

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 12/01/10;
Decision Issued: 12/03/10; Agency: DOC; AHO: William S. Davidson, Esq.; Case
No. 9436; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9436

Hearing Date: December 1, 2010
Decision Issued: December 3, 2010

PROCEDURAL HISTORY

The Grievant was issued a Group I Written Notice on July 7, 2010 for:

On 6/20/10 at approximately 11:20 PM a Corrections Officer on A-Day shift called to the institution to report that he would be unable to report to work the next day as scheduled due to illness. This Officer reported and you admitted in a conversation with Major A that you made several inappropriate comments to him, including that he was faking, lying, and creating problems for his shift with his absence. Based on the content of Major A's report, it is concluded that this conduct from a supervisor is completely unacceptable. I am therefore issuing this Group I Written Notice for Unsatisfactory Job Performance on today's date.¹

Pursuant to the Group I Written Notice, the Grievant received no disciplinary action other than the issuance of the Written Notice.² On July 14, 2010, the Grievant timely filed a grievance to challenge the Agency's actions.³ On October 18, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On December 2, 2010, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Grievant
Witnesses

ISSUE

1. Did the Grievant accuse an employee of the Agency of faking, lying and creating problems for his shift with his absence?
2. Did the Grievant admit these allegations to Major A?

¹ Agency Exhibit 1, Tab 2, Pages 2 and 3

² Agency Exhibit 1, Tab 2, Page 2

³ Agency Exhibit 1, Tab1, Page 1

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 eight (8) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing nine (9) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

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)

Neither the Grievant nor the Agency disputed the fact that on the evening of June 20, 2010, Officer L called the Agency to report that he would not be coming to work that evening. That call was received by the Grievant. The next day, Officer L reported to the Human Resource Office that he felt he had been abused in the prior evening's phone conversation. The Human Resources Officer instructed Officer L as to his rights.

On July 1, 2010, Officer L came to the Human Resources Officer to deliver certain documents. The Human Resources Officer again asked him if he wished to move forward with regards to the prior phone call and, after some discussion with Major C, it was determined that the Human Resources Officer would type an Institutional Incident Report for Officer L's signature.⁷

The first witness that the Agency presented at the hearing was Officer L. In questioning by the Agency representative, Officer L denied the entirety of the allegations found within the Institutional Incident Report. Officer L testified that he did not read the Report carefully and that he signed it because Major C asked him to sign it and he treated that as an Order from his superior. Officer L testified that the Report was untrue and that he was simply mad at himself for the problems that he was creating for himself regarding the Agency. On several occasions, under direct and cross-examination, Officer L stated that he signed the Institutional Incident Report because he was ordered to do so.

Major C, who was one (1) of the three (3) people present when the Institutional Incident Report was prepared, testified that Officer L asked that this Report be typed and that he carefully read it before signing it. The Human Resources Officer who typed the Report stated that Officer L asked for it to be typed, was told that he did not need to sign it unless he wished to and that he read it carefully before he signing it.

In her testimony, the Human Resources Officer testified that Officer L had lied to her many times before this incident took place. She indicated that there was a pattern of untruthfulness prior to this event and that she was certain that Officer L was lying before the Hearing Officer when he denied the veracity of the Institutional Incident Report. She and Major C both felt that he was telling the truth when he signed the Report but was not telling the truth after being sworn to do so by the Hearing Officer.

Major C met with the Grievant on July 29, 2010 to discuss the telephone call that had taken place between the Grievant and Officer L on June 20, 2010. Lieutenant R was present during that meeting. Major C filed an Institutional Incident Report on July 1, 2010 based in large part on his conversation with the Grievant of June 29, 2010.⁸ In the third paragraph of the Report, Major C states in part as follows:

...[Grievant] said he told [Officer L] that he had read the incident report he had written and that it just could not have happened the way he said it had.⁹

In his testimony at the hearing, Major C admitted that the Grievant followed that statement with the language, "because I trained you better than that."

