

Issues: Group I Written Notice (unsatisfactory performance), Group I Written Notice (unsatisfactory performance), and Termination due to accumulation; Hearing Date: 05/23/18; Decision Issued: 06/01/18; Agency: DSS; AHO: William S. Davidson, Esq.; Case No. 11073, 11076; Outcome: No Relief – Agency Upheld;
Administrative Review: Ruling Request received 06/12/18; EEDR Ruling No. 2018-4743 issued on 07/11/18; Outcome: AHO's decision affirmed.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 11073, 11076

Hearing Date: May 23, 2018
Decision Issued: June 1, 2018

PROCEDURAL HISTORY

On May 6, 2017, the Grievant was issued a Group I Written Notice for unsatisfactory performance.¹ This Written Notice led to a 30-day suspension.

On June 24, 2017, the Grievant was issued a Group I Written Notice for unsatisfactory performance.² This second Written Notice led to termination of the Grievant on June 24, 2017.

On June 2, 2017, the Grievant timely filed a grievance challenging the Agency's actions regarding the first Written Notice, issued on May 6, 2017.³ On July 20, 2017, the Grievant timely filed a grievance challenging the Agency's actions regarding the second Written Notice, issued on June 24, 2017.⁴ Pursuant to the facts set forth in the Compliance Ruling of the Director of Employee Dispute Resolution, dated April 4, 2018, this matter did not come before a Hearing Officer for some time. On March 30, 2018, the grievance was assigned to a Hearing Officer. Due to calendar conflicts, the hearing was held on May 23, 2018. The hearing was held at the Agency's location.

APPEARANCES

Representative for Agency
Grievant
Witnesses

ISSUES

Was the Grievant's job performance unsatisfactory, as set forth in each of the Group I Written Notices?

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-

¹ Agency Exhibit 1, Tab 1, Pages 1 & 2

² Agency Exhibit 1, Tab 2, Pages 1 & 2

³ Agency Exhibit 1, Tab 3, Page 1

⁴ Agency Exhibit 1, Tab 4, Page 1

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. ⁵ 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. ⁶ However, proof must go beyond conjecture. ⁷ In other words, there must be more than a possibility or a mere speculation. ⁸

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 twelve numbered tabs, only eleven containing evidence. The Grievant objected to the contents at Tabs 8 and 10. That notebook was accepted in its entirety as Agency Exhibit 1, with the exception of Tabs 8 and 10. The Grievant was allowed to object to the evidence at those tabs, if they were used.

The Grievant provided me with a notebook containing eleven tabs. That notebook was accepted in its entirety as Grievant Exhibit 1, without objection.

⁵ See Va. Code § 2.2-3004(B)

⁶ Ross Laboratories v. Barbour, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁷ Southall, Adm'r v. Reams, Inc., 198 Va. 545, 95 S.E. 2d 145 (1956)

⁸ Humphries v. N.N.S.B., Etc., Co., 183 Va. 466, 32 S.E. 2d 689 (1945)

In her documentary evidence, the Grievant alleged that she was discriminated against based on age, race and disability and that she was retaliated against because she was a witness to another employee's grievance, and that the Agency violated both ADA and FMLA. I pointed out to the Grievant that these were affirmative defenses and the burden of proof would be on the Grievant regarding these allegations.

The Grievant's Employee Work Profile ("EWP"), indicated that she was a Customer Service Representative Senior. ⁹ As such, the first duty or essential responsibility that was listed in her EWP was "handle phone calls." ¹⁰ Further, her EWP indicates that she is to be logged in and ready to answer phone calls by 8:15a.m. daily. ¹¹ It is clear from the Grievant's EWP that there were other duties. However, I heard significant testimony from the Agency witness that answering the phone was a primary responsibility for this Grievant's position. While at various times during her testimony before me, the Grievant indicated that she did not realize that answering calls was a priority under her EWP, she acknowledged that she knew it was a priority in an email from the Grievant to her supervisor dated April 24, 2017. In that email the Grievant stated in part as follows:

...knowing that live calls is the priority of the unit is why
I let you know... ¹²

This email from the Grievant was in response to her manager questioning whether or not the Grievant had informed a coworker that she would not be available to take live calls on April 21, 2017. ¹³ This failure is the event that led to the original Group I Written Notice.

