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**ADMINISTRATIVE REVIEW**

In the matter of the Department of Motor Vehicles  
Ruling Number 2021-5152  
September 28, 2020

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11509. For the reasons set forth below, EDR will not disturb the hearing officer’s decision.

FACTS

The relevant facts in Case Number 11509, as found by the hearing officer, are as follows:<sup>1</sup>

As of March 10, 2020, when Grievant received the three Group III 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. 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.

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.[”]

In December 2019, Grievant's customer service center was undergoing construction renovation. On December 13, 2019, the contractor reported to the [Deputy Director] that five vehicles and a trailer in the CSC parking lot “will become a major issue on Monday, December 16 when we commence demolition

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<sup>1</sup> Decision of Hearing Officer, Case No. 11509 (“Hearing Decision”), August 18, 2020, at 3-9 (citations and footnotes omitted).

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.

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.”

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.

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.

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 Infiniti G35. Two vehicles, a Sequoia SUV and an Oldsmobile were owned by associates of Grievant, [Mr. J] and [Mr. L]. 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.

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.

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 [W] regarding the four vehicles in question. The interview was recorded.

He told Agent [W] that he put the West Virginia Ride Away tag on the Infiniti but did not buy the car in that state.

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 [Agent W] disclosed that he had spoken with the owner, Grievant admitted that he purchased the car from [Mr. J], the owner of a repair shop Grievant does business with.

The prior owner of the Infiniti told [Agent W] 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. 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.” 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 [Mr. L], a mechanic at a repair and shop and the owner [Mr. J].

Grievant was re-interviewed by Special Agents [M and G], on January 6, 2020 to clarify information that had come to light since the first interview. The interview was also recorded.

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.

According to DMV's records Grievant purchased the Nissan Altima on April 4, 2018. 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. That Assistant Manager was severely disciplined. That Assistant Manager testified that she was instructed by Grievant to remove the title stop. 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.

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.

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's citizens which are accessed daily. Grievant (and other CSC employees) signed each year a "CSC Employee Operational Security Acknowledgement." 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.

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.

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. The records he accessed on those dates were vehicle records of his business associates.

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. This interview was also recorded.

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 § 45.2-651 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. 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. None of the memoranda were disciplinary actions. There is no evidence to attribute Grievant's termination to the issuance of these memoranda.

On March 10, 2020, the agency issued to the grievant three Group III Written Notices of disciplinary action, each indicating termination. The First Written Notice was issued for driving without proper vehicle registration on multiple occasions, "in willful disregard for the laws that [the agency] administers and enforces."<sup>2</sup> The Second Written Notice was issued for inappropriate accessing of records, improper removal of a title stop from a vehicle, and failure to log trip permits.<sup>3</sup> The Third Written Notice was issued for making false and misleading statements to law enforcement and agency management during its investigation.<sup>4</sup> The grievant timely grieved these disciplinary actions, and a hearing was held on June 12, 2020.<sup>5</sup> In a decision dated August 18, 2020, the hearing officer determined that each of the three Group III Written Notices with termination must be upheld.<sup>6</sup> The hearing officer also concluded that no mitigating circumstances existed to reduce the disciplinary action.<sup>7</sup>

The grievant now appeals the hearing decision to EDR.

### DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure."<sup>8</sup> If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.<sup>9</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>10</sup> The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

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<sup>2</sup> *Id.* at 1; Agency Ex. 2, at 3.

<sup>3</sup> Hearing Decision at 1; Agency Ex. 3, at 3-4. The Second Written Notice asserts that the charged policy violations merit an elevated Group III level because of the grievant's responsibility as a supervisor. Agency Ex. 3, at 4.

<sup>4</sup> Hearing Decision at 1; Agency Ex. 4, at 3.

<sup>5</sup> Hearing Decision at 1.

<sup>6</sup> *See id.* at 12-16.

<sup>7</sup> *Id.* at 17-18.

