



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12191

Hearing Date: December 13, 2024

Decision Issued: February 10, 2025

PROCEDURAL HISTORY

On August 20, 2024, Grievant was issued a Group III Written Notice of disciplinary action with termination for falsifying time records.¹

On September 19, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 21, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On December 13, 2024, a hearing was held at a probation and parole office in Norfolk, Virginia.

During the hearing, Grievant proffered an exhibit that she had not proffered by the deadline the Hearing Officer had established for the parties' exchange of their proposed exhibits. The Agency objected. The exhibit was a District Implementation Memorandum regarding Time, Attendance, & Leave dated August 16, 2024, and signed August 20, 2024. The Grievant's proffered exhibit also appeared to be a previous version of an exhibit proffered by the Agency as part of its exhibits (Agency Ex. Tab 12). The Hearing Officer provided the Agency an opportunity to review the memorandum, marked the exhibit as Grievant's Exhibit 1, and admitted it into the record. The Agency then proffered as rebuttal evidence, a copy of a publicly accessible Agency Operating Procedure, Operating Procedure 110.1, Hours of Work and Leaves of Absence. The Hearing Officer marked the Agency's proffered rebuttal exhibit as Agency Exhibit Tab 14. Grievant did not object to the admission of Agency Exhibit Tab 14 and it was admitted into the record. The Hearing Officer admitted into the record all of the Agency's exhibits, including Agency

¹ Agency Ex. at 1-4.

Exhibits Tabs 1-13 (pages 1-132) and Agency Exhibit Tab 14. Grievant objected to the admission of page 3 of the Agency's exhibits because Grievant asserted that the page, which was part of the Written Notice, contained inaccurate statements. Grievant had an opportunity to provide testimony and ask questions of Agency witnesses regarding the information in the Written Notice that she believed to be inaccurate, and the Hearing Officer admitted the Agency's exhibit into the record as relevant to this matter.

APPEARANCES

Grievant
Agency Legal Advocate
Agency Party Designee
Witnesses

ISSUES

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

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Prior to her dismissal, Grievant was a Department of Corrections probation officer working in a District office. Grievant had been employed by the Agency for more than one year. No evidence of prior active disciplinary action was introduced during the hearing.

DOCTime is the official time, attendance, and leave system for the Agency. All time, attendance, and leave are submitted in DOCTime. Generally, District staff used a computer to clock-in when they started their work shift. Designated staff who would begin their day away from a computer, could be granted access to clock-in using the DOCTime mobile phone application (or app).²

Grievant was required to clock-in when she began working each day and clock-out when she concluded her workday. Grievant's daily work schedule was 8:15 a.m. to 5:00 p.m. with a 45-minute lunch break. Grievant was approved to telework one-day each week. Grievant's telework day was "variable" each week.³ Grievant's duties required that she also perform work away from the District office, including attending court and visiting jails in the area. Grievant was not required to report to the District office before attending court or visiting a jail.

Deputy Chief became Grievant's supervisor on July 25, 2024. On August 12, 2024, Grievant met with Deputy Chief. Grievant testified that at that time she shared her concerns that she was not being provided sufficient support from District management given the size of her caseload and the frequency with which her supervision had changed.⁴

On or about August 14, 2024, Deputy Chief observed Grievant enter the building at approximately 8:45 a.m. Deputy Chief observed that Grievant was carrying her bag and other items that made it appear to Deputy Chief that Grievant was arriving to work for the first time that day. Deputy Chief had not received any texts or emails from Grievant to indicate that Grievant would be arriving to work late. Deputy Chief checked Grievant's DOCTime entry for that morning which showed that Grievant had clocked-in at 8:18 a.m. Deputy Chief learned from a colleague that DOCTime also would show the location from which Grievant had clocked-in if Grievant had used the DOCTime mobile app to clock-in. Deputy Chief reviewed DOCTime again and determined that Grievant had clocked-in using the DOCTime mobile app from a location that was not the District office, a courthouse, or a jail.⁵ Deputy Chief then reviewed Grievant's DOCTime records for July and August and identified at least ten dates on which it appeared that Grievant had clocked-in or clocked-out from a location that was not the District office, a courthouse, or a jail.

