

Issue: Group II Written Notice with Suspension (failure to follow instructions/policy and computer misuse); Hearing Date: 04/26/10; Decision Issued: 05/03/10; Agency: SBE; AHO: William S. Davidson, Esq.; Case No. 9303; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9303

Hearing Date: April 26, 2010
Decision Issued: May 3, 2010

PROCEDURAL HISTORY

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

See attached memo from Mr. S, State Internal Auditor dated September 4, 2009 - (Page 7) Allegation #6 - Grievant wastes State time on activities related to outside employment and Allegation #7 - (Page 8) Grievant comes to work late, but management has not done anything about it. In addition to providing Grievant with a copy of these sections from the Auditor's memo, I met with Grievant, her supervisor Mr. A and Ms. W of DHRM to go over the allegations in a Pre-Disciplinary Meeting held on September 21, 2009. In response to Allegation #6 Grievant admitted that she did have documents related to a business she was trying to start stored on her computer. She stated that she created these documents on breaks or at lunch. However she does personally log on to her computer everyday which requires at the beginning of each login an acknowledgment that the computer may only be used for the business of the Commonwealth. This policy is in effect regardless of when the computer is used. In Allegation #7 Grievant was asked to provide additional documentation to establish her time at work. Upon receiving the new documentation provided by Grievant, I shared the information with the Auditor's (who were not provided the information before their report was issued). Despite this new information there is still was [sic] a deficiency of 62.60 hours unaccounted for which will need to be reimbursed to the Commonwealth.¹

Pursuant to the Group II Written Notice, the Grievant was suspended from October 7, 2009 through October 13, 2009.² On November 4, 2009, the Grievant timely filed a grievance to challenge the Agency's actions.³ On March 21, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On April 26, 2010, a hearing was held at the Agency's location.

¹ Agency Exhibit 1, Tab 3, Page 1

² Agency Exhibit 1, Tab 3, Page 1

³ Agency Exhibit 1, Tab 4, Page 1

APPEARANCES

Agency Representative
Counsel for Agency
Grievant
Witnesses

ISSUE

1. Did the Grievant waste State time on activities related to her outside employment?
2. Did the Grievant come to work late?

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

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 fifteen (15) tabbed sections, but only the first eleven (11) of which had documents. There was an objection to the Grievant's notebook and Grievant did not dispute the removal of the documents at Tabs 5, 7, 9 and 10. Otherwise, that notebook was accepted in its entirety as Grievant Exhibit 1.

The Commonwealth of Virginia maintains a "hotline" which is available for employees of the Commonwealth of Virginia or citizens to call in and report suspected abuse, fraud or other waste by State employees. Pursuant to such a call, an audit was made of the Grievant's workstation and the various means by which she would log in to indicate that she had come to work. During the audit of her computer, various documents and folders were found on the computer that related to an outside employment opportunity in which the Grievant was participating. The Grievant, in her testimony before the Hearing Officer, did not deny that those documents were on her computer. She merely indicated that they were at least a year old. The Agency did not present any direct testimony to contradict the fact that, if the computer was being used for non-State purposes, such use was well in the past. However, the Grievant was unable to provide any justification to the Hearing Officer for use of a State computer for personal business regardless of when that use was made. The Grievant testified that these documents were created during breaks, during lunch, or after hours. The Grievant was unable to present any evidence or documentation to corroborate that statement. Accordingly, the Hearing Officer finds that the Grievant did in fact use her State computer for non-State business.

Regarding the allegation that the Grievant comes to work late, the Agency's position is set forth in a Memorandum dated September 4, 2009 from the State Internal Auditor to the Secretary of the State Board of Elections.⁷ Each State employee is provided with a swipe card which they can use in the parking lot for their cars and for entrance to the building. Every time that this card is used, a computer log is created with the date and time of its use. Pursuant to the aforementioned audit, when looking at the use of this card to try to determine when the subject reported to work or when she left, it appeared that the Grievant was either late in arriving or

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

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

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

⁷ Agency Exhibit 1, Tab 3, Page 7

early in leaving approximately 96 hours over the time period of October 1, 2008 through May 12, 2009.⁸

These facts were presented to the Grievant and she was asked to produce anything of her own records that might mitigate this deficiency. The Grievant testified that she produced some documents and the Agency, of its own accord, re-worked its audit looking at the Grievant's building access records. The theory here is that the Grievant had testified that her daughter had use of her parking lot access card and the daughter would come and go with the card at different hours, which could give a deceiving appearance as to the Grievant's presence. Further, the Grievant testified that there were days when she did not use the parking lot and used street parking. Accordingly, the Agency determined that a more accurate assessment of her time would be to check the computer logs for building access. The first time this method was used to attempt to determine the total hours in the time frame of October 1, 2008 through May 12, 2009 that the Grievant was not at her desk for the appropriate times each day, produced a result of approximately 75 of deficiency from work.⁹

Finally, the Agency re-computed her missed time by re-adjusting and giving her a full day's credit for any day in which she was there for part of the day. This final adjustment resulted in a deficiency of 62.6 hours.¹⁰

In the final audit, the Hearing Officer notes that the Agency was doing everything within its power to mitigate the time missed from work by the Grievant. In her testimony, the Grievant simply disputed the fact that she missed this much time. She produced no evidence to contradict any of the basis for the three (3) computations for her missed time.

At the time of this offense, the Grievant had an active Group II Written Notice for excessive tardiness.¹¹ Pursuant to that Written Notice, the Grievant received a Memorandum of Disciplinary Action dated March 14, 2007. The final paragraph of that Memorandum states in part as follows:

Subsequent violations of the attendance policies of the State Board of Elections may result in issuance of another Group II Written Notice. Receipt of two Group II Written Notices may be grounds for dismissal from state service.¹²

Accordingly, the Hearing Officer finds that the Grievant abused State time in arriving late and not working full days.

MITIGATION

⁸ Agency Exhibit 1, Tab 3, Page 13

⁹ Agency Exhibit 1, Tab 5, Page 5

¹⁰ Agency Exhibit 1, Tab 6, Page 5

¹¹ Agency Exhibit 1, Tab 1, Page 1

¹² Agency Exhibit 1, Tab 1, Page 4

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...”¹³ 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 Agency, of its own accord, re-worked the missed time from work from 74.93 hours to 62.60 hours. The Agency considered the active prior Group II Written Notice which could have resulted in the Grievant’s dismissal for an accumulation of two Group II Written Notices. The Agency considered the Grievant’s longevity of service and the Grievant’s stated willingness to improve her performance. The Hearing Officer has considered all of the delineated items in mitigation as set forth in this paragraph as well as 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 the suspension 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

¹³Va. Code § 2.2-3005

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.¹⁴ 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.¹⁵

[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

¹⁴An 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).

¹⁵Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.