

Issues: Group II Written Notice (failure to follow instructions, disruptive behavior, insubordination) and Termination (due to accumulation); Hearing Date: 07/31/09; Decision Issued: 08/06/09; Agency: Richard Bland College; AHO: William S. Davidson, Esq.; Case No. 9131; Outcome: Partial Relief; **Administrative Review:** **EDR Ruling Request received 08/21/09; EDR Ruling #2010-2400 issued 11/05/09; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 08/21/09; DHRM ruling issued 11/06/09; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9131

Hearing Date: July 31, 2009
Decision Issued: August 6, 2009

PROCEDURAL HISTORY

The Grievant was issued a Group II Written Notice on May 6, 2009 for:

Failure to follow instructions and/or policy; Disruptive behavior;
Insubordination.¹

Pursuant to the Group II Written Notice, as well as two (2) active Group II Written Notices and one (1) active Group I Written Notice, the Grievant was terminated on May 9, 2009.² On May 15, 2009, the Grievant timely filed a grievance to challenge the Agency's actions.³ On July 2, 2009, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On July 31, 2009, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Assistant Attorney General for Agency
Grievant
Advocate for Grievant
Witnesses

ISSUE

1. Did the Grievant's actions constitute failure to follow instructions and/or policy, disruptive behavior, and/or insubordination?
2. Did the Agency fail to grant the Grievant proper due process, and in so doing, prejudice his rights?

¹ Agency Exhibit 1, Tab 2, Page 13

² Agency Exhibit 1, Tab 3, Page 22; Agency Exhibit 1, Tab 4, Page 36; Agency Exhibit 1, Tab 5, Page 41

³ Agency Exhibit 1, Tab 1, Page 1

3. Was termination the appropriate remedy for this Group II Written Notice?

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 seven (7) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing six (6) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

On April 27, 2009, the Grievant was working as a Housekeeping and Apparel Worker I for the Agency. In that position he was to provide custodial support by cleaning bathrooms, office areas and classrooms in the Barn Theater and in the Humanities Building. In addition, he could be asked to perform similar tasks in other buildings of the Agency.⁴ On that date, the Grievant was approached by his immediate supervisor and was requested to move to another building at the Agency. This supervisor testified that the Grievant became angry and wanted to know why he was being moved. The Grievant stated to his immediate supervisor that, "You people have no right to move us people." The Grievant walked away from his immediate supervisor and stated that he simply had to talk to someone about this move.

The Grievant did not respond when the supervisor called him on his radio and, subsequent to this, the supervisor called his immediate superior and requested that she help in this matter. This second supervisor was picked up and brought to the location where the initial confrontation took place. The Grievant continued to not respond to calls on his radio when his supervisor called him and only responded when the supervisor stated that he had the second line supervisor with him. The second line supervisor inquired of the Grievant as to what the problem was. The Grievant stated to her that, "You people do not have the right to move us people around." The second line supervisor testified that the Grievant's voice was raised and that he was angry and that he was not responding to her direction to move to a new building.

Campus police were notified and, during the confrontation with the second line supervisor, they arrived on the scene. The second line supervisor advised the Grievant that he was being terminated for failure to follow instructions and he was reminded to turn in his keys, radio and uniforms. The second line supervisor and the first line supervisor testified that the Grievant took his shirt off and threw it at the second line supervisor and it was caught by one of the campus police officers. Both supervisors testified that the Grievant raised the radio as if to throw it and was advised not to by the police officer. The Grievant testified that he dropped the radio and had no intent on throwing it at anyone. Both of these supervisors testified that the Grievant became so angry so quickly that there was no effective opportunity to explain to him the purpose and rationale for moving him to a new building. It was, in fact, to allow a newer employee the opportunity to learn the building in which the Grievant was currently working. Both supervisors testified that the move was not permanent and was merely temporary.

The new employee who was to take over the Grievant's building was present during some of this confrontation. She testified that the Grievant was extraordinarily angry and that the supervisors were acting in a calm manner. She further testified that she was concerned enough that she left the immediate vicinity and went into a bathroom. She testified that she was a little scared and that she went into the bathroom because she did not want to be around the Grievant.