Deputy Chief met with Grievant and asked Grievant about the time entries that showed Grievant had clocked-in or clocked-out at locations that were not the District office, including a location in Portsmouth that appeared to be Grievant's home address. Without being provided an opportunity to review her records, Grievant responded at that time that she expected that the occasions when she clocked-in or clocked-out at locations other than the District office would have been dates when Grievant had visited a courthouse or a jail as part of her job duties.⁶

² Virginia Department of Corrections Operating Procedure 110.1, Hours of Work and Leaves of Absence, Procedure II.A.

³ Agency Ex. at 78-81.

⁴ Hearing Recording at 3:40:38-3:32:07.

⁵ Hearing Recording at 27:59-32:22, Agency Ex. at 1-4.

⁶ Hearing Recording at 33:56-35:42, 59:10-1:04:08.

Deputy Chief and District Chief then reviewed Grievant's DOCTime entries from January 1, 2024, to August 13, 2024. Deputy Chief and District Chief created a spreadsheet setting forth the dates they identified that showed that Grievant clocked-in or clocked-out at a location that was not the District office, a jail, or a courthouse.⁷ Deputy Chief and District Chief identified more than 80 dates in Grievant's DOCTime records where Grievant clocked-in or clocked-out from a location that did not appear to be the District office, a courthouse, or a jail. District Chief and Deputy Chief identified approximately 11 separate dates when Grievant clocked-in using the DOCTime mobile app while she was at her home address.

Many of the locations where Grievant clocked-in using the mobile app were highways and interstates in the area. The Agency's evidence showed that Grievant clocked-in using the DOCTime mobile app from an interstate or highway on approximately 14 separate occasions, including: August 1, 2024 (clock-in: 8:24 I-64; clock-out 17:03 LO Drive near OGB Road), July 25, 2024 (clock-in 8:18 I-464; clock-out 17:21 RM Circle), July 23, 2024 (clock-in 8:18 Highway 164; clock-out 17:04 District office), July 15, 2024 (clock-in: 8:18 Highway 164; clock-out: 17:08 District office), July 12, 2024 (clock-in: 8:24 South Military Highway; clock-out 17:16 District office), June 27 2024 (clock-in: 8:24 I-464; clock-out 17:10 LO Drive), June 18, 2024 (clock-in: 8:18 I-64 near 460; clock-out: 17:09 District office), June 12, 2024 (clock-in: 8:18 I-664 near Joliff Rd; clock-out: 17:34 District office), June 11, 2024 (clock-in: 8:18 I-64 near Great Bridge Blvd; clock-out: 17:05 District office), April 9, 2024 (clock-in: 8:18 Military Highway; clock-out: 16:55 OGB Road), March 26, 2024 (clock-in: 8:18 I-64 near Great Bridge Blvd; clock-out 17:07 District office), March 19, 2024 (clock-in: 8:18 – I-464 exit to Military Highway; clock-out: 17:02 District office), February 12, 2024 (clock-in: 8:24 South Military Highway; clock-out: 17:02 District office parking lot), January 8, 2024 (clock-in: 8:12 South Military Highway; clock-out 17:00 LO Drive).⁸

Grievant also clocked-in using the mobile app from the roads near or in close proximity to the District office. OGB Road and LO Drive are roads near the District office.⁹ The Agency's evidence showed that Grievant used the mobile app to clock-in from OGB Road or LO Drive on approximately 29 separate occasions between January 1, 2024, and August 13, 2024, including the following: July 30, 2024 (clock-in: 8:24 OGB Road; clock-out: 17:07 OGB Road), July 29, 2024 (clock-in: 8:18 OGB Road; clock-out: 17:01 LO Drive), July 26, 2024 (clock-in: 8:18 OGB Road; clock-out 17:05 OGB Road), July 19, 2024 (clock-in: 8:54 OGB Road; clock-out: 17:10 District office), July 10, 2024 (clock-in: 8:30 OGB Road; clock-out: 17:09 OGB Road), July 9, 2024 (clock-in: 8:12 OGB Road; clock-out 17:01 District office), July 2, 2024 (clock-in: 8:24 LO and OGB Road; clock-out 17:08 LO and OGB), July 1, 2024 (clock-in: 8:18 OGB Road; clock-out: 17:03 LO Drive), June 20, 2024 (clock-in: 8:18 OGB Road; clock-out: 17:04 LO Drive), June 17, 2024 (clock-in: 8:18 LO and OGB; clock-out: 17:00 District office), June 14, 2024 (clock-in 8:24 OGB Road; clock-out: 16:46 District office), June 3, 2024 (clock-in: 8:12 OGB and LO; clock-out: 17:13 District office), May 30, 2024 (clock-in: 8:18 OGB and LO; clock-out:

⁷ Hearing Recording at 3:07:11-3:08:46 and see Agency Ex. at 11-13.

