

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 11914

Hearing Date: March 27, 2023
Decision Issued: March 29, 2023

PROCEDURAL HISTORY

On September 23, 2022, Grievant was issued a Group I Written Notice. ¹ On October 21, 2022, Grievant timely filed a grievance challenging the Agency's actions. ² On January 24, 2023, the grievance was assigned to a Hearing Officer. A hearing was held on March 27, 2023.

APPEARANCES

Agency Counsel
Agency Representative
Grievant
Witnesses

ISSUES

Did the Grievant commit a *Violation of OP135.1. Standards of Conduct, for failure to follow supervisor's instructions and comply with the unit's protocol. On several occasions extending from March 1 - August 31, 2022, Grievant has failed to meet the expectations of her position. Her repeated errors have resulted in negative impacts on the business of the work unit including discrepancies with billing, invoicing, and customer orders. Some of these errors were a direct result of not following instructions provided directly to her by management.*³

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 reserved the exclusive right to manage the affairs and operations of state government.⁴ 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

¹ Agency Exhibit 1, Page 001

² Agency Exhibit 1, Page 005

³ Agency Exhibit 1, Page 001

⁴ See Va. Code § 2.2-3004(B)

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.⁵ However, proof must go beyond conjecture.⁶ In other words, there must be more than a possibility or a mere speculation.⁷

FINDINGS OF FACT

After reviewing the evidence presented, I make the following findings of fact:

The Agency submitted a notebook containing pages 1 through 99. Grievant had no objections to the contents of Agency’s notebook and it was accepted as Agency Exhibit 1.

Grievant submitted a notebook containing Sections 1 through 5. The Agency had no objections to the contents of Grievant’s notebook and it was accepted as Grievant’s Exhibit 1.

Grievant’s job was very detail oriented and data specific. It required the ability to deal with large spreadsheets of numbers, digest and interpret those numbers, and then enter information properly and exactly on various forms used by this Agency. On February 2, 2022, Grievant received a Notice of Improvement Needed/Substandard Performance.⁹ It set forth many errors that Grievant had

⁵ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁶ *Southall, Adm’r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁷ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

⁹ Agency Exhibit 1, Pages 041-042

made, included but not limited to, entering incorrect quantities, different due dates, creating a job order in error, and entering an incorrect material code. Further, it stated in part that Grievant would *need to demonstrate organizational and critical thinking skills with a high level of attention to detail and she will review all entries prior to submitting them for accuracy.* Grievant signed this Notice on February 2, 2022.¹⁰

On July 12, 2022, Grievant received a Notice of Improvement Needed/Substandard Performance.¹¹ The errors cited were similar in kind to those delineated in the Notice of Improvement Needed/Substandard Performance issued on February 2, 2022. Grievant and the Agency subsequently entered into a Performance Improvement Plan (PIP).¹² As improvement goals for Grievant, the PIP stated in part: *(1) Accurately managing the data from the ... server through entry into Syteline; (2) Attention to detail when processing order shipping so there are no miss shipping of Customer Order Lines; (3) Ensure all processes are completed prior to signing off that they have been accomplished and (4) Ensure all tasks are completed timely.*

The PIP also stated *Effective immediately, you are placed on a 30-day PIP. During this time, you will be expected to make regular progress on the plan outlined above. Failure to meet or exceed these expectations... will result in further disciplinary action. Failure to maintain performance expectations after the completion of the PIP may result in additional disciplinary action.*¹³ The PIP was signed by Grievant on July 12, 2022.¹⁴

The Agency called 3 witnesses to testify. The first was a senior supervisor (A) at the location where Grievant worked. He testified that he had worked with Grievant in many different ways and times to help her improve the quality of her work performance. Many of his attempts to help were set forth at Agency Exhibit 1, pages 026-040 and 043-075. The mistakes being made were both small and large and continuous. Some were as small as a \$0.40 error and some as large as approximately \$45,000.¹⁵ Of significant concern is, that when confronted with this large error, Grievant stated that *she does not recall making the mistake or correcting it.*¹⁶

I heard from 2 other Agency witnesses (B and C). With A, both of them met with the Grievant on September 22, 2022. The purpose of the meeting was to provide Due Process Notification¹⁷ to Grievant.¹⁸ The Grievant was given 24 hours to respond. All 3 Agency witnesses testified that the intent was to issue a Group II Written Notice for failure to follow supervisor's instructions.