<sup>8</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>9</sup> *See Grievance Procedure Manual* § 6.4(3).

<sup>10</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

In his request for administrative review, the grievant raises numerous objections to the hearing decision.<sup>11</sup> In broad summary, the grievant argues that (1) the agency violated procedural requirements before and during the hearing; (2) the hearing officer's findings as to the grievant's misconduct lack support in the record, primarily because the agency's witnesses should not have been considered credible; and (3) the hearing officer failed to fully address the grievant's defenses, notably that the agency disciplined the grievant too harshly and with improper motives.<sup>12</sup>

Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>13</sup> and to determine the grievance based "on the material issues and the grounds in the record for those findings."<sup>14</sup> Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.<sup>15</sup> Thus, in disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.<sup>16</sup> As long as the hearing officer's findings are based on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

### *Procedural Objections*

In his request for administrative review, the grievant alleges that the hearing officer permitted the agency to commit multiple procedural violations. He contends that the agency failed to make adequate arrangements for witnesses testifying remotely, such that the demeanor of some witnesses could not be effectively considered.<sup>17</sup> In addition, he asserts that the agency failed to timely produce relevant documents prior to the hearing and to make material witnesses available

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<sup>11</sup> Among many other arguments, the grievant's submission implies that the race of the parties and/or the witnesses may have influenced the hearing officer's credibility determinations. Request for Administrative Review at 1. Upon a thorough review of the record, EDR perceives no basis for this suggestion, especially considering the totality of the evidence supporting the hearing officer's conclusions as addressed more fully in this ruling. The hearing decision does not indicate that the credibility of any witness other than the grievant was in question.

<sup>12</sup> To the extent this ruling does not address any specific issue raised in the grievant's appeal, EDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case. However, the grievant's individual objections are addressed in more detail in the remainder of this ruling.

<sup>13</sup> Va. Code § 2.2-3005.1(C).

<sup>14</sup> *Grievance Procedure Manual* § 5.9.

<sup>15</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>16</sup> *Grievance Procedure Manual* § 5.8.

<sup>17</sup> Request for Administrative Review at 1, 5. The grievant disputes the credibility of several witnesses, including the member of management who served as the agency's representative at the hearing and, therefore, was present during other agency witnesses' testimony before giving her own. This witness was present in the capacity of a party and, accordingly, was entitled "to be present during the entire hearing" and could testify. *Rules for Conducting Grievance Hearings* § IV(A). The grievance procedure does not prohibit parties from offering testimony after other non-party witnesses do.

(both for pre-hearing investigation and for hearing testimony).<sup>18</sup> Finally, he claims that the agency's advocate was "abusive and rude" throughout the hearing.<sup>19</sup>

During the hearing, the parties and their advocates appeared in person before the hearing officer. However, several non-party witnesses appeared remotely via a videoconferencing application. The agency's advocate used a laptop to run this application and establish a remote connection with the witnesses.<sup>20</sup> Although EDR has long recognized the significance of a hearing officer's ability to observe the demeanor of witnesses, the *Rules for Conducting Grievance Hearings* specifically acknowledge hearing officers' discretion to receive testimony or other sworn statements by means other than in-person appearances – particularly when "sound reasons" exist for such alternative arrangements.<sup>21</sup> The grievant argues generally that the apparent credibility of his witnesses was hampered by having to testify remotely, but he himself testified in person, and he identifies no particular testimony by remote witnesses that the hearing officer failed to credit.

EDR notes that the grievant does not appear to have objected during the hearing to the remote-testimony arrangements, the admission of the agency's exhibits, the availability of witnesses, or the conduct of the agency's advocate.<sup>22</sup> Further, although the grievant claims that the agency did not fully respond to his request for documents or timely exchange its hearing exhibits with the grievant, he does not explain how receiving particular documents late affected his case. Ultimately, EDR's review of the record does not suggest that the grievant's procedural objections on review, even if they had been raised and overruled at the hearing, would now merit remand due to any prejudice to the grievant's ability to present his arguments.