⁸ See Agency Ex. at 11-13 and Hearing Recording at 1:39:00-2:02:20.

⁹ See Agency Ex. at 11-13, Agency Ex. at 77 and see Hearing Recording at 1:39:53-1:40:33, 1:41:15-2:02:20.

17:04 District office), May 17, 2024 (clock-in: 8:12 LO near OGB; clock-out: 17:03 District office), May 7, 2024 (clock-in: 8:18 OGB and LO; clock-out 17:13 District office), April 16, 2024 (clock-in: 8:24 OGB and LO; clock-out: 17:06 District office), March 27, 2024 (clock-in: 8:12 LO Drive; clock-out: 17:07 District office), March 13, 2024 (clock-in: 8:18 OGB and LO; clock-out: 17:11 District office), March 12, 2024 (clock-in: 8:18 OGB and LO; clock-out: 17:00 District office), March 4, 2024 (clock-in: 8:18 OGB and LO; clock-out: 17:01 District office), February 29, 2024 (clock-in 8:18 OGB and LO; clock-out: 17:03 District office), February 21, 2024 (clock-in: 8:18 OGB and LO; clock-out: 17:01 District office parking lot), February 8, 2024 (clock-in 8:12 Live Oak Drive; clock-out 17:00 OGB Road), January 31, 2024 (clock-in: 8:18 LO and OGB; clock-out: 17:00 District office), January 30, 2024 (clock-in: 8:18 LO and OGB; clock-out 17:03 District office), January 23, 2024 (clock-in: 8:18 LO Drive; clock-out: 17:02 LO Drive), January 22, 2024 (clock-in: 8:18 LO and OGB; clock-out: 17:00 District office), January 17, 2024 (clock-in: 8:18 LO and OGB; clock-out: 17:00 District office), January 3, 2024 (clock-in: 8:18 OGB Road; clock-out 17:02 District office parking lot).¹⁰

On August 20, 2024, Grievant was issued a Group III Written Notice of disciplinary action with termination for falsifying time records.¹¹

On that same day, District Chief and the regional administrator approved an updated District Implementation Memorandum regarding Time, Attendance, & Leave. The Implementation Memorandum purported to update a prior version that had first become effective on June 1, 2024. The Implementation Memorandum stated that it provided information to accomplish the intent of Operating Procedure 110.1 Hours of Work and Leave of Absence and 110.2 Overtime & Schedule Adjustments.¹² District Chief testified that the District could not change Agency policies and procedures, but it could provide additional District specific requirements to implement the Agency policy. District Chief testified that following the investigation of Grievant's time entries, she used the update to the Implementation Memorandum to further restrict use of the DOCTime mobile app by District staff.¹³

CONCLUSIONS OF POLICY

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

The Agency presented sufficient evidence to prove that Grievant engaged in misconduct.

Grievant was required to clock-in when she started working and clock-out when she finished her workday. Agency operating procedures provided that for the purposes of determining work hours, "work begins when the employee arrives at the actual

¹⁰ See Agency Ex. at 11-13, 14-17, 77, 84, 85-102 and Hearing Recording at 1:39:00-2:02:20.

¹¹ Agency Ex. at 1-4.

¹² Grievant Ex. 1.

¹³ Hearing Recording at 2:02:20-2:06:12.

workstation, place of performance of essential job functions.”¹⁴ When probation officers were performing their work duties at the District office, they were required to clock-in and clock-out at the District office. When District probation officers were appearing in court or visiting a jail before, or in lieu of, reporting to the District office, District Chief and Deputy Chief both testified that consistent with the Agency’s policy regarding hours of work, the probation officers were expected to clock-in when they reported to the place where they were beginning their work that day, that is at the courthouse or at the jail.¹⁵ District Chief testified that travel time from home to a courthouse or jail was considered commuting time and was not considered time at work.¹⁶ District Chief testified that, except for Grievant’s telework day, Grievant’s actual workstation was the District office or, if Grievant went from home directly to court or on a jail visit, her workstation or place where she started to perform her work would be the courthouse or the jail. According to District Chief, if Grievant was subpoenaed to appear in court at a time later than the start of her normal workday, Grievant’s options were either to go into the office and clock-in at her scheduled work time in the office before leaving for court or she could arrive at the courthouse by her scheduled work start-time and clock-in from the courthouse using the DOCTime mobile app. According to District Chief, Grievant was not allowed to include her travel time to the courthouse (or jail) as part of her workday unless the courthouse was further away than Grievant’s normal commute to the office, which District Chief testified would require Grievant to “back out” her normal commute time and would be an infrequent occurrence.¹⁷