On September 23, 2022, A, B, and C met with Grievant, who provided a written response to the Due Process Notification.¹⁹ Subsequent to this meeting, Grievant provided a revised written

¹⁰ Agency Exhibit 1, Page 042

¹¹ Agency Exhibit 1, Pages 019-021

¹² Agency Exhibit 1, Pages 021-025

¹³ Agency Exhibit 1, Page 025

¹⁴ Agency Exhibit 1, Page 025

¹⁵ Agency Exhibit 1, Page 072

¹⁶ Agency Exhibit 1, Page 072

¹⁷ Agency Exhibit 1, Pages 003-004

¹⁸ Agency Exhibit 1, Page 015

¹⁹ Agency Exhibit 1, Pages 007-008

statement.²⁰ B, in his testimony before me, stated that Grievant said she has vision and memory issues and that she had issues with A micro-managing her work. B, while in Grievant's management chain of command, stated he had never received any documentation from Grievant regarding medical difficulties. He testified that he knew Grievant had been requested to produce such documentation. He knew of no time that Grievant ever requested an accommodation for any medical challenge. He testified that Grievant stated she could not continue to work with A.

C asked Grievant if she would like to consider another position with the Agency.²¹ Both B and C stated in their testimony that Grievant answered in the affirmative. C testified that they provided Grievant with job descriptions and requirements for several current openings within the Agency. Grievant was interested in the position where she is currently employed. C explained to Grievant that this position was a lower level than her current position and would result in a 10% reduction in pay.²² Grievant indicated at this meeting that a 10% reduction in pay was more than she could accept. C offered to attempt to negotiate the pay reduction to only 5%. This offer was accepted, and C was successful in negotiating on Grievant's behalf.²³

Consequently, the Group Notice was written as a Group I. C asked Grievant if she wanted to move forward with the voluntary demotion and a 5% reduction in pay. On September 26, 2022, C wrote to Grievant confirming the change in the level of the Written Notice and confirmed that Grievant agreed to the voluntary demotion, with a 5% reduction in pay. Grievant responded that she was interested in the new position and wished C a fabulous day.²⁴ Both B and C testified to Grievant stating that she desired this new position. The testimony of A, B, and C is that Grievant was in no way pressured into taking this new position. It was Grievant's free and voluntary choice.

Grievant, both in documentary evidence and in her oral testimony, stated that she had memory problems and vision impairment. She included in her evidence a doctor's statement that was dated some 5 months after the issuance of the Group I Written Notice.²⁵ She also offered medical records that were dated September 4, 2020, and February 22, 2016.²⁶ The first is after the fact and the second is multiple years prior to the events that caused this hearing to take place. There was no evidence that any of the records were ever shared with the Agency. The Grievant testified that she never asked for any accommodation as one of her physicians stated, whenever many of his patients asked for an accommodation, they were soon no longer employed by this Agency. Grievant offered no evidence to support this statement. Grievant offered no evidence that she ever provided the Agency with any medical records setting forth her memory issues or vision issues. Grievant did not deny making mistakes, stating that no one is perfect.

Because Grievant had mentioned her vision issues, A testified that the font size on documents was increased and the size of the spreadsheets was reduced, so that there were fewer lines per sheet. Errors continued to be made, no medical documentation was provided to the Agency and no request for any type of accommodation was made.

²⁰ Agency Exhibit 1, Pages 009-012

²¹ Agency Exhibit 1, Page 015 and 016

²² Agency Exhibit 1, Page 016

²³ Agency Exhibit 1, Pages 016-017

²⁴ Agency Exhibit 1, Page 018

²⁵ Grievant Exhibit 1, Section 4, Page 1

²⁶ Grievant Exhibit 1, Pages 2-7

The 3 Agency witnesses testified that each of the mistakes resulted in time being spent to make the necessary corrections. The mistakes were small and large and continued, regardless of attempts to help Grievant improve her job performance. The Agency worked with Grievant to find a new position within the Agency and I find that Grievant did so voluntarily. Grievant hints at intimidation on behalf of the Agency, but she offered no credible evidence to support that allegation.

MITIGATION

Va. Code § 2.2-3005(C)(6), authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. 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 the Agency management that are found to be consistent with law and policy. 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.

Hearing Officers are authorized to make findings of fact as to the material issues of the case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute 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. 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.

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.

As the offenses in this matter justified a Group II notice, and as I find the Grievant voluntarily accepted a transfer to another position within the Agency, resulting in a demotion and consequent 5% reduction in pay, and as the Agency mitigated to a single Group I, I find no reason to further mitigate this matter.

DECISION

For the reason stated herein, I find the Agency has borne its burden of proof in this matter and that the issuance of the Group I Written Notice was proper.

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

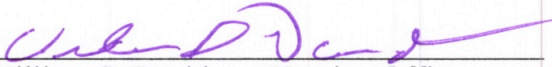
or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.