance. (Agency Ex.30) None of the memoranda were disciplinary actions. There is no evidence to attribute Grievant's termination to the issuance of these memoranda.

ANALYSIS AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. The Act balances the need for the orderly administration of state employees and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989)

Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints.... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

“In disciplinary actions, the agency must present its evidence first and show by a **preponderance of evidence** that the disciplinary action was warranted and appropriate under the circumstances. Grievance Procedure Manual. **The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline** (GPM) § 5.8.

The Department of Human Resource Management (DHRM) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees. Policy 1.60. *“The purpose of the policy 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, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness." A legitimate goal of the policy is to "enable agencies to fairly and effectively discipline and/or terminate employees... where the misconduct and/or unacceptable performance is of such a serious nature that a first offense warrants termination." Id. (Agency Ex. 5)

The policy requires that employees “[c]omply with the letter and spirit of all state and agencies policies and procedure, the Conflict of Interest Act, and Commonwealth laws and regulations” and [c]onduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties”.

The severity of an infraction determines which of three levels of disciplinary actions an agency chooses to administer. Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, ... constitute illegal or unethical conduct; ... or other serious violations of policies, procedures, or laws.”

DMV has implemented a Code of Conduct for DMV employees based on core values of:

Trustworthiness – Inspiring the confidence of others through our reliability, dependability, and honesty

Respect – recognizing and appreciating the value and importance of other individuals and the agency

Accountability – taking ownership for our actions and decisions

Integrity - always doing the right thing, and

Teamwork – working together to achieve common goals (Agency Ex. 6)

DMV employees are expected to, among other things, “uphold the laws, regulations, executive orders, and directives of the United States and the

Commonwealth of Virginia; adhere to all policies and procedures of the Department of Motor Vehicles and other state agencies as appropriate and guard against conflict of interest or the appearance of impropriety..." (Id)

APPLICABLE POLICIES

The Department of Motor Vehicles took the disciplinary action in this case pursuant to the Standards of Conduct, Policy 1.60. Agency Ex. 5)

Grievant Engaged in the conduct described in the Written Notices

The Findings of Fact that are carefully articulated above demonstrate that the Grievant engaged in the conduct described in the written notices. Grievant's misconduct and the supporting evidence are analyzed under each notice.

The first Group 111 Notice -Termination for violations of law

Grievant admitted in the second interview with the investigators that he broke Virginia law by driving his car from his home to the CSC he managed without a Trip Permit or a registration, using the West Virginia placard as a substitute for a vehicle license. This conduct is shocking for any DMV employee more so a CCSC manager charged with leading subordinate employees and advising the public seeking services at the DMV. Clearly in his role as a DMV manager he is expected to adhere to the core values of "Integrity by always doing the right thing" and "Trustworthiness by inspiring the confidence of others through reliability, dependency and honesty". (Agency Ex. 6).

The agency concluded in its notice that Grievant's "willful disregard for the laws DMV administers and enforces makes [him] unsuitable to serve as a DMV manager". The Hearing Officer agrees with that conclusion based on the hearing record, to include the documents and testimony of all the witnesses, including the Grievant.

Grievant testified that he had a valid dealer drive away tag that permitted him to drive his vehicle on the roads and highways legally. This was the first time he had made such a claim even though a significant aspect of the DMV investigation focused on his legal right to operate his vehicles on the roads and highways. He testified that he did not disclose this information to the

investigating officers because he did not want to get the dealer in trouble.

Assuming arguendo the assertion is true, Grievant's use of such a tag is illegal

"Dealers license plates may be used on vehicles in the inventory of licensed motor vehicle manufacturers, distributors and dealers in the Commonwealth when operated on the highways of Virginia by dealers or dealer operators, their spouses, or employees of manufacturers, distributors, and dealers as permitted in this article, which shall include business, personal, and family purposes..."

Va. Code § 46.2-1550⁵

It is undisputed that Grievant is not an employee of the dealership/repair shop he supposedly got the tags from and his vehicles are not owned by the dealership/repair shop.

Moreover, it is evident that such a disclosure early in the investigation may have benefitted the Grievant. It is therefore difficult for the Hearing Officer to find this claim credible. The Hearing Officer concludes that this explanation is a fabrication.

The Second Group 111 Notice -Termination for Policy Violations- (A. Inappropriate Accessing of Records; B. Inappropriate Removal of a "Held" (Title stop) ; and C. Failure to Enter into Friends and Family Log all Trip Permits).

