

Issues: Group III Written Notice with Termination (failure to follow instructions, failure to perform assigned work, providing deceptive reports); Hearing Date: 09/16/09; Decision Issued: 09/22/09; Agency: DPOR; AHO: William S. Davidson, Esq.; Case No. 9167; 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: 9167

Hearing Date: September 16, 2009
Decision Issued: September 22, 2009

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on May 27, 2009 for:

Failure to follow supervisor's instructions; Failure to perform assigned work of a supervisory position; Providing Misleading and Deceptive Reports to Management.¹

Pursuant to the Group III Written Notice, the Grievant was terminated on May 27, 2009.² On June 24, 2009, the Grievant timely filed a grievance to challenge the Agency's actions.³ On August 18, 2009, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On September 16, 2009, a hearing was held at the Agency's location.

APPEARANCES

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

ISSUE

1. Did the Grievant fail to follow supervisor's instructions?
2. Did the Grievant fail to perform the assigned work of his supervisory position?
3. Did the Grievant provide misleading and/or deceptive reports to management?
4. Was termination the appropriate remedy for this Group III Written Notice?

AUTHORITY OF HEARING OFFICER

¹ Agency Exhibit 1, Tab 4, Page 1

² Agency Exhibit 1, Tab 4, Page 1

³ Agency Exhibit 1, Tab 2, Page 1

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 thirteen (13) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing nineteen (19) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

The position from which the Grievant was terminated was that of Compliance Manager I. In this position, the Grievant was to perform the following functions:

Provides leadership to and directly supervises investigative staff and ensures adherence to policies and procedure. Manages the compliance and investigation

process. Ensures that investigative activities are performed in accordance with established state laws, agency policies, procedures, and board regulations.⁴

In essence, the Grievant's position was that of a manager of four (4) investigators for the Southwest Region of this Agency. The Hearing Officer heard much testimony regarding the functioning of this Agency and it is important to understand how cases flowed through this Agency's administrative process. As testified to by both Agency and Grievant witnesses, the cases were originated when a member of the public filed a complaint with the Complaint Analysis Resolution department of this Agency ("CAR"). Once a complaint was filed with CAR, that department made a determination as to whether or not this complaint was best suited to be sent to mediation, handled within the CAR department or, if it was of sufficient seriousness, sent to the Investigative Unit for further investigation. If the complaint was sent to the Investigative Unit for this Grievant's region, it would be sent to him and his first task was to review the file and prepare a brief synopsis of what he deemed to be the issues involved and perhaps a methodology for approaching those issues and then he turned this file over to one of his investigators. For so long as the file was in his hands, the computer system of this Agency noted that he was the holder of the file. As soon as he turned it over to one of his investigators, the Grievant was supposed to enter into the computer system that the file was now in the possession of the investigator.

The investigator was tasked with investigating the complaint and ultimately producing a document known as a Report of Finding ("ROF"). The goal of the Agency was that this should take no longer than ninety (90) days.

When the investigator produced his or her ROF, the file and the ROF were returned to the Grievant for his analysis, review and approval. At this point, the Agency's computer system should have been updated by the Grievant showing that he was now in possession of the file and that it was no longer in the possession of the investigator. The Grievant's task was to review this file, make any corrections that he saw, send it back to his investigator for further investigation if he deemed it appropriate and, once he was comfortable with the contents of the file, return it to CAR where CAR would attempt to enter into a Consent Agreement. If that was not possible, the file would be sent to the Adjudication Department for the initiation of an Informal Fact Finding Conference.