Grievant did not dispute that she was required to clock-in and clock-out each workday and Grievant admitted that at times, she clocked-in and clocked-out using the DOCTime mobile app. Grievant also did not dispute that she clocked-in and clocked-out at any of the locations on the dates and times identified in the Agency’s evidence. Grievant asserted that she often would go directly to a courthouse or jail from her home. According to Grievant, she had been trained by her Previous Supervisor to clock-in at the start of her shift using the DOCTime mobile app on the occasions she was starting her workday going directly from home to court or to a jail. Grievant testified that she understood this to mean that she should clock-in (or clock-out) at her scheduled start (or end) time regardless of where she was at that time and including if she had not yet arrived at the courthouse or jail but was still at home or driving on a highway.¹⁸ Grievant also testified that she was trained that when she was working in the office, she was allowed to clock-in from the District parking lot. Grievant asserted that she verbally communicated her schedule, including court appearances and jail visits with her Previous Supervisor.

Even if Grievant had been trained to clock-in at the start of her shift using the DOCTime mobile app on the occasions she was starting her workday going directly from home to court or to a jail, it was not clear to this Hearing Officer that such an instruction would allow her to represent to the Agency that she had started working when she had not actually started work as opposed to requiring Grievant to arrive at the courthouse (or

¹⁴ See Agency Ex. 1-4 and see Virginia Department of Corrections Operating Procedure 110.1, Hours of Work and Leaves of Absence, Procedure I.G.II.

¹⁵ Hearing Recording at 1:49:50:2:01:06, 2:59:48-3:07:11, 3:52:25-3:54:46, 25:26-27:43.

¹⁶ Hearing Recording at 1:59:37-2:01:06.

¹⁷ Hearing Recording at 1:49:50:2:01:06, 2:59:48-3:07:11, 3:52:25-3:54:46.

¹⁸ Hearing Recording at 3:25:15-3:30:48, 3:32:07-3:34:08, 3:34:13-3:35:59.

jail) by the scheduled start time of her shift and clock-in from there using the app to confirm that she had started her workday on time.

The evidence showed that Grievant used the DOCTime mobile app to clock-in from an interstate or highway on at least 14 separate occasions between January 1, 2024 and August 13, 2024, including: August 1, 2024 (clock-in: 8:24 I-64; clock-out 17:03 LO Drive near OGB Road), July 25, 2024 (clock-in 8:18 I-464; clock-out 17:21 RM Circle), July 23, 2024 (clock-in 8:18 Highway 164; clock-out 17:04 District office), July 15, 2024 (clock-in: 8:18 Highway 164; clock-out: 17:08 District office), July 12, 2024 (clock-in: 8:24 South Military Highway; clock-out 17:16 District office), June 27 2024 (clock-in: 8:24 I-464; clock-out 17:10 LO Drive), June 18, 2024 (clock-in: 8:18 I-64 near 460; clock-out: 17:09 District office), June 12, 2024 (clock-in: 8:18 I-664 near Joliff Rd; clock-out: 17:34 District office), June 11, 2024 (clock-in: 8:18 I-64 near Great Bridge Blvd; clock-out: 17:05 District office), April 9, 2024 (clock-in: 8:18 Military Highway; clock-out: 16:55 OGB Road), March 26, 2024 (clock-in: 8:18 I-64 near Great Bridge Blvd; clock-out 17:07 District office), March 19, 2024 (clock-in: 8:18 – I-464 exit to Military Highway; clock-out: 17:02 District office), February 12, 2024 (clock-in: 8:24 South Military Highway; clock-out: 17:02 District office parking lot), January 8, 2024 (clock-in: 8:12 South Military Highway; clock-out 17:00 LO Drive).¹⁹ The preponderance of the evidence showed that Grievant was not in the District office, in the parking lot to the office, at a courthouse, at a jail, at her telework location, or at another work-related location at the times she clocked-in using the DOCTime mobile app while she was on an interstate or highway.²⁰ To the extent that Grievant generally argued that she “could” have been on her way to a courthouse, a jail, a training, or another work-related location, she provided no evidence to support any such assertion. Grievant testified that she had a planner that she took with her when she was dismissed that, according to Grievant would have more accurate or complete information than the information included in the Agency’s exhibits.²¹ Grievant, however, did not provide that planner as evidence to support her assertions.

