

Issue: Group II Written Notice (failure to follow instructions/policy; Hearing Date: 07/27/17; Decision Issued: 08/01/17; Agency: VEC; AHO: William S. Davidson, Esq.; Case No. 11042; Outcome: No Relief – Agency Upheld; **Administrative Review: Ruling request received 08/16/17; EEDR Ruling No. 2018-4605 issued 08/25/17; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 11042

Hearing Date: July 27, 2017  
Decision Issued: August 1, 2017

**PROCEDURAL HISTORY**

On March 6, 2017, the Grievant was issued a Group II Written Notice for: Failure to Follow Instructions and/or Policy.<sup>1</sup> On March 20, 2017, the Grievant timely filed a grievance to challenge the Agency's actions.<sup>2</sup> On June 29, 2017, the grievance was assigned to a Hearing Officer. On July 27, 2017, a hearing was held at the Agency's location.

**APPEARANCES**

Advocate for Agency  
Attorney for Grievant  
Grievant  
Witnesses

**ISSUES**

Did the Grievant fail to follow instructions and/or 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 reserved the exclusive right to manage the affairs and operations of state government.<sup>3</sup> 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

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<sup>1</sup> Agency Exhibit 1, Tab 1, Page 1-2

<sup>2</sup> Agency Exhibit 1, Tab 2, Page 1

<sup>3</sup> See Va. Code § 2.2-3004(B)

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. <sup>4</sup> However, proof must go beyond conjecture. <sup>5</sup> In other words, there must be more than a possibility or a mere speculation. <sup>6</sup>

### **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 five tabs and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

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

The genesis of this matter seems to have been an assignment that was given to the Grievant on January 23, 2017. On that date, the Grievant was asked to modify the Agency's Check File that is sent to the Department of Treasury from their legacy Unemployment Insurance Benefits applications. <sup>7</sup> On or about that same time, a second employee ["AB"] of the Agency was asked to also propose an implementation strategy on how to solve this assignment. The Agency's witnesses testified that their process was to assign a problem to more than one person, analyze the proposed solutions to the problem, and then assign the project to one of the people whose solution was not accepted. While the merits of this process may be debated, that is not the issue before me.

Subsequent to this assignment to two people on or about January 23, 2017, a series of meetings took place on January 27<sup>th</sup>, January 30<sup>th</sup>, February 3<sup>rd</sup>, February 9<sup>th</sup>, and February 14<sup>th</sup>. Those meetings were attended by some or all of: the Grievant, AB, the Grievant's immediate supervisor and that supervisor's supervisor. On February 14, 2017, the two proposed strategies

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

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

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

<sup>7</sup> Agency Exhibit 1, Tab 1, Page 4

were discussed and considered and on February 16, 2017, the strategy of AB was accepted, and management directed the Grievant to implement AB's strategy.<sup>8</sup>

On February 24, 2017, a meeting took place between the Grievant, AB, Grievant's immediate supervisor and the director of IT. In the intervening ten days, since the meeting of February 14, 2017, the Grievant had not started development on this project. The director of IT testified before me that he asked the Grievant directly as to whether or not she would perform the assignment. His testimony was that her response was that she would not do it if she had to follow AB's strategy. This statement is supported by the proposed disciplinary action notice of February 24, 2017, which he gave to the Grievant.<sup>9</sup> The Grievant's immediate supervisor also testified before me and corroborated the director's testimony.

On February 27, 2017, the Grievant delivered to the director of IT a statement which seems to encompass her thoughts regarding this matter.<sup>10</sup> It is compelling to see that in her own words, she stated the following:

...I was told 'you are doing it [AB's] way YES or NO' I did not understand why it has to be done the way [AB's] proposed. It was not logical to me to do it the way she proposed and not beneficial. I said if you insist [AB's] way it is better for [AB] do it...<sup>11</sup>

In addition, the Grievant wrote:

...Only I do not like busy work that gets us nowhere. For this assignment I thought work will need to be done the way I presented. I also respect that if other's want to do things their way. But if they want the work done their way, they should be the one doing it, not force me or anybody else do it the way they want it to be done. I will not have any objection for that...<sup>12</sup>

The Grievant's own written statement indicates that she would not perform the task as assigned to her. Management has the absolute right to assign tasks to whomever they feel can best perform the task and it is not up to the employee to impose his or her standards or understandings of how best the work could be performed.

The Grievant testified that she had many questions regarding this assignment and that they were not fully answered. However, her testimony was similar in content and tone to her written statement referenced earlier. I find that the Agency has borne its burden of proof regarding any questions asked and that the Grievant simply did not wish to perform a task where she did not agree with the way in which the task was being assigned and she did not agree with the way to perform the task.

## **MITIGATION**

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<sup>8</sup> Agency Exhibit 1, Tab 1, Page 5

<sup>9</sup> Agency Exhibit 1, Tab 1, Page 5

<sup>10</sup> Agency Exhibit 1, Tab 1, Pages 6-7

<sup>11</sup> Agency Exhibit 1, Tab 1, Page 7

<sup>12</sup> Agency Exhibit 1, Tab 1, Page 7

*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 the issuance of the Group II Written Notice to 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

[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].

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William S. Davidson  
Hearing Officer

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