The Written Notice had an eight (8) page addendum that was delivered to the Grievant with the Written Notice.⁵ The Agency set forth ten (10) reasons to justify elevating the Grievant's conduct from a Group II offense to a Group III offense. When the Grievant testified, he forthrightly admitted that he lacked confidence in the way that cases were being handled by both CAR and the Adjudication Department when they were submitted by him. Because of this lack of confidence and manner in which the cases were being handled, he admitted that he held many files in his office after he had reviewed them and they were ready for submission to CAR or to the Adjudication Department. Pursuant to questions posed to him by the Hearing Officer,

⁴ Agency Exhibit 1, Tab 8, Page 1 (Section 16)

⁵ Agency Exhibit 1, Tab 4, Pages 3-10

the Grievant acknowledged that his holding of these completed cases in his office would in fact result in the allegations made by the Agency in Paragraphs 1 through 4 of its Addendum to the Written Notice.⁶

Paragraph 6 of the addendum alleges that the Grievant failed to follow his supervisor's instructions in that he failed to bring all of his files to his supervisor as requested. On December 10, 2008, the Grievant received and acknowledged receipt of an email from his first line supervisor directing him to:

Go ahead and bring me all the files in your possession that are completed and need to be reviewed so I can assist in getting ETS (Enforcement Tracking System) and our logs to match.⁷

The Agency interprets that email to mean that the Grievant was to bring all files in his office directly to his supervisor. The Grievant interpreted that email to mean that he was to bring files that had been completed by his investigators and on which he had received an ROF but had not himself reviewed. The Grievant's focus is on the words, "completed and need to be reviewed," to arrive at an understanding of the fact that the Agency wanted files that his investigators had finished but that he had not reviewed. On its face, that is a possible understanding of the wording of that email, although it seems to be a quite strained interpretation.

As part of the addendum to the Written Notice, the Agency provided a document titled, Timeline Chart of Weekly Reports.⁸ This document purported to set forth files that were under-reported by the Grievant when he was reporting to his supervisor the number of files within his office. By way of example, this document shows that on the week of July 18, 2008, the Grievant reported that he had three (3) completed case reports within his office wherein he had an ROF from an investigator and it needed his review. The Agency argues that there were at least ten (10) completed cases in the Grievant's possession at that time. The Agency reports an under-reported number of seven (7). The Grievant's testimony was that he did not report the seven (7) files, as those were cases within his office for which he had received an ROF and for which he had finished his review. Therefore, the Grievant's posture was that there were seven (7) cases in his office that he had completely finished all of his work on but had simply not submitted and three (3) cases that the investigator had finished his work on and needed Grievant's review and therefore that accounted for the ten (10) cases. The particular ten (10) cases in question are found in the second column of this exhibit.

On July 25, 2008, after three (3) more cases came into the Grievant's hands, he now reported that he had eight (8) cases in his office that needed review and only three (3) cases in his office for which he had finished his work but was holding the case.⁹ Clearly the mathematics do not work in that on July 18, 2009, he had three (3) cases that needed his review. In the

⁶ Agency Exhibit 1, Tab 4, Page 3

⁷ Grievant Exhibit 1, Tab 17, Page 10

⁸ Agency Exhibit 1, Tab 4, Page 10

⁹ Agency Exhibit 1, Tab 4, Page 10

intervening week, three (3) new cases came in and the Grievant then reported he had eight (8) cases for review. Further, the math does not work in the under-reported column. This is a flaw throughout this document and it appears to the Hearing Officer that the Grievant is interpreting definitions in a manner that best suits the Grievant and particularly best suits the Grievant after the fact. Accordingly, the Hearing Officer finds that the Grievant did not follow his supervisor's instructions to bring all files to his supervisor.

Paragraph 7 of the addendum to the Written Notice is explained by the Grievant's testimony that he was holding cases within his office because he lacked confidence in CAR and the Adjudication Department.

Paragraph 8 of the addendum indicates that the Grievant declined assistance from the Agency to help him in his supervisory function. The Grievant testified that on at least one occasion, his first line supervisor made arrangements to have three (3) other supervisors assist him in working his case load. The Grievant testified that he did not take advantage of this as he had a level of embarrassment in having other people help him on his files.¹⁰

Paragraph 9 of the addendum alleges that the Grievant had no plan to submit certain cases for further action.¹¹ The Grievant's testimony was that it is not accurate to say that he had no plan to submit the cases, but rather he simply lacked confidence in CAR and the Adjudication Department and that his plan was to submit them when his confidence was higher. The Grievant freely admitted that holding the cases for months gave the appearance that he intended to not return them in a timely fashion. The Hearing Officer finds that the Grievant's failure to submit files that he had fully reviewed to the Agency in a timely fashion amounts to having no plan to submit those files to the Agency. A Grievant cannot wait until his subjective confidence level in the Agency rises to a level that only the Grievant determines before he decides to deliver completed files to the Agency. Such a plan on his part is no plan.

