

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 07/26/10;
Decision Issued: 07/28/10; Agency: VEC; AHO: William S. Davidson, Esq.; Case
No. 9358; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9358

Hearing Date: July 26, 2010
Decision Issued: July 28, 2010

PROCEDURAL HISTORY

The Grievant was issued a Group II Written Notice on April 27, 2010 for:

You are being issued a Group II Written Notice for your failure to follow supervisor's instructions.¹

Pursuant to the Group II Written Notice, the Grievant received no punishment other than the Written Notice becoming a part of her file. On April 27, 2010, the Grievant timely filed a grievance to challenge the Agency's actions.² The Second Step Resolution meeting took place on May 4, 2010.³ Pursuant to that meeting, the Group II Written Notice was reduced to a Group I Written Notice.⁴ The Group I Written Notice was issued for:

You are being issued a Group I Written Notice for your failure to follow supervisor's instructions.⁵

On June 23, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On July 26, 2010, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Grievant
Witnesses

¹ Agency Exhibit 1, Tab 4, Pages 8 and 10

² Agency Exhibit 1, Tab 1, Page 1

³ Agency Exhibit 1, Tab 1, Page 2

⁴ Agency Exhibit 1, Tab 5, Page 11

⁵ Agency Exhibit 1, Tab 7, Pages 18 and 20

ISSUE

Did the Grievant fail to follow supervisor's instructions?

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.⁶ However, proof must go beyond conjecture.⁷ In other words, there must be more than a possibility or a mere speculation.⁸

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 ten (10) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

⁶ Ross Laboratories v. Barbour, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁷ Southall, Adm'r v. Reams, Inc., 198 Va. 545, 95 S.E. 2d 145 (1956)

⁸ Humphries v. N.N.S.B., Etc., Co., 183 Va. 466, 32 S.E. 2d 689 (1945)

The Grievant did not provided the Hearing Officer with a notebook but relied on all of the Exhibits presented by the Agency in Agency Exhibit 1.

The Grievant in this matter was a Labor Market Analyst for the Agency. Part of her duties included contacting employers and asking them to send in data regarding the types of jobs that they had, the number of employees that they had and a salary range for those employees. This data is then compiled and used by the Office of Employee Statistics (“OES”) and The Bureau of Labor Statistics (“BLS”). As a part of the compilation of this data, the Grievant had to indicate how the data was sent to her by the employer. The OES State Operations Manual sets forth eight (8) codes for indicating how data is received.⁹ The Grievant, in her testimony, admitted to using Code #3 (Phone Call) when she should have used Code #6 (E-mail) or Code #7 (FAX). The Grievant’s immediate supervisor testified that this issue was addressed with the Grievant and others at a meeting during October of 2009. The issue of miscoding continued and the Grievant’s immediate supervisor talked with her again on March 23, 2010 regarding the use of the three (3) codes when it was inappropriate. Finally, these errors continued to occur and were brought to the immediate supervisor’s attention on April 13, 2010. The supervisor testified that she called the Grievant and told her that, if these errors continued, she would be given a Written Notice for failure to follow instructions.

On April 14, 2010, which was one (1) day after being told that any further misuse of codes would result in a Written Notice being issued, the Grievant submitted files with the continued use of improper coding. This was brought to the supervisor’s attention on April 15, 2010 and a process was commenced for the issuance of a Written Notice.

On April 22, 2010, the Grievant’s immediate supervisor provided her with an Inner Office Memo notifying her of proposed disciplinary action.¹⁰ On April 27, 2010, the Written Notice was issued.

As a part of the grievance process, the Grievant filed an attachment which admits that she miscoded the two (2) documents that were filed on April 14, 2010.¹¹ In that attachment, the Grievant stated that she needed to get a clear understanding and would ask the BLS staff on April 22, 2010 to clear up her confusion. The Hearing Officer finds that there should have been no confusion regarding the use of these codes and in particular the use of Code #3. The driving force behind the coding system was what method the employer used to send in data. The only time that Code #3 would be appropriate is when the employer called and gave the data over the phone. It was never appropriate when documents were sent in electronically, by fax, or by hard copy. Accordingly, the Hearing Officer finds that the Agency has borne its burden of proof in this matter.

⁹ Agency Exhibit 1, Tab 9, Page 42

¹⁰ Agency Exhibit 1, Tab 2, Page 3

¹¹ Agency Exhibit 1, Tab 9, Page 27

There was some discussion and testimony before the Hearing Officer about retaliation by the Agency relative to this Written Notice. The Hearing Officer has considered both the oral testimony and documentary evidence regarding the issue of retaliation and finds that there is no merit at all to a claim of retaliation by the Agency.

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...”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.

This Grievant was initially issued a Group II Written Notice which was reduced to a Group I Written Notice during the grievance process because the Second Step Respondent believed that mitigation was appropriate. The Second Step Respondent took into account the fact that the Grievant had been employed by the Agency for eight (8) years and was an Enthusiastic Contributor to a number of voluntary Agency activities.¹³ The Hearing Officer has considered all of the delineated items in mitigation as set forth in this section 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 no further mitigation is required in this matter.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof regarding this matter.

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:

¹²Va. Code § 2.2-3005

¹³ Agency Exhibit 1, Tab 5, Page 11

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.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.