

Issue: Removal due to inability to meet work conditions; Hearing Date: 08/31/10;
Decision Issued: 09/01/10; Agency: VCU; AHO: Cecil H. Creasey, Jr., Esq.; Case
No. 9393; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9393

Hearing Date: August 31, 2010
Decision Issued: September 1, 2010

PROCEDURAL HISTORY

Virginia Commonwealth University (“Agency”), on May 14, 2010, removed the Grievant from her position because of her loss of access to the Commonwealth’s web-based purchasing system (“eVA”). The removal was made under the Standards of Conduct, Policy 1.60, Section H, Removal Due to Circumstances which Prevent Employees from Performing their Jobs.

Grievant timely filed a grievance to challenge the Agency’s removal action. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On August 11, 2010, the Department of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer. At the pre-hearing conference held by telephone on August 16, 2010, the grievance hearing was scheduled for August 31, 2010. Accordingly, the grievance hearing was held on August 31, 2010, at the Agency’s human resources office.

The Agency submitted documents for exhibits that were, with limited objection from the Grievant, admitted into the grievance record, and they will be referred to as Agency’s Exhibits. The Grievant’s exhibits were received into the grievance record without objection, and they will be referred to as the Grievant’s Exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Representative/Advocate for Agency
Witnesses

ISSUES

1. Whether Agency had grounds for removing Grievant from her job?
2. Whether the Agency’s action was consistent with law and policy?

3. Whether there were mitigating circumstances justifying a lesser action than removal, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

The Grievant requests reversal of the removal action, reinstatement, or job modification, with back pay.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this removal action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee’s ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth’s grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency’s Standards of Conduct, Policy 1.60, provides:

H. Removal Due to Circumstances which Prevent Employees from Performing their Jobs

1. Inability to meet working conditions

An employee unable to meet the working conditions of his or her employment due to circumstances such as those listed below may be removed under this section.

Reasons include:

- loss of driver's license that is required for performance of the job;
- incarceration for an extended period;
- failure to obtain license or certification required for the job;
- loss of license or certification required for the job;
- inability to perform the essential functions of the job after reasonable accommodation (if required) has been considered;
- failure to successfully pass an agency's background investigation; or
- conviction of a misdemeanor crime of domestic violence for employees whose jobs require: (a) carrying a firearm; or (b) authorization to carry a firearm.

Prior to such removal, the appointing authority and/or Human Resource Office shall gather full documentation supporting such action and notify the employee, verbally or in writing, of the reasons for such a removal, giving the employee a reasonable opportunity to respond to the charges. Final notification of removal should be via memorandum or letter, not by a Written Notice form.

Employees may challenge removals through the Employee Grievance Procedure, and may direct questions regarding this procedure to the Department of Employment Dispute Resolution.

Agencies may, based on mitigating circumstances, demote or transfer and reduce the employee's duties with a minimum 5% reduction in salary, or transfer them to an equivalent position without a reduction in salary as an alternative to termination.

Agency Exh. 5.

The Grounds for Removal

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Grievant has worked in various capacities for the Agency since 1990. Most recently, the Agency employed Grievant as an administrative assistant. The Employee Work Profile ("EWP") describes the Grievant's position as providing "administrative support to the Housekeeping Manager and two Supervisors." Among the requirements of the EWP is using eVA for Agency purchases. Agency Exh. 4.

The Grievant admits the facts that she misused her eVA purchase card in her prior position in a different department within the Agency that led to her voluntary resignation in lieu of going through the disciplinary process. With a voluntary resignation, the Grievant was eligible for other employment with the Commonwealth and Agency. The Grievant also admits that her misuse of the eVA purchase card rendered her ineligible for eVA access. The Grievant was also convicted of misdemeanor embezzlement resulting from her misuse of the eVA purchase card. Agency Exh. 2. The Grievant testified that her misuse of the purchase card was a mistake and she repaid the money.

Va. Code § 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 § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the Agency's action. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), 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."

The Grievant's ineligibility to access eVA renders her incapable of performing her job as established by the EWP. This loss of eVA access justifies the Agency's exercise of remedial action authorized by the Standards of Conduct, up to and including removal. The Agency, thus, has met its burden of proving some action was justified. Under the policy, the Agency, based on mitigating circumstances, may have demoted, transferred, or reduced the Grievant's duties with a minimum 5% reduction in salary, or transferred her to an equivalent position without a reduction in salary as an alternative to termination.

The Grievant argues, reasonably, that the Agency had discretion to take less severe action and could have exercised a lesser alternative than termination. 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...." Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."

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, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated. Grievant contends her 20 years of service to the Agency, albeit in other job capacities, provides enough consideration to mandate a lesser sanction than termination, and that job duties requiring eVA access could be reassigned to other employees. However, length of service, alone, is insufficient for a hearing officer to overrule an agency's mitigation determination. EDR Ruling No. 2007-1518 (October 27, 2009) held:

Both length of service and otherwise satisfactory work performance are grounds for mitigation by agency management under the Standards of Conduct. However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become.

The hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, and the hearing officer is permitted to mitigate a disciplinary action if it exceeds the limits of reasonableness. The Agency did not specifically address mitigating circumstances, so there is no record of mitigation by the Agency that requires hearing officer deference. Although the Grievant's long tenure with the Agency is a factor to consider, it cannot be viewed as immunity to removal when she lost access to eVA. The Grievant neither alleged nor showed any bias, disparate treatment, or improper motive in the Agency's removal decision. Additionally, aggravating circumstances exist in the form of the Grievant's conviction of misdemeanor embezzlement related to her misuse of the eVA purchase card.

Given the aggravating circumstances, and in light of the standard set forth in the *Rules*, no mitigating circumstances exist to reduce the termination. Here, when viewing the circumstances, removal is within the consequences required by policy and falls within the

bounds of reasonableness. Under these circumstances, the hearing officer lacks authority to disturb the Agency's action and must uphold the removal.

DECISION

For the reasons stated herein, the Agency's removal of the Grievant is **upheld**.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.



Cecil H. Creasey, Jr.
Hearing Officer