A. Inappropriate Accessing of Records

DMV records clearly show that Grievant accessed the records of several individuals when there was no legitimate business purpose for doing so. (Agency Ex. 24, 26) (██████ testimony) DMV is sworn to safeguard the public's vehicle records, therefore, whenever a record is accessed and there is no business purpose, that raises a red flag for DMV. Grievant was aware that improper accessing of DMV records and information is grounds for dismissal, even for a first offense.(Testimony of ██████)

As was carefully laid out in the Findings of Fact, Grievant accessed the record of a former Assistant Manager on November 10, 2018 and accessed the records of █████ and the repair shop where he works on February 17, 2018. (Agency Ex. 24,26) Grievant claimed in his due process response and in his hearing testimony that the call from the former Assistant Manager was transferred to him to handle by a front counter employee. He said he looked up

⁵ A dealer drive away tag is limited to the driving on the highway in order to test the installation, service, or repair at a distance of not more than 10 miles from the place of business or for the pick up and delivery of a vehicle. Va. Code §46.2 - 733

the vehicle record before he returned the call. He described his action as “normal business practice” (Agency Ex. 1) The procedure Grievant says he followed is not a normal business practice of the DMV. The established procedure is described in the written notice. Grievant has offered no corroborating evidence to contradict that description.

DMV has a Contact (Call) Center designed to field telephone inquiries and transactions. The Contact Center has an authentication process to ensure callers are whom they claim to be. DMV publicizes the Contact Center phone numbers on its website rather than individual CSC numbers so that appropriate identity verification occurs via Contact Center protocols. Front counter staff therefore receive a limited number of customer calls. If for some reason a call makes it directly to the front counter, CSC employees including employees at Grievant’s CSC should be giving callers the Contact Center number and instructing them to contact the center.

Even if one of Grievant’s employees transferred a call that was seeking information, there was absolutely no reason to access the Assistant Manager’s account because he could not provide information over the phone. Grievant’s explanation is inconsistent with DMV policy which he had to be aware of. The Hearing Officer rejects the validity of the explanation.

There is no evidence that Grievant had a valid reason to access [REDACTED] vehicle record.

B. Inappropriate Removal of a “Held” Title Stop

The evidence as a whole demonstrates that Grievant instructed a subordinate to remove a “held” title stop from the Nissan Altima vehicle he purchased on April 4, 2018. (Agency Ex. 18) ([REDACTED] testimony) The Grievant argues that removing the title stop was a routine transaction and he never directed his subordinate to remove the title stop. Neither contention is supported by the record.

[REDACTED] persuasively explained that removal of a Held” stop title is not routine. She noted that The Assistant Manager who removed the Held stated in response to a due process notice of a disciplinary action she received that she was instructed by the Grievant to remove the “held” title stop. The Assistant Manager testified at the instant grievance hearing that she was instructed by Grievant to remove the “held”. Her testimony is contradicted by her response to the DMV investigators that Grievant did not instruct her to remove the “held”. (Agency Ex. 27) The Hearing Officer credits her testimony that she was instructed to remove the “held” title stop.

The Assistant Manager testified remotely. The Hearing Officer had no opportunity to observe her demeanor. Nevertheless, her testimony was direct and unequivocal. She had no motive to lie; she had already been disciplined. The Grievant on the other hand had a motive to lie. An investigation was closing in on him. He was desperately trying to hold on to his job. He clearly wanted to buy the car and get a clean title of ownership. As the ownership transaction was concluded Grievant obtained a clean Title in 2018 and someone else had a Virginia title for the same vehicle that was issued in 2015. That outcome would defeat the fundamental ownership purpose of a title.

In addition, the California Registration shows a lien holder and no indication that the lien was satisfied and released. Therefore, the Virginia DMV had unnecessarily exposed itself to liability.

C. Failure to Enter into Friends and Family Log All Trip Permits

DMV records show that Grievant purchased 8 Trip Permits to drive his cars to and from the CSC parking lot. A standard Trip Permit allows the owner of any motor vehicle to move the vehicle from one location to another without registering the vehicle. Grievant was required to log each permit into the Friends and Family Log. DMV records show that Grievant only logged in one permit when he was working at another CSC during construction at his CSC.

Grievant admits that “[he] is aware of the proper use of a trip permit and its limitations as it relates to an unregistered vehicle”. Nevertheless, he feigned confusion of the one-way use of the permits to the investigators when he was questioned in the second interview. (Agency Ex. 28) He argues that “whenever I purchased a trip permit for my vehicles, there has always been a friends and family log form completed and signed”. His argument is not supported by the record.