Because it does not appear that the grievant's procedural objections were presented to the hearing officer or prejudiced his case in any event, EDR will not disturb the hearing decision on these grounds.

### *Findings of Misconduct*

Substantively, the grievant raises multiple objections to the hearing officer's findings that he committed the misconduct alleged by the three Written Notices. As to the First Written Notice, he claims he did not drive any vehicles without proper registration or otherwise illegally. As to the

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<sup>18</sup> *Id.* at 4-5.

<sup>19</sup> *Id.* at 5.

<sup>20</sup> Hearing Recording, Pt. 1, at 5:10-6:40.

<sup>21</sup> *Rules for Conducting Grievance Hearings* § IV(E). Here, it appears that witnesses testified remotely due to the ongoing COVID-19 pandemic and the need to avoid spreading the virus between individuals in close proximity. *See* Hearing Recording, Pt. 1, at 5:10-6:40. During these pandemic conditions, EDR has regularly administered grievance hearings with remote participation and, more generally, has recognized the need for hearing officers to exercise discretion, within the bounds of the grievance procedure, to account for the individual circumstances that may warrant special practices in a particular case. *See, e.g.*, EDR Ruling No. 2020-5108.

<sup>22</sup> The individuals who the grievant claims should have testified do not appear on his pre-hearing witness list, and the grievant also did not request to examine them during the hearing. While the grievance procedure generally requires agencies to make their employees available as hearing witnesses if ordered by the hearing officer at the request of the grievant, there is no requirement to make such employees available for questioning prior to the hearing. *See Rules for Conducting Grievance Hearings* § IV(E).



Second Written Notice, he alleges that he accessed the relevant agency records for business reasons, had nothing to do with removing the title stop at issue, had no personal association with Mr. J or Mr. L at the relevant times, and obtained all necessary and valid trip permits with appropriate documentation. Relatedly, he maintains he did not provide false or misleading information to management or law enforcement, as the Third Written Notice alleges he did. To the extent that the hearing officer found otherwise based on testimony by agency witnesses, the grievant challenges the credibility of those witnesses.

#### First Written Notice

The hearing officer upheld the First Written Notice on the following grounds:

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. . . .

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 [agency's] 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[:]

Dealer's 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.<sup>23</sup>

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. . . . The hearing officer concludes that this explanation is a fabrication.<sup>24</sup>

The hearing officer's analysis makes clear that he did not find the grievant's testimony credible as to whether he drove his vehicles consistent with the laws and regulations his agency

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<sup>23</sup> Va. Code § 46.2-1550.

<sup>24</sup> Hearing Decision at 12-13.

administers. Instead, the hearing officer credited testimony by an agency investigator – in conjunction with the investigator’s recorded interview with the grievant – that the grievant said he drove his car in Virginia without proper registration or permitting.<sup>25</sup> EDR perceives no error in the hearing officer’s determination that the grievant did not effectively rebut the agency’s evidence on this point. Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer’s authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.<sup>26</sup>

### Second Written Notice

The hearing officer upheld the Second Written Notice on the following grounds:

[Agency] records clearly show that Grievant accessed the records of several individuals when there was no legitimate business purpose for doing so. . . .

. . . Grievant accessed the record of a former Assistant Manager on November 10, 2018 and accessed the records of [Mr. L] and the repair shop where he works on February 17, 2018. . . . The procedure Grievant says he followed is not a normal business practice of the [agency]. . . .

[The agency] 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. [The agency] 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 [agency] policy which he had to be aware of. . . .

There is no evidence that Grievant had a valid reason to access [Mr. L]’s vehicle record. . . .

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<sup>25</sup> See Hearing Recording, Pt. 1, at 4:36:35-4:43:50 (Investigator’s testimony); *see generally* Agency Ex. 28.