An Audit Report of the Grievant's files was completed on January 19, 2009.¹² This report was written by the Grievant's immediate supervisor. Subsequent thereto, a meeting was held on January 27, 2009 with the Grievant, the author of the audit report and the Deputy Director of the Compliance and Investigations Division. This report indicated that the Grievant had maintained files in his possession long after he had entered data into the ETS that showed that the file was now in an investigator's hands. In response to one particular allegation in the Audit Report, on December 17, 2009, the Grievant stated in part as follows:

...I identified a number of issues and complexities regarding the case in question and made the determination at some point to take the case back from Investigator X. My initial intention in doing so was to get additional information and feedback from other Department and Agency staff on just how to pursue this matter. Those efforts met with limited positive results and I subsequently and simply did not move the investigation along as I should have. The responsibility for this rather embarrassing matter rest[s]

¹⁰ Agency Exhibit 1, Tab 4, Page 4

¹¹ Agency Exhibit 1, Tab 4, Page 4

¹² Agency Exhibit 1, Tab 5, Page 1

solely on my shoulders. I did not provide the guidance, supervision and action that I should have regarding this particular situation.¹³

This matter was one in which the Grievant assigned the case to an investigator on November 2, 2007 but took the case file back on November 14, 2007. From that date through his response of December 17, 2008, the Grievant did nothing to move the case forward. Indeed, on June 12, 2008, the Grievant sent his immediate supervisor an email and in that email referenced this particular case and stated in part as follows:

...This is a complex case that I currently have in my possession. The anticipation is that we will be able to close this by the end of July. Responsibility for the duration of this case falls on Investigator as well as Investigator Supervisor.¹⁴

Accordingly, it is clear that on June 12, 2008, the Grievant is placing blame on himself and the investigator for not moving this case forward and is indicating that he hopes to have it finished by July, 2008. On December 17, 2008, the Grievant acknowledges that this could not have been the problem of the investigator as she only had possession of the file from November 2, 2007 through November 14, 2007. The Grievant, in his December 17, 2008 response, indicates that the fault lies with him. There are numerous other examples in the Audit Report of the Grievant misstating who had possession of a particular file at a particular time and of the Grievant being extraordinarily dilatory in either assigning cases to investigators or reviewing the investigator's ROF's or, having reviewed the ROF's, forwarding the file on to CAR or the Adjudication Department for further action. The Hearing Officer finds that the Agency has met its burden regarding the allegation of Paragraph 5 of its addendum.¹⁵

Subsequent to the meeting of January 27, 2009, the Grievant was told that management wanted to make a thorough evaluation of the Audit Report and other documentation and that they would meet again in early February of 2008 to review this matter. Just prior to that meeting, the Grievant suffered a serious medical condition and was on medical leave for several months. Upon his return on May 26, 2009, the Grievant received a Memorandum¹⁶ from the Deputy Director indicating that disciplinary action, pursuant to Standards of Conduct Policy 1.60, would be taken against the Grievant and he was asked to review the information and to provide any additional information that he wished management to consider at 10:00 a.m. on May 27, 2009. This served as his Due Process Notice. Subsequently, the Written Notice was issued to the Grievant.