The Third Group 111 Notice – Making False and Misleading Statements to Law Enforcement and Management

The record is replete with instances of contradictory responses to legitimate questions posed to Grievant. Contrasting his due process responses and hearing testimony to the recorded investigations bears this out. First his statements to two separate managers that the cars reported by the contractor to be abandoned and in the way of construction was patently false and misleading. He told them that the cars belonged to residents of a nearby apartment. Two of the cars belonged to him and were on the CSC property for months, and two cars

belonged to his business associates that he had given permission to park at the CSC.

The Infiniti had a West Virginia dealer placard in place of a license plate and tag. Grievant's explanation as to how the placard ended up on his Infiniti changed repeatedly. In his first interview with DMV investigators he stated that he put the placard on his car. In his second interview he changed his story multiple times. First, he denied having any idea of where the placard came from. In the second interview he denied having any idea of where the placard came from. Then he claimed an unknown person put it on the car. And finally reversing himself he claimed that a car repair shop in Baltimore placed the placard on his car when he took it in for repairs.

Grievant admitted to the DMV investigator that he drove his cars numerous times with the West Virginia dealership placard. Nevertheless, he insisted that he never drove his cars with the Dealership placard and never told the investigator that he did.

Other contradictions include operating his vehicles with a one-way trip permit that he used as a two-way permit, failing to log each trip into the Friends and Family Log, denying he purchased the Altima on April 4, 2018 when the certificate of title showed that date as the date of purchase (Ex. 18 at p. 10) , and claiming he paid nothing for the car when the records indicate he paid \$500 (Id) and the prior owner told the investigators that he sold the vehicle for \$500 to \$600. Grievant signed the Va. Title he received on April 4, 2018 and listed the sales price as \$500. By so doing he certified "under penalty of perjury that the information contained in this application is true and correct." Ex. 18 at p. 10)

Grievant's contradictory and changing statements were false and intended to mislead the agency.

The Agency's discipline was consistent with law and policy.

Grievant argues that the statements in the Group Notices and in various agency memoranda are false and speculates that they were malevolently orchestrated by DMV management. Grievant was given every opportunity to

provide evidence in support of his argument. He has not done so, and the record does not support his claim. The record does show that between October 2017 and May 2019 Grievant was written up by his manager generally for unsatisfactory job performance. (Agency Ex.30)

There were no mitigating circumstances justifying a reduction or removal of the disciplinary action

In hearings contesting formal discipline, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (11) the behavior constituted misconduct, and (11) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated unless under the record evidence, the agency's discipline exceeds the limits of reasonableness."(GPM at § 5.9).

The Standards of Conduct Policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that compel a reduction to promote the interests of fairness and objectivity, or based on an employee's otherwise satisfactory work performance; or (2) an employee's long service or otherwise satisfactory work performance.

Grievant had 32 years of service to DMV when he was fired. This is a significant length of employment and should not be terminated lightly. DMV does not fire employees for minor infractions such as a low-level speeding conviction. In this case however, Grievant was in a leadership position managing a busy CSC service center. As a manager, Grievant is expected to lead by example in following the law and policies of DMV. Grievant drove his cars that were not registered and licensed. Grievant clearly lost the trust and confidence of DMV management for veracity and obeying the laws and policies he was required to follow. Grievant's latest assertion that he legally drove his cars on a dealer driveaway tag provides further support to question Grievant's veracity and willingness to disobey the law. There is therefore no basis to mitigate the penalty in this case.

Grievant attempts to argue that the performance memoranda he received proved that DMV management were targeting him for termination. This is an affirmative defense on which Grievant bears the burden of proof. He has offered

only vague statements and no supporting evidence. The memoranda demonstrate that Grievant's managers were trying to assist him to improve his performance, not to fire him. (Testimony of [REDACTED])

Grievant testified that two of his witnesses lied under oath to hurt him. One of the witnesses he accuses of lying under oath testified that he was a good manager. Grievant was given every opportunity to explain the witnesses motive for lying and he responded they may have harbored a grudge against him over the many years he worked with them. He could not identify any motive to support a grudge.

DECISION

The disciplinary action of the Agency is affirmed.

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 Employment Dispute Resolution (EDR)
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.⁶

⁶ [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].

A handwritten signature in black ink, appearing to read "Neil A.G. McPhie". The signature is fluid and cursive, with a large, stylized initial "N" and "M".

Neil A.G. McPhie
Hearing Officer