

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 12/09/08; Decision Issued: 12/11/08; Agency: VDOT; AHO: William S. Davidson, Esq.; Case No. 8974; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8974

Hearing Date: December 9, 2008
Decision Issued: December 11, 2008

PROCEDURAL HISTORY

The Grievant received a Group I Written Notice on June 18, 2008 for:

Violation of DHRM Policy 1.60, Standards of Conduct, for unsatisfactory work performance. See attached due process letter for details leading to the issuance of formal discipline.

Pursuant to the Group I Written Notice, the Grievant had this Written Notice placed in her file. On July 13, 2008, the Grievant timely filed a grievance to challenge the Agency's actions. On November 5, 2008, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On December 9, 2008, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Agency Advocate
Grievant
Counsel for Grievant
Witnesses

ISSUE

1. Was the Grievant's work performance unsatisfactory?

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 eight (8) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing fifteen (15) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

The basic facts in this matter were undisputed. The Grievant operated a tractor that was used for mowing purposes. On or about May 29, 2008, the Grievant noticed that some of the bolts that secured the cutting blade to the tractor were loose. She moved the tractor to a secure area and removed one (1) of the bolts and returned to headquarters to attempt to find replacement bolts. On that date, she notified her immediate Supervisor of the issue with the tractor. On June 2, 2008, the Area Supervisor became aware of the issue with the tractor and it was determined that, in addition to having to replace some bolts, some minor welding would need to be performed in order to make the tractor operable and safe. During the afternoon of June 2, 2008, this Area Supervisor requested that the Grievant provide a written statement as to the occurrence that led to the missing bolts and damage to the tractor. The Area Supervisor told the Grievant

that she wanted that report either on the afternoon of June 2, 2008 or by the morning of June 3, 2008. The Grievant questioned this Supervisor as to the need of such a report as the Grievant felt that reports were not needed for minor repairs of this nature.

The Agency witnesses indicated that there was no written policy regarding such reports. They indicated that, based on the severity of the damage to the tractor and on the opinions of at least two (2) people, reports may or may not be required. It appeared that there was no standard uniform requirement for when and why reports would be requested.

On the morning of June 3, 2008, the Area Supervisor asked the Grievant if she had the report. The Grievant did not respond in the affirmative and again questioned the need for producing such a report. During the afternoon of June 3, 2008, the Area Supervisor again met with the Grievant and, pursuant to her testimony, told the Grievant that, "If I do not have the statement by the end of today, there will be consequences." At the end of the day, the Grievant placed the report on the Supervisor's desk and left. The report was typed and the Agency feels that indicates that the report was done the previous evening and could have been delivered to the Area Supervisor on the morning of June 3, 2008.

The Grievant has received a Written Notice for unsatisfactory work performance. The Agency witnesses testified that the Grievant's work performance was completely satisfactory. The Agency relies on Standards of Conduct Policy 1.60. At page 2 of Policy 1.60, the Standards of Conduct hold that:

Employees who contribute to the success of an agency's mission...Demonstrate respect for the agency and toward agency co-workers, supervisors, managers, subordinates, residential clients, students and customers.¹

The Agency's position is that the failure to promptly comply with the Area Supervisor's request for the report constituted unsatisfactory work performance. The Hearing Officer finds that the Agency has not borne the burden of proof regarding unsatisfactory work performance when its witnesses have testified directly that the Grievant's work performance was satisfactory. Further, the Area Supervisor initially gave the Grievant until Wednesday morning to produce the report. Subsequently, she extended the time for the production of the report until close of business on June 3, 2008. When she stated that, "if [she did] not have the statement by the end of [the day], there [would] be consequences." In point of fact, the report was delivered within that time frame. Accordingly, the Grievant did not violate any instructions from the Area Supervisor. The Grievant cannot be faulted for the Area Supervisor continuing to move the target for when the report must be produced, particularly when the report was produced within the last target time frame.

¹ Agency Exhibit 1, Tab 4

MITIGATION

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...”² 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.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency did not meet its burden of proof regarding the issuance of a Group I Written Notice and the Hearing Officer hereby orders that the Group I Written Notice be immediately expunged from the Grievant’s file.

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 14th Street, 12th Floor
Richmond, VA 23219

²Va. 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
600 East Main Street, Suite 301
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.³ 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.⁴

[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

³An 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).

⁴Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.