Even if, as Grievant asserted, she understood that on the days she started work at court or a jail she was allowed to clock-in at her scheduled start time regardless of where she was and whether she had actually arrived to the place where she would be starting work, that would not explain the times that Grievant used the DOCTime mobile app to clock-in from locations near the District office near the start time of her shift but before she had actually arrived at the District office to begin working. OGB Road and LO Drive are roads near or in close proximity to the District office.²² Grievant used the mobile app to clock in from OGB Road or LO Drive at approximately the scheduled start time for her shift on approximately 29 separate occasions between January 1, 2024, and August 13, 2024, including the following: July 30, 2024 (clock-in: 8:24 OGB Road; clock-out: 17:07 OGB Road), July 29, 2024 (clock-in: 8:18 OGB Road.; clock-out: 17:01 LO Drive), July 26, 2024 (clock-in: 8:18 OGB Road; clock-out 17:05 OGB Road), July 19, 2024 (clock-in: 8:54 OGB Road; clock-out: 17:10 District office), July 10, 2024 (clock-in: 8:30 OGB Road; clock-out: 17:09 OGB Road), July 9, 2024 (clock-in: 8:12 OGB Road; clock-

¹⁹ See Agency Ex. at 11-13 and Hearing Recording at 1:39:00-2:02:20.

²⁰ See Agency Ex. at 11-13, 14-17, 77, 84, 85-102 and Hearing Recording at 1:39:00-2:02:20.

²¹ ²¹ Hearing Recording at 3:28:32-3:30:25.

²² See Agency Ex. at 11-13, Agency Ex. 14-76, Agency Ex. 84, Agency Ex. at 77 and see Hearing Recording at 1:39:53-1:40:33, 1:41:15-2:02:20.

out 17:01 District office), July 2, 2024 (clock-in: 8:24 LO and OGB Road; clock-out 17:08 LO and OGB), July 1, 2024 (clock-in: 8:18 OGB Road; clock-out: 17:03 LO Drive), June 20, 2024 (clock-in: 8:18 OGB Road; clock-out: 17:04 LO Drive), June 17, 2024 (clock-in: 8:18 LO and OGB; clock-out: 17:00 District office), June 14, 2024 (clock-in 8:24 OGB Road; clock-out: 16:46 District office), June 3, 2024 (clock-in: 8:12 OGB and LO; clock-out: 17:13 District office), May 30, 2024 (clock-in: 8:18 OGB and LO; clock-out: 17:04 District office), May 17, 2024 (clock-in: 8:12 LO near OGB; clock-out: 17:03 District office), May 7, 2024 (clock-in: 8:18 OGB and LO; clock-out 17:13 District office), April 16, 2024 (clock-in: 8:24 OGB and LO; clock-out: 17:06 District office), March 27, 2024 (clock-in: 8:12 LO Drive; clock-out: 17:07 District office), March 13, 2024 (clock-in: 8:18 OGB and LO; clock-out: 17:11 District office), March 12, 2024 (clock-in: 8:18 OGB and LO; clock-out: 17:00 District office), March 4, 2024 (clock-in: 8:18 OGB and LO; clock-out: 17:01 District office), February 29, 2024 (clock-in 8:18 OGB and LO; clock-out: 17:03 District office), February 21, 2024 (clock-in: 8:18 OGB and LO; clock-out: 17:01 District office parking lot), February 8, 2024 (clock-in 8:12 Live Oak Drive; clock-out 17:00 OGB Road), January 31, 2024 (clock-in: 8:18 LO and OGB; clock-out: 17:00 District office), January 30, 2024 (clock-in: 8:18 LO and OGB; clock-out 17:03 District office), January 23, 2024 (clock-in: 8:18 LO Drive; clock-out: 17:02 LO Drive), January 22, 2024 (clock-in: 8:18 LO and OGB; clock-out: 17:00 District office), January 17, 2024 (clock-in: 8:18 LO and OGB; clock-out: 17:00 District office), January 3, 2024 (clock-in: 8:18 OGB Road; clock-out 17:02 District office parking lot).²³ The preponderance of the evidence showed that Grievant was not in the office, in the parking lot to the office, at a courthouse, at a jail, at her telework location, or at another work related location at the times she clocked-in using the DOCTime mobile app while she was on OGB Road or LO Drive.²⁴ To the extent that Grievant generally argued that she “could” have been on her way to a courthouse, a jail, a training, or another work-related location, she provided no evidence to support any such assertion. Grievant testified that she had a planner that she took with her when she was dismissed that, according to Grievant would have more accurate or complete information than the information included in the Agency’s exhibits.²⁵ Grievant, however, did not provide that planner as evidence to support her assertions. There was no evidence to suggest that Grievant’s location on OGB Road or LO Drive on those dates and at those times showed anything other than Grievant commuting to the District office to start her workday at the District office on each of those dates. Additionally, the evidence showed that on many of those dates, Grievant also clocked-out using the mobile app from OGB Road or LO Drive showing that she clocked-out on her return commute after leaving the District office.