<sup>26</sup> See, e.g., EDR Ruling No. 2020-4976.

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. . . .

[The Deputy Director] persuasively explained that removal of a [title stop] is not routine. . . . The Assistant Manager testified at the instant grievance hearing that she was instructed by Grievant to remove the “held” . . . . [H]er 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 [agency] had unnecessarily exposed itself to liability. . . .

[Agency] records show that Grievant purchased 8 Trip Permits to drive his cars to and from the CSC parking lot. . . . [Agency] 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. 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.<sup>27</sup>

The record contains evidence to support the hearing officer’s findings. The Deputy Director testified to the effect that CSC staff would not access records for call-in customers because they had no way to verify such callers’ identity.<sup>28</sup> She also testified that, of the relatively few records the grievant had accessed during 2018, a disproportionate number appeared to be related to his personal interests.<sup>29</sup>

The Assistant Manager testified to the effect that the grievant instructed her to remove the title stop on a vehicle that he would purchase the same day the stop was removed.<sup>30</sup> While the hearing officer acknowledged reasons to question the Assistant Manager’s credibility, he

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<sup>27</sup> Hearing Decision at 13-15.

<sup>28</sup> Hearing Recording, Pt. 1, at 2:51:10-2:55:40 (Deputy Director’s testimony).

<sup>29</sup> *Id.* at 2:40:25-2:46:10; *see generally* Agency Exs. 24, 26.

<sup>30</sup> Hearing Recording, Pt. 1, at 3:33:40-3:35:45 (Assistant Manager’s testimony); *see* Agency Ex. 18, at 10-12; Agency Ex. 29.

ultimately found her account under oath to be more credible than the grievant's, given their respective motivations. Even if EDR were to accept the grievant's argument that the hearing officer failed to appreciate the Assistant Manager's motive to lie, the hearing officer's ultimate findings of fact are supported by the totality of the circumstances he cites with record support; *i.e.* records indicate that the grievant obtained title to the vehicle the same day the title stop was removed.<sup>31</sup> Finally, there is evidence to support the hearing officer's finding that the grievant purchased trip permits for his vehicles but did not appropriately document these as the grievant's personal business, as agency policy required him to do.<sup>32</sup>

While the grievant maintains that the Deputy Director and Assistant Manager were not being truthful, EDR finds no basis in the record to disturb the hearing officer's findings as to the misconduct alleged by the Second Written Notice. Again, the hearing officer's analysis makes clear that he did not find the grievant's testimony credible as to whether he had a legitimate business purpose to access records, whether he was involved in the removal of a title stop on a vehicle he would purchase on the same day, and whether he failed to follow the agency's documentation procedures for trip permits. Based on supporting record evidence, these determinations are well within the hearing officer's discretion.

### Third Written Notice

The hearing officer upheld the Third Written Notice on the following grounds:

[The grievant's] 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.

. . . Grievant's explanation as to how the [West Virginia dealer] placard ended up on his Infiniti changed repeatedly. . . .

Grievant admitted to the [agency] 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

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<sup>31</sup> *Id.*

<sup>32</sup> Hearing Recording, Pt. 1, at 3:09:15-3:13:10 (Deputy Director's testimony); Agency Exs. 12, 23. In his request for administrative review, the grievant maintains that management removed records that would show he complied with the Friends & Family policy. However, the hearing officer did not find facts that would support this allegation, and EDR finds nothing in the record to cast doubt on the hearing officer's analysis of this issue.

certificate of title showed that date as the date of purchase, and claiming he paid nothing for the car when the records indicate he paid \$500 and the prior owner told the investigators that he sold the vehicle for \$500 to \$600. . . .<sup>33</sup>