The Agency called a fellow custodian of the Grievant to testify. He identified himself as a friend of the Grievant who had known him for thirteen (13) years. This custodian testified that the Grievant was a good worker but that he had trouble following supervisors' instructions. He

⁴ Agency Exhibit 1, Tab 6, Page 44

testified that the Grievant had told him that people were out to get him but he knew of no one in management who was out to get the Grievant. He testified that the first line supervisor treated everyone “pretty much” the same and that he was a “pretty good” supervisor. He further testified that everyone liked this supervisor and that the supervisors had put up with a lot from the Grievant.

The Grievant called several fellow custodians as witnesses. One of them testified that fellow employees had a hard time working with the Grievant. Another testified that the Grievant has a quick temper and that he had experienced this temper of the Grievant.

Accordingly, after listening to the witnesses and observing their demeanor, the Hearing Officer finds that the Agency has borne its burden of proof to establish that the Grievant, on April 27, 2009, did fail to follow instructions, was insubordinate and was exhibiting disruptive behavior.

The next issue is whether or not the Grievant was afforded proper due process. Due process is set forth in The Standards Of Conduct Policy 1.60(E). This paragraph sets forth the following:

Prior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations, employees must be given oral or written notification of the offense, an explanation of the agency’s evidence in support of the charge, and a reasonable opportunity to respond.⁵

Reasonable opportunity is defined as follows:

Employees must be given a reasonable opportunity to respond after receiving notification of pre-disciplinary or disciplinary actions. *Normally*, a 24 hour period is a sufficient period of time, however, a “reasonable opportunity to respond” should not be based solely on the quantity of time provided but also on the nature of the offense, which may or may not require more or less time to refute or mitigate the charge.⁶

On April 27, 2009, the Grievant’s second line supervisor orally notified him that he was terminated for failure to follow her instructions. He was told to leave, turn in his keys, uniforms and radio. Subsequently, this second line supervisor attempted to fill out a termination notice on the State’s computer system and was informed that she could not do so until she had provided the Grievant with his appropriate due process notice. This supervisor contacted a specialist at DHRM on May 1, 2009 regarding this matter. There was no justification given in her testimony as to why it took from April 27, 2009 to May 1, 2009 for her to seek this assistance. In this conversation, it was determined that she should issue a Group II Written Notice and this was

⁵ Agency Exhibit 1, Tab 7, Page 69

⁶ Agency Exhibit 1, Tab 7, Page 69

written on May 6, 2009 and was indicated that it was issued on May 6, 2009.⁷ In actuality, this Notice was not issued to the Grievant on May 6, 2009, but was mailed to him on May 7, 2009 and was delivered to his “front door” at 10:10 a.m. on May 8, 2009.⁸ It is clear that UPS delivered the letter to the front door of the Grievant’s residence. It is not clear that it was delivered to the Grievant. The Grievant alleges that he did not receive the Notice until May 13, 2009.⁹

Under the best position for the Agency, the Grievant received the Due Process Notice at 10:10 a.m. on May 8, 2009. That Notice notified him that he was being terminated effective May 9, 2009. It would appear that under a best-case scenario for the Agency, the Grievant was not afforded a 24 hour notice as called for by Policy 1.60.

In an Administrative Review of Director, the Director of EDR has defined due process as follows:

The essence of due process is notice of the charges and an opportunity to be heard. Moreover, the opportunity to be heard must be provided at a meaningful time and in a meaningful manner. The United States Constitution and state and agency policy generally entitle a non-probationary, non-exempt employee of the Commonwealth to oral or written notice of the charges, an explanation of the employer’s evidence, and an opportunity to respond to the charges, appropriate to the nature of the case. This represents the minimum amount of due process that the employee must receive. To satisfy procedural due process requirements, the Agency is required, at a minimum, to give the employee: (1) notice of the charges against him, and (2) a meaningful opportunity to respond. Therefore, a government employee must receive the requisite notice under the *Loudermill* standard for any hearing at which the employee is terminated, demoted, suspended, or otherwise disciplined to be constitutionally proper.¹⁰