The Agency has met its burden of proving that Grievant engaged in misconduct.

Whether the Agency’s discipline was consistent with law and policy

Operating Procedure 135.1 describes the offense of falsifying records as “[f]alsifying any records either by creating a false record, altering a record to make it false, or omitting key information, willfully or by acts of negligence including but not limited to all

²³ See Agency Ex. at 11-13, 14-17, 77, 84, 85-102 and Hearing Recording at 1:39:00-2:02:20.

²⁴ See Agency Ex. at 11-13, 14-17, 77, 84, 85-102 and Hearing Recording at 1:39:00-2:02:20.

²⁵ Hearing Recording at 3:28:32-3:30:25.

electronic and paperwork and administrative related documents generated in the regular and ordinary course of business, such as . . . time records.”²⁶

Grievant knew that she was not working when she clocked-in using the DOCTime mobile app while she was on OGB Road, LO Drive, and on other roadways (including highways and interstates). Grievant represented to the Agency that she was working when she was not actually working.

The Agency has presented sufficient evidence to show that Grievant falsified her time records. Falsifying records is a Group III offense.²⁷

Grievant argued that the Agency’s actions were discriminatory and retaliatory. The Agency showed that it had business reasons for its discipline of Grievant based on Grievant’s misconduct and Grievant offered no evidence that would suggest that those reasons were mere pretext for discrimination or retaliation.

Grievant argued that the Agency did not properly investigate the allegations against her and that the Agency made up its mind without giving proper consideration to her response to the allegations. Grievant essentially argued that the Agency did not afford her with sufficient due process. The hearing process cures any such deficiency. Grievant had the opportunity to present any evidence and arguments she wished during the hearing.

Absent mitigating circumstances, job termination is the normal result of a Group III written notice.

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

Mitigation

Grievant argued that the Agency could have taken lesser disciplinary action than removal. That the Agency could have taken lesser disciplinary action, but chose not to is not a basis for this Hearing Officer to determine that the Agency’s discipline exceeded the limits of reasonableness. The Agency’s action was consistent with Operating Procedure 135.1 which makes falsification of records a Group III offense.

Grievant elicited testimony to suggest that a probationary employee of a different race had received a less harsh punishment for an offense related to driving or the employee’s ability to drive.²⁸ This Hearing Officer does not consider an offense related to driving (or ability to drive) to be similar to the offense of falsifying records. Grievant

²⁶ Virginia Department of Corrections Operating Procedure 135.1, Procedure XIV.B.2.

²⁷ Virginia Department of Corrections Operating Procedure 135.1, Procedure XIV.B.2.

²⁸ See Hearing Recording at 2:37:13-2:41:17.

presented no evidence to indicate that other employees who were similarly situated to Grievant were treated differently for the same or similar offense to Grievant's offense.

Virginia Code § 2.2-3005.1 authorizes hearing officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management...."²⁹ Under the Rules for Conducting Grievance Hearings, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

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

APPEAL RIGHTS

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

Please address your request to:

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

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

You 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

²⁹ Va. Code § 2.2-3005.

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.³⁰

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

³⁰ 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.