Issue: Group II Written Notice (failure to follow instructions/policy); Hearing Date: 10/11/17; Decision Issued: 10/20/17; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 11061; Outcome: Partial Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 11061

Hearing Date: October 11, 2017
Decision Issued: October 20, 2017

PROCEDURAL HISTORY

On February 16, 2017, the Grievant was issued a Group II Written Notice for:

> Failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable written policy to wit: On January 6, 2017 employee was present when another employee committed an act of offender abuse. Employee failed to make report of incident in accordance with established policy and post orders by **making claim that he did not see anything**.[1] (Emphasis added)

On March 17, 2017, the Grievant timely filed a grievance challenging the Agency's actions.[2] On July 28, 2018, the grievance was assigned to a Hearing Officer. Due to calendar conflicts with the Agency counsel's calendar, the hearing was held on October 11, 2017. The hearing was held at the Agency's location.

APPEARANCES

Attorney for Agency
Grievant
Witnesses

ISSUES

Did the Grievant fail to follow supervisor's instructions, perform assigned work or otherwise comply with applicable written policy?

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 1
[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 six tabs, including a disc. That notebook and disc were accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant provided me no documentary evidence.

The primary witness for the Agency was the Special Investigator who was assigned to investigate an occurrence that took place at the Agency on January 6, 2017. He testified before me that his investigation revealed that The Offender was assaulted by an Agency Employee 1. When this alleged assault took place, in addition to The Offender and Agency Employee 1 being present, three other Agency employees were present. One of those employees, Agency Employee 2 was transporting The Offender to a different location at the facility; One of those

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[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)

employees was a trainee assisting in this transport; and the third employee was the Grievant. Pursuant to his investigation, the Special Investigator determined that The Offender had in fact been assaulted by Agency Employee 1. At various times, The Offender said he was assaulted by Agency Employee 1, but at other times he contradicted that allegation. Agency Employee 2 and the trainee who was assisting, confirmed that Agency Employee 1 had pushed The Offender against a wall, knocking him down.

The Grievant, in his statement to the Special Investigator, indicated that he was out of sight of what happened, heard the other officers asking The Offender if he was alright, and then looked around a corner to see what had happened. The Grievant testified that The Offender said he was fine and just wanted to return to his cell. The Grievant further testified that the floor was wet and he assumed The Offender had slipped on the wet floor. All of this is set forth in the Report of Investigation ("ROI") by the Special Investigator.[7]

At no time during his testimony before me or in his ROI did the Special Investigator allege that the Grievant assaulted The Offender.

The allegation in the Written Notice regarding this Grievant, is that he made a claim that he did not see anything.

The second witness for the Agency was one of the Wardens for this particular location. It is important to note that this witness testified that it was possible that the Grievant was in a position where he could not see the event that took place regarding The Offender and Agency Employee 1. The gist of his testimony was that he felt the Grievant had seen what took place. This was his opinion as he was not present during the event.

During the course of evidence presented before me, the Agency directed me to Operating Procedure 135.2. Pursuant to testimony, it referenced Operating Procedure 135.2(IV)(B)(2), which states in part as follows:

> ...Employees are expected to be alert to detect and prevent...violations of departments operating procedures. Observed incidents...shall be reported to the employee's supervisor or the appropriate officer in accordance with established procedures.[8]

Operating Procedure 135.2(IV)(4)(E)(2), states in part as follows:

> ...Employees have a continued affirmative duty to disclose to their supervisors or other management officials any conduct that violates this procedure or behavior that is inappropriate...[9]

Finally, Operating Procedure 135.5(IV)(C)(3), states in part as follows:

> Employees observing another employee...injuring another person...not consistent with policy or procedure, while on state

[7] Agency Exhibit 1, Tab 6, Pages 2-87
[8] Agency Exhibit 1, Tab 4, Page 2
[9] Agency Exhibit 1, Tab 4, Page 5

> premises...are to **immediately report** the incident to their supervisor, Unit Head, or the Special Investigative Unit.[10] (Emphasis added)

For sake of my opinion, I will assume that an assault took place. The Written Notice provided to this Grievant indicates that the reason he failed to make the proper incident report is that he filed a report indicating that he did not see anything. The exact verbiage on the Written Notice is as follows:

> Employee failed to make report of incident in accordance with established policy and post orders **by making claim that he did not see anything**.[11] (Emphasis added)

The testimony by the Warden indicated that it was possible that the Grievant did not see anything. The Grievant's testimony was that he did not see anything, but was around a corner picking up a coat. The Special Investigator, when he interviewed the Grievant on the day of the event, indicated that the Grievant stated that he did not see anything as he was around the corner picking up a coat. The Grievant's testimony to the Special Investigator, as recorded by the Special Investigator, was as follows:

> ...Grievant stated he didn't see anything because he was his back was towards them while he was picking up jackets and putting them in a basket...[12]

There were four other possible witnesses to where the Grievant was and what he saw during this incident. None of The Offender, Agency Employee 1, Agency Employee 2 or the trainee testified before me. Further, to the extent that this Agency has an internal video surveillance system, that may have shown where the Grievant was, no such evidence was offered.