Because the Grievant had an outstanding Group III Written Notice which was now final, the original Group I Written Notice that is before me led to a 30-day suspension. ¹⁴

The Grievant, in her testimony, appeared to testify that her signature on the Group III Written Notice was a forgery. She then seemed to retract that statements, but it is unclear to me whether or not she actually believed the signature was a forgery. She acknowledged receipt of the Group III Written Notice, and that it was either not grieved or grieved and was now final.

On April 26, 2017, the Grievant's supervisor sent her a screen shot that indicated there were 18 customers in the phone queue, one of whom had been on hold for more than one hour. ¹⁵ The Grievant indicated that she had been working on labels for court documents as a justification for not dealing with these agency customers. She indicated that she could have worked on the court documents at a later time. ¹⁶ Pursuant to this, the Grievant's supervisor performed a quality assurance check. As a part of that process, documents were produced that indicated when the Grievant logged into her computer every morning, for a period of time. This document showed that, subsequent to April 21, 2017, the offense date for the original Written

⁹ Agency Exhibit 1, Tab 5, Page 2

¹⁰ Agency Exhibit 1, Tab 5, Page 3

¹¹ Agency Exhibit 1, Tab 5, Page 3

¹² Agency Exhibit 1, Tab 1, Page 12

¹³ Agency Exhibit 1, Tab 1, Page 13

¹⁴ Agency Exhibit 1, Tab 10, Page 1

¹⁵ Agency Exhibit 1, Tab 7, Page 1

¹⁶ Agency Exhibit 1, Tab 7, Page 1

Notice before me, the Grievant was late in logging in to her station on April 24, 2017 and April 26, 2017. 17

Testimony was presented before me that, when this Grievant logged into her computer, she had the ability to tell the system by an entry into the computer that she was unavailable to answer phones. The Agency presented evidence that, for the week of April 3, 2017 through April 7, 2017, the Grievant was unavailable for 98.81% of the time that she was logged in to her computer. 18 For the week of April 10, 2017 through April 14, 2017, the Grievant was unavailable 93.78% of the time. 19 For the week of April 17, 2017 through April 21, 2017, the Grievant was unavailable 95.75% of the time. 20 And finally, for the week of April 24, 2017 through April 26, 2017, a time after the first Group I Written Notice, the Grievant was unavailable 93.28% of the time. 21

The Grievant's own written statement to her supervisor indicated that she knew answering live phone calls was the priority of her job. The Grievant was issued a Group I Written Notice for failure to notify anyone that she was going to be unavailable to answer the phone and, subsequently, pursuant to a quality-assurance check, it was found that the Grievant continued, after the issuance of the Group I Written Notice, to be unavailable to answer phone calls.

When the Grievant testified, she offered no meaningful testimony regarding the Agency's failure to comply with FMLA or ADA. The Grievant introduced a doctor's note indicating that she should be on "light duty." The Grievant offered no further evidence as to whether or not answering a phone was considered "light duty." The Grievant offered no testimony regarding the Agency failing to comply with FMLA. The Grievant offered no testimony regarding being discriminated against because of a disability. The Grievant testified that she was called as a witness to a fellow-employee's grievance, but further testimony indicated that she did not appear and did not testify in said grievance. The Grievant offered no meaningful testimony regarding retaliation. A witness for the Grievant indicated that she knew of no one working in the Grievant's department at the Agency who was over the age of 50 years. Having said that, no further evidence was presented to indicate that anyone had been terminated because they were over age 50. The Grievant simply presented no meaningful testimony regarding any of her alleged affirmative defenses.

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

¹⁷ Agency Exhibit 1, Tab 6, Page 23

¹⁸ Agency Exhibit 1, Tab 7, Page 3

¹⁹ Agency Exhibit 1, Tab 7, Page 4

²⁰ Agency Exhibit 1, Tab 7, Page 5

²¹ Agency Exhibit 1, Tab 7, Page 6

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 stated, I do not find a reason to mitigate either of the Group I Written Notices 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 request an administrative review by EEDR within **15 calendar days from the date the decision was issued. Your request must be in writing and must be received by EEDR within 15 calendar days of the date the decision was issued.**

Please address your request to:

Office of Equal Employment and 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]

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

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

William S. Davidson
Hearing Officer