Accordingly, the Hearing Officer finds that the Grievant was not afforded proper due process when he was told that he was terminated on April 27, 2009. Indeed, the Agency conceded that due process had not been granted at that point. The issue then becomes; Was the Grievant provided adequate due process prior to his termination on May 9, 2009? Inasmuch as May 9, 2009 was a Saturday and not likely to have been a work day for either the Grievant or his supervisors, the Hearing Officer finds that, assuming the Grievant actually received the Written Notice on Friday, May 8, 2009, he did not have a 24 hour notice. The issue then becomes; Does that failure preclude the Agency from moving forward with termination and does it preclude the Agency from granting the Grievant his rights to grieve this matter and have a full evidentiary hearing where each party is allowed to present both written and oral evidence. The Grievant was given a very brief oral justification for his termination by his second line supervisor on April 27, 2009. When the Agency realized its error of not giving the Grievant proper due process, the

⁷ Agency Exhibit 1, Tab 2, Page 13

⁸ Agency Exhibit 1, Tab 6, Page 21

⁹ Agency Exhibit 1, Tab 1, Page 7

¹⁰ Administrative Review of Director dated September 21, 2006, Ruling #2007-1409,

Grievant was given a formal Written Notice sometime between May 8, 2009 and May 13, 2009. Subsequently, the Grievant was afforded a full and complete opportunity to introduce written evidence, oral testimony and to question witnesses before this Hearing Officer. The Hearing Officer finds that the due process given to the Grievant was sufficient, if not perfect, and it does not prevent the Agency from moving forward with this matter.

The Written Notice was a Group II Written Notice which resulted in termination. The Grievant has alleged that he could not be terminated for the actions set forth in this Group II Written Notice. The Hearing Officer was surprised to find that the expert at DHRM, who testified at this hearing, thought that this Grievant could be terminated based on the Group II Written Notice alone after the witness testified that he was unaware of any prior Written Notices. Counsel for the Agency argued that he knew of no reason why an employee could not be terminated for a single Group II Written Notice. Contrary to these two positions, the Hearing Officer can find no justification in Policy 1.60 to justify termination based on a single Group II Written Notice. However, in this matter, there were two (2) prior and active Group II Written Notices and one (1) prior and active Group I Written Notice. The Grievant attempted to introduce evidence regarding those prior Written Notices and the fact that they were not validly issued but they were not before the Hearing Officer and the Hearing Officer excluded evidence on the validity of those three (3) prior and active Written Notices. Policy 1.60 clearly gives the Agency the authority to terminate where there are three (3) Group II Written Notices and one (1) Group I Written Notice.

The Agency presented evidence that it used the Grievant's annual leave time from April 27, 2009 through May 9, 2009 to pay the Grievant. The Agency acknowledged that the Grievant was not properly terminated on April 27, 2009. The Agency further stated that it did not send to the Grievant a Suspension Notice nor any other Notice as to what his status was from April 27, 2009 through May 9, 2009. Policy 1.60 deals with pre-disciplinary leave with pay. Pre-disciplinary leave is leave with pay to be used when disciplinary action is being considered and the employee's removal from the workplace is necessary or prudent.¹¹ In this matter, for the time frame of April 27, 2009 through May 9, 2009, the Grievant was neither suspended nor terminated. Accordingly, the Hearing Officer finds that the Agency misapplied Policy 1.60 when it arbitrarily used the Grievant's leave time in order to compensate him for those days. The Agency offered no policy nor any evidence justifying the use of leave time during this time frame. Accordingly, the Hearing Officer directs that the Agency properly return those days of leave time to the Grievant's account and, using the same formula that was used in Agency Exhibit 1, Tab 2, Page 16, reimburse the Grievant for this lost leave time.

MITIGATION

¹¹ Agency Exhibit 1, Tab 7, Page 64

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...”¹² 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 has considered all of the delineated items in mitigation as set forth in this paragraph and, the Hearing Officer also considered any and all other possible sources of mitigation which were raised by the Grievant at the hearing and the Hearing Officer finds that there are no grounds for mitigation in this matter.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof and that the Group II Written Notice was validly and properly issued and that termination was proper.

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

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

¹²Va. Code § 2.2-3005

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.¹³ 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.¹⁴

[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

¹³An 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).

