

Issue: Separation from State due to Below Contributor rating on Re-Evaluation;
Hearing Date: 05/16/17; Decision Issued: 05/24/17; Agency: VDOT; AHO: William
S. Davidson, Esq.; Case No. 10992; Outcome: No Relief – Agency Upheld;
**Administrative Review: Ruling Request received 06/08/17; Ruling No. 2017-4566
issued 07/28/17; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10992

Hearing Date: May 16, 2017
Decision Issued: May 24, 2017

PROCEDURAL HISTORY

On or about February 15, 2017, the Grievant received a letter from the Accounts Payable Accounting Manager, which stated in part as follows:

...As a result of your 90-day re-evaluation you are being rated “BELOW CONTRIBUTOR”, per DHRM Policy 1.40...your employment with the agency is terminated, effective immediately...¹

On March 13, 2017, the Grievant timely filed a grievance to challenge the Agency’s actions.² On April 3, 2017, the grievance was assigned to a Hearing Officer. On May 16, 2017, a hearing was held at the Agency’s location.

APPEARANCES

Attorney for Agency
Agency Representative
Witnesses
Grievant

ISSUES

1. Was the Grievant reasonably rated “Below Contributor” at the end of her 90-day re-evaluation?
2. Does DHRM Policy 1.40, allow for termination if the Grievant was rated “Below Contributor” at the end of her 90-day re-evaluation period?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency’s disciplinary action. By statute and under the grievance procedure, management is

¹ Agency Exhibit 1, Tab 6, Page 2

² Agency Exhibit 1, Tab 1, Page 1

reserved the exclusive right to manage the affairs and operations of state government. 3 Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

BURDEN OF PROOF

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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. 4 However, proof must go beyond conjecture. 5 In other words, there must be more than a possibility or a mere speculation. 6

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of the witness, I make the following findings of fact:

The Agency provided me with a notebook containing 24 tabs and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant provided me with a notebook containing 24 tabs. The Agency objected to the Grievant's documentary notebook for not being timely filed.

I held a conference call with the Grievant and Agency Counsel on April 17, 2017. At that time, it was established that all documentary evidence would be exchanged on or before 5:00 p.m., on May 2, 2017. Subsequently, that date was extended until May 5, 2017. The Agency filed its documentary evidence with me and the Grievant on May 5, 2017. The Grievant did not file any documentary evidence with either me or the Agency until May 15, 2017, the day prior to

³ See Va. Code § 2.2-3004(B)

⁴ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁵ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁶ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

the hearing. Upon questioning by me, the Grievant had a litany of reasons for why she was unable to timely file her documentary evidence. Some of those reasons were that- she was under stress; the first company that she went to for photocopies of the documents stapled them together rather than three-hole-punching them; a subsequent company ran out of toner; her copier broke; she did not have anyone to assist her in putting this notebook together; and other such excuses which I found wholly unsatisfactory. Accordingly, I sustained the Agency's objection and the Grievant's notebook was excluded.

As the hearing commenced, I heard substantial testimony regarding the Agency's Utility Bill Payment System ("VUBPS"). It became obvious to me that VUBPS was not the issue that I was being asked to rule on in this matter. Accordingly, I ruled during the course of the hearing that I needed to hear no further testimony regarding VUBPS, as it was not the matter before me.

On November 16, 2016, the Grievant acknowledged receipt of her Performance Evaluation for the 2015-2016 cycle. That evaluation rated her as "Below Contributor."⁷

Pursuant to this evaluation and pursuant to DHRM Policy 1.40, a Performance Planning Employee Development Plan ("Plan") was developed for the Grievant.⁸ The Plan was reviewed and discussed with the Grievant on or about November 17, 2016. The Plan was to be completed on or about February 15, 2017.

During the course of this Plan, meetings were held between the Grievant and appropriate Agency personnel on December 1, 2016; December 15, 2016; December 29, 2016; January 12, 2017; and February 2, 2017. Progress or lack thereof was discussed at each of these meetings and suggested corrective actions were made by the Agency to the Grievant.⁹

The Agency introduced an Exhibit that set forth the errors that the Grievant made during the course of the Plan.¹⁰ That Exhibit shows that approximately 250 errors were made during this 90-day period. I heard testimony that, as a vendor for the State submitted an invoice, the data from that invoice was keyed into a document known as a voucher. The creation of the voucher was not done by the Grievant. One of the Grievant's roles prior to being placed on the Plan was to take the voucher and compare it to the vendors invoice and other supporting documentation. The Grievant was a second set of eyes to make sure that voucher, which was created from the data taken from the vendor's invoice and supporting documentation, was correct. Based on Agency Exhibit 1, Tab 5, Page 1, it is clear that the Grievant, even though she was on the Plan and even though duties had been taken away from her so that she could focus on only 25 vouchers per day, still was capable of making an extreme number of errors. Examples of those errors could be found at Agency Exhibit 1, Tabs 19-22.

Based on the documentary evidence before me and the testimony before me at the hearing, I can find no justification for the quality or quantity of the errors made by the Grievant. The Grievant offered no witnesses who could testify to a justification for the nearly 250 errors that were made in a 90-day period and the Grievant, herself, declined to testify. Further, I find that the Agency complied with Policy 1.40, in granting the Grievant a re-evaluation period. There is ample evidence for the Agency to conclude that the Grievant's performance at the end

⁷ Agency Exhibit 1, Tab 3, Pages 1-9

⁸ Agency Exhibit 1, Tab 4, Pages 1-3

⁹ Agency Exhibit 1, Tab 6, Page 2

¹⁰ Agency Exhibit 1, Tab 5, Page 1

of the re-evaluation period continued to be “Below Contributor.” The Agency made the determination that its only course of action was termination of the Grievant and I find that to be a justifiable determination.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the Agency disciplinary action.” Under the Rules for Conducting Grievance Hearings, “a Hearing Officer must give deference to the Agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus a Hearing Officer may mitigate the Agency’s discipline only if, under the record evidence, the Agency’s discipline exceeds the limits of reasonableness. If the Hearing Officer mitigates the Agency’s discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

I find no reason to mitigate the termination issue before me.

DECISION

For reasons stated herein, I find that the Agency has borne its burden of proof in this matter and that termination of the Grievant was proper.

APPEAL RIGHTS

You may file an administrative review request if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or Agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. You may fax your request to 804-371-7401, or address your request to:

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

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

Office of Employment Dispute Resolution

101 North 14th Street, 12th Floor
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received by** the reviewer within 15 calendar days of the date of the original hearing decision. A copy of all requests for administrative review must be provided to the other party, EDR and the hearing officer. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹¹ 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.¹²

[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]

William S. Davidson
Hearing Officer

¹¹An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹²Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.