Accordingly, as written, the Agency's Written Notice fails because the Agency has not met its burden of proof that the incident report as filed was fatally flawed because the Grievant stated that he didn't see the event take place.

During the course of the testimony before me, it appears that the Agency shifted its focus to the allegation that 'the incident report was not filed in a timely manner,' thereby violating Operating Procedure 135.5(IV)(C)(3). The Grievant did not object to this substantial change in the Agency's theory regarding this matter. The oral evidence was that the Grievant was called at his home after his shift and he returned to file an incident report. There were at least four Agency employees who could and should have filed an incident report, assuming they knew that an assault had taken place - The Grievant (who denies that he saw it take place); Agency Employee 2 who was directly charged with transporting The Offender; the trainee officer who was assisting him; and Agency Employee 1 who allegedly assaulted The Offender. I heard testimony that Agency Employee 1 was terminated because of the assault. I further heard testimony that Agency Employee 2 received a counseling notice for failure to timely file his incident report. A question then arises as to whether or not there is disparate treatment in this matter. The testimony before me was that Agency Employee 2 reported this matter orally

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[10] Agency Exhibit 1, Tab 5, Page 2
[11] Agency Exhibit 1, Tab 1, Page 1
[12] Agency Exhibit 1, Tab 6, Page 7

sometime earlier on the day of the event. The ROI indicates that the event was reported at 1700 or 5:00 p.m.[13] This means that the event was first reported some eight hours after it occurred.

The ROI has several internal incident reports ("IIR") attached to it. Inasmuch as these reports were submitted to me by the Agency and accepted without objection, then they become Agency evidence. The IIR for Agency Employee 2 indicated that it was reported or filed at 5:00 p.m. The Special Investigator stated the incident was reported at 5:00 p.m., which is consistent with the ROI.[14]

The IIR for the Grievant indicates, under Date Reported, a time report of 10:12 a.m. This would seem to indicate that the Grievant filed his IIR within approximately one hour of the incident, and some seven hours before Agency Employee 2 filed his IIR. 15 The IIR filed by Agency Employee e1 indicates a time report of 9:00 a.m. This would seem to indicate he filed his report perhaps moments before the incident took place. 16 Likewise, the trainee's IIR indicates a time report of 9:00 a.m. Again, this report would seem to indicate it was filed before the incident took place.[17]

There are several other reports attached to the ROI and it is quite frankly impossible to make the times of the reports correspond to the Special Investigator's first statement of fact in his ROI, that this matter was not reported until 5:00 p.m.

The best evidence before me for the Agency is that Agency Employee 2 did not file his report until 5:00 p.m., on the day of the incident, some eight hours after the incident took place. The evidence is in conflict as to when the Grievant filed his report. The documentary evidence indicates that it was filed within approximately one hour of the event and oral testimony indicates that the Grievant was called back on the same day, after his shift. The evidence before me is that Agency Employee 2 received a counseling memorandum, rather than a Group II Written Notice. As I have previously found, the Group II Written Notice fails if the sole issue, as it is written, was that the Grievant made a claim that he did not see anything. The Agency's own evidence indicates that was, in fact, certainly a possibility. That said, the Warden, in a moment of extreme clarity, indicated that all employees are cautioned to file reports whenever something takes place that may possibly be construed after the fact against them. The Grievant, in this matter, in all likelihood, should have filed a report, if nothing else, for his own protection.

Accordingly, I find that it would be disparate treatment for Agency Employee 2, who witnessed the entire event, to only receive a counseling memorandum, when his IIR was filed at least eight hours delinquent, and for the Grievant to receive a Group II Written Notice when it is unclear when he actually filed his report.

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

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[13] Agency Exhibit 1, Tab 6, Page 2
[14] Agency Exhibit 1, Tab 6, Page 18
[15] Agency Exhibit 1, Tab 6, Page 20
[16] Agency Exhibit 1, Tab 6, Page 22
[17] Agency Exhibit 1, Tab 6, Page 24

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.

As stated, I do find reason to dismiss the Group II Written Notice and to suggest a Counseling Memorandum.

DECISION

For reasons stated herein, I find that the Agency has not bourne its burden of proof in this matter and that the issuance of the Group II Written Notice to the Grievant was improper and should be withdrawn and the Grievant should receive a counseling memorandum in the same form and fashion as Agency Employee 2 received in this matter.

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]

[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

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