¹⁴Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Policy Ruling of the
Department of Human Resource Management

In the Matter of the
Richard Bland College
November 6, 2009

The grievant has appealed the hearing decision in Case Number 9131. The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to this request for an administrative review of the hearing officer's decision in the above referenced case. For the reason stated below, this Agency will not disturb this decision.

FACTS

According to the facts as set forth by the hearing officer, the following transpired in this case:

On April 27, 2009, the Grievant was employed as a Housekeeping and Apparel Worker I for the Agency. In that position, he was to provide custodial support by cleaning bathrooms, office areas and classrooms in the Barn Theater and in the Humanities Building. In addition, he could be asked to perform similar tasks in other buildings of the Agency. On that date, the grievant was approached by his immediate supervisor and asked to move to another building at the Agency. This supervisor testified that the Grievant became angry and wanted to know why he was being moved. The Grievant stated that, "You people have no right to move us people." The Grievant walked away from his immediate supervisor and stated that he simply had to talk to someone about this move.

The Grievant did not respond when the supervisor called him on his radio and subsequent to this, the supervisor called his immediate supervisor and requested that she help in this matter. The second supervisor was picked up and brought to the location where the initial confrontation took place. The Grievant continued to not respond to calls on his radio when his supervisor called him and only responded when the supervisor stated that he had the second line supervisor with him. The second line supervisor inquired of the Grievant as to what the problem was. The Grievant stated to her that, "You people do not have the right to move us people around." The second line supervisor testifies that the Grievant's voice was raised, that he was angry, and that he was not responding to her direction to move to the new building.

In summary, campus police were summoned to ensure that there were no physical altercations. The Grievant was directed to turn in all College property and dismissed from

employment. He was issued a Group II Written Notice some ten days after he was sent home for “Failure to follow instructions and/or policy, Insubordination and Disruptive Behavior.” The Grievant filed a grievance to have the disciplinary action overturned. The hearing officer upheld the College’s disciplinary action.

In his appeal to this Agency, the grievant stated the following:

(1) the agency did not show by a preponderance of the evidence that the grievant failed to follow instructions, was insubordinate or exhibited disruptive behavior on April 27, 2009; (2) the hearing officer based his decision on the testimony of the very supervisors who terminated the grievant and a new employee who testified that she left the scene; (3) the hearing decision references testimony from fellow custodians who spoke to their general impressions of the grievant’s work and the grievant’s supervisors rather than the specific incident that occurred on April 27, 2009; (4) the decision does not reference the documents that the grievant provided that document the grievant’s consistently good work throughout the thirteen years that he was employed by Richard Bland College; (5) the testimony of current employees, appearing at the request of their employer, would be naturally biased in favor of the employer; (6) while the police were notified and arrived on the scene on April 27, no officer testified at the hearing and no police report documenting the incident was admitted; (7) the agency failed to provide the grievant with proper due process related to the issuing of the written notice terminating him, a violation of DHRM Policy No. 1.60.

DISCUSSION

A hearing officer is authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer’s decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department’s authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer’s assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In the instant case, the grievant opined that the agency violated DHRM’s Policy No. 1.60 regarding due process by not giving him a reasonable opportunity to respond after receiving notification of disciplinary action. The hearing officer questioned whether not giving the grievant 24 hours to respond to the allegations of misconduct was a violation of due process. He determined that the grievant was given a very brief oral justification for his termination by his second line supervisor on April 27, 2009. In addition, when the agency realized its error of not giving the grievant proper due process, the grievant was given a formal Written Notice sometimes between May 8, 2009 and May 13, 2009. The hearing officer continues, “Subsequently, the Grievant was afforded a full and complete opportunity to

introduce written evidence, oral testimony and to question witnesses before this Hearing Officer. The Hearing Officer finds that the due process given to the Grievant was sufficient, if not perfect, and it does not prevent the Agency from moving forward with this matter.”

The Department of Human Resource Management notes that the Director of the Department of Employment Dispute Resolution has addressed the same issues that were put before this Agency. We find that the issues related to violation of DHRM Policy 1.60 have been addressed by the EDR ruling dated November 5, 2009, and do not warrant further consideration. Thus, this Agency will not interfere with the application of this hearing decision.

Ernest G. Spratley