Standards of Conduct Policy 1.60 is the appropriate state policy setting forth the Standards of Conduct for state employees.¹⁷ This policy sets forth at page 6, the following:

The Commonwealth's disciplinary system typically involves the use of increasingly significant measures to provide feedback to employees so that they may correct conduct or performance problems...¹⁸

¹³ Agency Exhibit 1, Tab 5, Page 2

¹⁴ Grievant Exhibit 1, Tab 14, Page 3

¹⁵ Agency Exhibit 1, Tab 4, Page 4

¹⁶ Agency Exhibit 1, Tab 4, Page 6

¹⁷ Agency Exhibit 1, Tab 3, Page 1

¹⁸ Agency Exhibit 1, Tab 3, Page 6

One of the forms of this type of increasingly significant feedback is counseling. Counseling is defined in part as follows:

Counseling is *typically* the first level of corrective action but **is not a required precursor** to the issuance of Written Notices. Counseling may be an informal (verbal) or formal (written) communication which conveys that an employee's conduct or performance was improper and must be corrected. This level of corrective action would be appropriate for conduct and/or performance issues resulting in minimal impact to business operations, to the safety and well-being of others, or that involve minor infractions of policies or laws.¹⁹ **(Emphasis added)**

Should the management of the Agency avail itself of counseling opportunities and they fail or should management feel that the offense is of a more serious nature, then the appropriate remedy is a Written Notice. Policy 1.60 sets forth the following:

When counseling has failed to correct misconduct or performance problems, or **when an employee commits a more serious offense**, management should address the matter by issuing a Written Notice.²⁰ **(Emphasis added)**

In this case, the Agency has taken the position that the Grievant's offense most properly fit within the definitions for Group II Written Notices. However, the Agency gave the Grievant a Group III Written Notice based on the fact that this was an extreme circumstance. Policy 1.60 sets forth in part the following:

Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequence of the performance or misconduct substantially exceeded agency norms.²¹

The Agency's primary concern here is that by delaying the submission of cases to investigators in order for them to do their job and by delaying the delivery of fully completed cases to CAR or the Adjudication Department, the Grievant placed the public at risk because licensees, who would have had their licenses removed if the Grievant had timely moved cases, were allowed to work and perform services for longer periods of time. This had a high likelihood of endangering the public.²²

It is significant for this Hearing Officer that the Grievant called as one of his witnesses a person who held the same position that he did but in a different region of Virginia. That witness testified that he felt that fourteen (14) days was the absolute outside limit of time that would be needed for him to review and forward on to CAR or the Adjudication Department any ROF that was given to him by one of his investigators. That witness testified that he had never failed to send on to CAR or the Adjudication Department a fully reviewed ROF.

¹⁹ Agency Exhibit 1, Tab 3, Page 6

²⁰ Agency Exhibit 1, Tab 3, Page 7

²¹ Agency Exhibit 1, Tab 3, Pages 7 and 8

²² Agency Exhibit 1, Tab 4, Page 3, Paragraph 2

This case essentially is of a Grievant who testified that he did not have confidence in sending cases to CAR and the Adjudication Department and had a high level of uncomfortableness with the scrutiny that the cases were receiving by those two (2) divisions of this Agency. Because of that, cases were not sent, time lines were not met, and reports that were filed by this Grievant with the Agency at worst were intentionally deceiving and at best, were deceiving by obfuscation.

Pursuant to the evidence that was introduced at the hearing both orally and in writing, the Hearing Officer finds that the Grievant did fail to follow his supervisor's instructions, he did fail to perform his assigned work as a supervisor and he did provide misleading and deceptive reports to management. Indeed, the Grievant essentially acknowledged all three (3) of those allegations with the possible exception of taking exception to whether or not he was deceptive in his reporting. The more important issue for the Hearing Officer is whether this is a legitimate matter where the Agency can take a Group II Written Notice and elevate it to a Group III Written Notice. The Hearing Officer finds that because of the Grievant's delay in properly moving files forward, licensees maintained their licenses in situations where those licenses would have possibly been removed had these files been sent forward. This potentially put citizens of the Commonwealth at risk if they hired any of those licensees to perform services for them. Accordingly, the Hearing Officer finds that this is an appropriate situation where a Group II offense has been elevated to a Group III offense.

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..."²³ 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 III Written Notice was validly and properly issued and that termination was proper.

²³Va. Code § 2.2-3005

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 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.²⁴ 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.²⁵

²⁴An 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).

²⁵Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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