

Issues: Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 06/16/10; Decision Issued: 06/16/10; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 9336; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 06/22/10; EDR Ruling #2010-2686 issued 07/19/10; Outcome: AHO's decision affirmed;** **Administrative Review: DHRM Ruling Request received 06/22/10; DHRM Ruling issued 06/23/10; Outcome: Declined to review.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9336

Hearing Date: June 16, 2010
Decision Issued: June 16, 2010

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on February 24, 2010 for:

Failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy. You did not follow the inclement weather policy which requires essential staff to report to work during inclement weather. You did not attempt to come to work on January 30 and 31, 2010. You did attempt to come on February 1, 2010 but you were able to make it. ¹

Pursuant to the Group II Written Notice, the Grievant was terminated on February 24, 2010. ² On March 12, 2010, the Grievant timely filed a grievance to challenge the Agency's actions. ³ On May 17, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On June 16, 2010, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Advocate for Agency
Witnesses

ISSUE

Did the Grievant fail to follow supervisor's instructions, perform assigned work or otherwise fail to comply with written policy?

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

¹ Agency Exhibit 1, Tab 1, Page 1

² Agency Exhibit 1, Tab 1, Page 1

³ Agency Exhibit 1, Tab 2, Page 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 did not appear for this hearing and the Grievant did not file any documentary evidence with the Hearing Officer.

The totality of the Agency's Exhibit 1 clearly established that the Grievant did not comply with the Inclement Weather Policy for this Agency in that she did not report to work when essential staff had to report to work. On January 20, 2010, the Grievant did not report as scheduled for her yearly qualification on the firing range. Further, on January 30, 2010, the Grievant called the Agency and stated that she could not come to work due to weather

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)

conditions. On January 31, 2010, the Grievant did not report to work and stated that she was taking a personal day. On February 1, 2010, the Grievant did not report to work.⁷

Prior to the Written Notice before this Hearing Officer, the Grievant had three (3) other Written Notices that were still active. On September 15, 2009, the Grievant received two (2) separate Group II Written Notices for failure to report to work without notice. On January 15, 2009, the Grievant received a Group I Written Notice for absences and excessive tardiness.

The Agency has borne its burden of proof in this matter and, coupled with the three (3) prior active Written Notices, the Agency was justified in terminating the Grievant's employment.

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..."⁸ 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 as well as any and all other possible sources of mitigation and 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 regarding this matter and the termination of the Grievant's employment on February 24, 2010 was proper.

APPEAL RIGHTS

⁷ Agency Exhibit 1, Tab 1, Page 3

⁸Va. Code § 2.2-3005

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.⁹ 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.¹⁰ [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

⁹An 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).

¹⁰Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

June 23, 2010

RE: **Grievance of Grievant v. Department of Corrections**

Dear Grievant:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
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.

In each instance where a request is made to the Department of Human Resource Management (DHRM) 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. You have requested that DHRM reopen your case for consideration of new evidence. The DHRM has no authority to honor your request. Rather, if you have new evidence, you must make a request to the hearing officer to reopen your case for consideration of the new evidence. We must therefore respectfully decline to honor your request to conduct the review.

Sincerely,

Ernest G. Spratley