

Issues: Group I Written Notice (unsatisfactory attendance) and Termination (due to accumulation); Hearing Date: 10/15/08; Decision Issued: 10/16/08; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 8947; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 8947

Hearing Date: October 15, 2008  
Decision Issued: October 16, 2008

**PROCEDURAL HISTORY**

The Grievant received a Group I Written Notice on April 14, 2008 for:

Unsatisfactory Attendance- Between January 31 and April 5, Correctional Officer C has been absent from work 22 days (176 hours). This includes 72 hours attributable to sick personal and 64 hours of leave attributable to family personal leave (comp/annual taken when sick leave exhausted). Correctional Officer C currently has no sick personal, family personal, or comp and has a very low balance of annual leave. During the period, Correctional Officer C has also been late to work 7 times and has been counseled about this.

Pursuant to the Group I Written Notice and a prior active Group III Written Notice, Group II Written Notice and Group I Written Notice, the Grievant was terminated on April 15, 2008. On May 21, 2008, the Grievant timely filed a grievance to challenge the Agency's actions. On September 15, 2008, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On October 15, 2008, a hearing was held at the Agency's location.

**APPEARANCES**

Grievant  
Agency Party  
Agency Representative  
Witnesses

**ISSUE**

1. Whether or not the Grievant's actions rose to the level of unsatisfactory attendance or excessive tardiness, thereby justifying a Group I Written Notice and whether or not this Group I Written Notice, coupled with a prior active Group III Written Notice, Group II Written Notice and Group I Written Notice, justifies termination.

## **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. 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. Grievance Procedure Manual ("GPM") §5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM §9.

## **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Agency provided the Hearing Officer with a notebook containing six (6) tabbed sections, only the first five (5) of which contained evidence, and that notebook was accepted in its entirety as Agency Exhibit 1. The Grievant did not provide the Hearing Officer or the Agency with any documentary evidence pursuant to the request by the Hearing Officer. At the hearing, the Grievant proffered to the Hearing Officer a three (3) page document from [the medical facility], a one (1) page document from [the doctor], dated February 11, 2008 and a two (2) page document that appears to be a Summons and Petition from the [court]. There being no objection, these documents were accepted as Grievant Exhibit 1 and for file purposes, were inserted in the Agency notebook at Tab 6. While they are located in the Agency notebook at Tab 6, they are clearly being accepted as Grievant Exhibit 1.

The basic evidence before the Hearing Officer was uncontroverted. The Grievant acknowledged that there was an active Group III Written Notice issued on January 25, 2006, an active Group II Written Notice issued on December 14, 2005 and an active Group I Written Notice issued on March 27, 2007 in his file.<sup>1</sup> Further, the Grievant acknowledged that the active Group I Written Notice was for abuse of State time based on unsatisfactory attendance for excessive tardiness.

Over a period of approximately 65 days, the Grievant was absent from work for a period of 22 days.<sup>2</sup> Because of the Grievant's absence or tardiness or leaving early, other correctional officers were forced to extend their shifts and the State was forced to pay overtime pay to these officers. In the event that the Agency was unable to find someone to cover the Grievant's shifts, that post would have to be closed as correctional officers cannot be required to work longer than sixteen (16) hours without a break.

On February 18, 2007, the Grievant was provided with an Interim Evaluation Form which identified areas that needed improvement. That form stated that the Grievant needed to work on "improving his attendance by getting to work on time."<sup>3</sup>

The Grievant argued that he should have been counseled regarding his tardiness and absenteeism prior to the issuance of a formal disciplinary action. The Virginia Department of Corrections Operating Procedure 135.1(VI)(B) states in part as follows:

Formal disciplinary action is accomplished by the issuance of a Written Notice form. While it is anticipated that most performance and behavior problems can be resolved through a counseling process, **counseling is not a prerequisite to taking formal disciplinary action. (Emphasis added)**

In this matter, the Grievant clearly was on notice that his attendance was an issue inasmuch as he has already received a Group I Written Notice and had received an evaluation indicating that he needed to improve.

While it is unusual for a person who receives a Group I Written Notice to be terminated, when that group I Written Notice is coupled with an active Group III Written Notice, Group II Written Notice and another Group I Written Notice, then termination is permitted.

### MITIGATION

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

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

<sup>3</sup> Agency Exhibit 1, Tab 3, Page 8

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the Agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution...”<sup>4</sup> 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. The Hearing Officer, after considering the above-referenced examples and the Grievant’s active Written Notices, finds no basis for mitigation in this matter.

### **DECISION**

For reasons stated herein, the Hearing Officer finds that the Agency acted properly in terminating the Grievant.

### **APPEAL RIGHTS**

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the Hearing Officer either to reopen the hearing or to reconsider the decision.

2. 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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

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<sup>4</sup>Va. Code § 2.2-3005

3. 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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main Street, Suite 400  
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 the decision was issued. You must give a copy of your appeal to the other party and to the EDR Director. 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.<sup>5</sup> 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>6</sup>

[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]

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William S. Davidson  
Hearing Officer

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<sup>5</sup>An 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).

<sup>6</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.