While the grievant maintains that he never made false or misleading statements to his managers or law enforcement, multiple agency witnesses testified to the contrary, and the hearing officer accepted their accounts. As to why the grievant indicated that the cars in the CSC lot belonged to nearby apartment dwellers rather than himself, the hearing officer found the grievant's explanation that he misunderstood management's inquiries to be "totally unconvincing,"<sup>34</sup> also noting the inconsistency of the grievant's explanations for how long his cars had been in the CSC lot and what their status was. In addition, the agency's investigator, a law enforcement officer, testified as to numerous changes in the grievant's answers to where the West Virginia dealer placard came from and how the grievant was using his trip permits, among other things; these inconsistencies led the investigator to conclude that the grievant was not being honest in his responses.<sup>35</sup> It was within the hearing officer's discretion to credit the investigator's testimony, supported by the investigation report and recorded interview.

In sum, the hearing officer did not abuse his discretion or otherwise err in finding that the grievant engaged in the misconduct alleged. Further, the hearing officer explained that each separate charge of misconduct – violating laws within the agency's own purview, using his position for improper personal business, and misleading agency managers and investigators – could each properly sustain a Group III Written Notice. Based on DHRM Policy 1.60, *Standards of Conduct*, EDR finds no error in the hearing officer's conclusion that the agency's disciplinary actions were consistent with law and policy.

#### *Further Defenses*

In addition to disputing the misconduct alleged, the grievant argues that the agency disciplined him for improper reasons and that any misconduct should have merited, at most, a Group I Written Notice.<sup>36</sup> Specifically, the grievant takes issue with numerous aspects of the agency's investigation, such as allegedly recording the grievant's interview without his knowledge and not advising him of the subject of the investigation. The grievant asserts that multiple agency personnel conspired to end his employment through a groundless hunt for wrongdoing on his part. Although the grievant presented these allegations at the hearing, the hearing officer nevertheless did not find that the grievant had proven any defense to the agency's charges of misconduct. EDR finds no error in this aspect of the hearing decision. It is unclear how the grievant's objections, such as the impetus for the investigation and whether the grievant was recorded, relate to whether the grievant in fact drove his vehicles in violation of Virginia law, violated agency policies in pursuit of his personal interests, and was dishonest during the investigation. The grievant suggests

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<sup>33</sup> Hearing Decision at 15-16.

<sup>34</sup> *Id.* at 4.

<sup>35</sup> See Hearing Recording, Pt. 1, at 4:12:55-4:14:30 (Investigator's testimony); see also Agency Ex. 27, at 26-27; see generally Agency Ex. 28.

<sup>36</sup> In disciplinary grievance hearings, the grievant has the burden to prove defenses as well as mitigating circumstances. *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § IV(B).

that the agency's bad faith undermined the credibility of its witnesses, but as explained above, it was within the hearing officer's discretion to determine the witnesses' credibility. It appears that he did not find the grievant's theory persuasive,<sup>37</sup> and EDR finds no abuse of discretion or other error in that regard.

Finally, to the extent that the grievant argues that the hearing officer should have mitigated the agency's disciplinary action to a Group I Written Notice, the *Rules for Conducting Grievance Hearings* ("Rules") provide that "a hearing officer is not a 'super-personnel officer'"; therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."<sup>38</sup> More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>39</sup>

In this case, as explained above, the hearing officer appropriately sustained the agency's charges of violations of state law and agency policy, in addition to dishonesty with agency management. Thus, he appropriately upheld the agency's conclusion, in its discretion, that these various offenses had irreparably compromised management's trust in him going forward. Thus, EDR cannot say that the hearing officer erred in finding that the grievant's removal was within the bounds of reasonableness. As such, EDR will not disturb the hearing officer's decision on this basis.

### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>40</sup> Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.<sup>41</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>42</sup>

*Christopher M. Grab*  
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<sup>37</sup> Hearing Recording, Pt. 2, at 1:20:50-1:23:50 (Grievant's testimony).

<sup>38</sup> *Rules for Conducting Grievance Hearings* § VI(A).

<sup>39</sup> *Id.* § VI(B).

<sup>40</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>41</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>42</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).