

Issue: Group III Written Notice with Termination (insubordination, disruptive behavior, failure to follow policy and instructions); Hearing Date: 06/27/17; Decision Issued: 06/29/17; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 11028; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 11028

Hearing Date: June 27, 2017
Decision Issued: June 29, 2017

PROCEDURAL HISTORY

On April 6, 2017, the Grievant was issued a Group III Written Notice, which, because of the length of the narrative regarding the offense, is attached to this Decision as Hearing Officer Exhibit 1.

Pursuant to the Written Notice before me, the Grievant was terminated on April 6, 2017.¹ On May 2, 2017, it appears that DHRM received a grievance form challenging the Agency's actions.² On May 18, 2017, this appeal was assigned to me. Due to the Grievant stating his desire to retain counsel and that the original hearing date of June 15, 2017, was one with which the Grievant had a conflict, the hearing was rescheduled for June 27, 2017. Accordingly, on June 27, 2017, a hearing was held at the Agency's location.

APPEARANCES

Advocate for Agency

Agency Representative

Witness

Grievant did not appear (and was not represented by counsel)

ISSUES

Did the Grievant commit the offenses set forth in the Written Notice issued on April 6, 2017?

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 1, Page 4

² Agency Exhibit 1, Tab 2, 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 20 tabs and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant did not appear before me, nor was he represented by counsel, nor did he file a documentary evidence notebook. Further, the Grievant did not request that I compel any witnesses to attend this hearing.

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 Agency witness testified before me that the Notice of Due Process given to the Grievant factually set forth the offenses for which the Agency terminated the Grievant.⁷ This same Agency witness testified that the allegations set forth in the Notice of Due Process are the same as were stated in the Written Notice dated April 6, 2017.⁸

The Agency witness testified that the Grievant was issued a Group II Written Notice on June 3, 2016, for substantially similar issues. That Group II Written Notice is active until June 3, 2019.⁹

Inasmuch as the only evidence before me is Agency Exhibit 1, which was not objected to and the testimony of the Agency witness setting forth the allegations of the offenses that the Grievant committed, I find that testimony and Agency Exhibit 1 shall be accepted as truthful and factual. I find the Grievant was insubordinate, his behavior was disruptive and he failed to comply with his supervisor's instructions.

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 Written Notice before me.

DECISION

For reasons stated herein, I find that the Agency has borne its burden of proof in this matter and that the issuance of the Group III Written Notice to the Grievant, with termination, was proper.

⁷ Agency Exhibit 1, Tab 3, Pages 1-3

⁸ Agency Exhibit 1, Tab 1, Pages 3-5

⁹ Agency Exhibit 1, Tab 8, Pages 3-4

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.¹⁰ 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.¹¹

[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

¹⁰An 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).

¹¹Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.