⁷ Agency Exhibit 1, Tab 8, Page 3

⁸ Agency Exhibit 1, Tab 8, Page 1

⁹ Agency Exhibit 1, Tab 8, Page 1

Major C deemed that language to be an allegation by the Grievant that Officer L was either faking his injury or lying or both. Major C further stated in the third paragraph of the Report:

...[Grievant] said he told [Officer L] he just cannot see it happening that way and that [Officer L] needs to get another doctor.¹⁰

In his testimony, Major C alleged that was interfering with the medical rights of an employee of the Agency and that was improper conduct. The Hearing Officer asked if Major C could point to any operational guidelines or Standards of Conduct guidelines that indicated that it was improper for any supervisory member of an Agency to suggest a medical second opinion. Major C could not produce such language.

In paragraph four of the Report, Major C states in part as follows:

[Grievant] said he told [Officer L] that he should go on and leave the correctional center because there are a lot of people out there that could use this job and he might as well just quit.¹¹

Officer L denied that any such language was ever used and, in his testimony, the Grievant also denied that any such language was used.

Finally, in the fifth paragraph of the Report, Major C stated in part as follows:

During the conversation I had with [Grievant] he said that [Officer L] should not be getting worker's compensation.¹²

The Grievant, in his testimony, denied ever making such a statement.

During the conversation that Major C had with the Grievant, there was a third party present, Lieutenant R. This Lieutenant testified and clearly stated that the Grievant did not make any allegations that Officer L was faking or lying and did not suggest to Officer L that he quit his job. This witness had no recollection of the Grievant suggesting that Officer L should not receive worker's compensation. Essentially, this witness, a disinterested third party, testified that, in large measure, the entirety of this Institutional Incident Report was inaccurate.

The Grievant denied accusing Officer L of faking, lying or creating problems for his shift. The Grievant also presented evidence regarding disparate treatment in this matter in that other employees of this Agency were treated differently than he was. The two (2) examples that he presented were for fellow employees who, in the opinion of the Hearing Officer, committed significantly worse offenses than this Grievant is alleged to have committed, and they received only "counseling." The Hearing Officer need not address that issue as this case rises and falls on the credibility of the witnesses.

¹⁰ Agency Exhibit 1, Tab 8, Page 1

¹¹ Agency Exhibit 1, Tab 8, Page 1

¹² Agency Exhibit 1, Tab 8, Page 1

The credibility of Officer L, who was the originator of this matter, is fatally flawed. The Agency's HR Director testified that Officer L "had a history of lying to her" prior to this event. Officer L acknowledges signing an Institutional Incident Report which was the lynch pin of the Agency's case in this matter.¹³ At the hearing, Officer L clearly stated that he signed that document because he was ordered to, that he did not read it clearly and upon being questioned about it at the hearing, denied essentially all of the allegations within the Report. The Agency, as it must, argues that Officer L was being truthful when he signed the Report and was being untruthful when he testified. The Hearing Officer, when presented with the fact that the Agency acknowledges that Officer L was untruthful prior to the incident, cannot distinguish as to whether he was truthful when he signed the Report or whether he is being truthful when he testified before the Hearing Officer.

The Agency's fallback position is that the Grievant admitted to some of the statements that were contained in the Institutional Incident Report of July 1, 2010. However, Lieutenant R, who at the time prior to his retirement, was also an Agency employee and was present during that conversation, disputes essentially all of what Major C testified. The Lieutenant's testimony was such as to leave the Hearing Officer in the posture of concluding that either Major C was fabricating and lying to the Hearing Officer or Lieutenant R was fabricating and lying to the Hearing Officer.

Accordingly, based solely on the credibility of the witnesses in this matter, the Hearing Officer finds that the Agency has not borne its burden of proof.

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..."¹⁴ 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.

¹³ Agency Exhibit 1, Tab 8, Page 3

¹⁴ Va. Code § 2.2-3005

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has not borne its burden of proof in this matter and the Hearing Officer orders that the Group I Written Notice be rescinded.

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.¹⁵ 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.¹⁶

¹⁵An 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).

[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

¹⁶Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.