

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 11/29/10;
Decision Issued: 12/08/10; Agency: VDH; AHO: William S. Davidson, Esq.; Case
No. 9442; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9442

Hearing Date: November 29, 2010
Decision Issued: December 8, 2010

PROCEDURAL HISTORY

The Grievant was issued a Group I Written Notice on May 18, 2010 for:

Disruptive Behavior.¹

Pursuant to the Group I Written Notice, the Grievant received no punishment other than the Group I Written Notice.² On June 15, 2010, the Grievant timely filed a grievance to challenge the Agency's actions.³ On October 25, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On November 29, 2010, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Grievant
Attorney for Grievant
Witnesses

ISSUE

1. Was the Grievant's behavior disruptive?

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

¹ Agency Exhibit 1, Tab 2, Page 2

² Agency Exhibit 1, Tab 2, Page 2

³ Agency Exhibit 1, Tab 1, Page 3

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 six (6) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing seven (7) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1. During the course of the hearing, and without objection, Tabs 8 and 9 were added to the Grievant’s notebook.

The Agency relied on two (2) witnesses to establish the Grievant’s alleged disruptive behavior. The first sent an e-mail to his supervisor on April 22, 2010 regarding the Grievant’s disruptive behavior with him.⁷ This witness states in his e-mail in part as follows:

...During that visit with me, she kept asking When! When!, I was

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 2, Page 7

going to work the assignment, her voice was raised. Her tone was capricious. In thirty years of employment, I have never been spoken you [sic] in such a demeaning manner.⁸

During his testimony, this witness stated that he felt the Grievant micro managed him, that she treated him as a “throw away style” and that she was demeaning.

The Agency then called its second witness. This witness wrote an e-mail to the Grievant’s supervisor, dated April 23, 2010. In that e-mail, this witness stated in part as follows:

...[Grievant] then proceeded to go over her M.O.A. and tell us her job description as our supervisor in an intimidating tone. She used statements like “it is my responsibility to observe you in the field quarterly, and it will be done, and I will be using the skills inventory to do it,” “I want to see all paper work that is being sent out of this office.” Other issues discussed in the meeting were route sheets. She asked that we write a route sheet as to where we are going, take a photo copy of the route sheet with us, and write down what time we arrived, what time we left and what time we made it back to the health department. Once we return to the health department we submit the route sheet along with what was documented on the field record. In a sarcastic manner she asked if we needed to see her M.O.A.

There was no problem necessarily with the information that was being given at the meeting, it was the negative tone as if we’ve done something wrong and we were being punished for carrying out our job duties to the best of our abilities. I was made to feel as if I was being reprimanded instead of having an informative meeting with the supervisor.

May I also add that there are inconsistencies in her supervision; each meeting brings about a new policy which has me frustrated, worn down and confused. It’s hard to know what to expect from her daily and try to interpretate [sic] her demeanor. Meaning am I being given instruction or being disciplined with each of our encounters.⁹

During this witness’ testimony, she also stated that the Grievant micro managed.

⁸ Agency Exhibit 1, Tab 2, Page 7

⁹ Agency Exhibit 1, Tab 2, Page 6

The Agency's position is that the Grievant engaged in disruptive behavior with the first witness on April 19, 2010¹⁰ and with the second witness on April 14, 2010.¹¹ The Agency offered no definition of disruptive behavior. The Department of Human Resource Management ("DHRM") in its Sample Workplace Violence Policy Statement states in part as follows:

Violence, threats, harassment, intimidation, and other disruptive behavior in our workplace will not be tolerated...We need your cooperation to implement this policy effectively and maintain a safe working environment.

No Agency witness testified that the Grievant threatened them, used profanity in speaking with them, or screamed at them. There was some testimony indicating that the Grievant may have used a raised voice. However, there were no other witnesses who were present within the building to indicate that they heard a raised voice. Indeed both witnesses indicated that the Grievant had the right to say what she was saying to them, they simply questioned the manner of delivery. While the Grievant's manner of delivery may have been boorish behavior, it does not rise to the level of "disruptive behavior." The Agency seems to place great reliance on a document that was sent to the Grievant from her immediate supervisor on December 18, 2009.¹² The Agency refers to this document as a Formal Counseling Memo. The Third Step Respondent specifically relied on that document and stated as follows:

...Your supervisor reviewed certain performance issues with you which were covered in a memorandum included in the grievance package dated December 18, 2009.¹³

This Formal Counseling Memo does not deal with inappropriate language, tone, volume nor any of the issues that are before this Hearing Officer in this matter. The First Step Respondent also relied on this Formal Counseling Memo in denying the grievance.¹⁴ The Second Step Respondent also relied on this Formal Counseling Memo.¹⁵

The Agency simply seems to be implying in this matter that the Grievant does not communicate well. However, in the Employee Work Profile dated October 20, 2009, the Grievant's supervisor wrote as follows:

¹⁰ Agency Exhibit 1, Tab 2, Page 6

¹¹ Agency Exhibit 1, Tab 2, Page 7

¹² Agency Exhibit 1, Tab 3, Pages 8 and 9

¹³ Agency Exhibit 1, Tab 5, Page 3

¹⁴ Agency Exhibit 1, Tab 3, Page 2

¹⁵ Agency Exhibit 1, Tab 4, Page 1

[Grievant] does an outstanding job communicating with her staff...[Grievant] is a wonderful employee.¹⁶

The Agency introduced a document dated August 17, 2009 that purports to be the memorialization of a counseling session between the Grievant and her immediate supervisor.¹⁷ It appears that the Grievant's tone of voice was addressed in this counseling session. This document is relied upon in both the First, Second and Third Step Responses of management. However, management seems to disregard the fact that two (2) months after this counseling session took place, the Grievant was deemed to be "an excellent communicator."

The grievance that is before this Hearing Officer is simply whether or not this Grievant engaged in disruptive behavior on two (2) separate dates. Based on the evidence that has been presented to the Hearing Officer, the demeanor of the witnesses, and the documentary evidence, the Hearing Officer finds that on those two (2) occasions, the Grievant's behavior did not rise to the level of disruptive behavior. Boorish perhaps, but not disruptive.

The Grievant introduced evidence that suggested retaliation was the motive behind the issuance of this Written Notice. Because of the Hearing Officer's prior finding, he does not address that matter at this time.

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..."¹⁸ 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.

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

¹⁶ Grievant Exhibit 1, Tab 7, Page 2

¹⁷ Agency Exhibit 1, Tab 3, Page 7

¹⁸ Va. 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.¹⁹ 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.²⁰ [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

¹⁹An 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).

²⁰Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.