

Issues: Group III Written Notice (falsifying records), Group III Written Notice (patient abuse), and Termination; Hearing Date: 12/20/10; Decision Issued: 12/21/10; Agency: DBHDS; AHO: William S. Davidson, Esq.; Case No. 9459; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9459

Hearing Dates: December 6, 2010 and December 20, 2010
Decision Issued: December 21, 2010

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on August 3, 2010 for:

Falsification of records as determined by investigation # 707-2010-026. ¹

The Grievant was also issued another Group III Written Notice on August 3, 2010 for:

Verbal abuse of an individual in residence as determined by investigation #707-2010-026. ²

Pursuant to the two (2) Group III Written Notices, the Grievant was terminated on August 3, 2010. ³ On August 26, 2010, the Grievant timely filed a grievance to challenge the Agency's actions. ⁴ On November 8, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On December 6, 2010 and December 20, 2010, a hearing was held at the Agency's location.

The original hearing in this matter was scheduled to commence at 9:00 a.m. on Monday, December 6, 2010. Shortly after the time of commencing, the Hearing Officer received from his office a re-transmission of a fax that had been sent to his office at 7:06 p.m., Friday December 3, 2010. This fax purported to be a doctor's excuse for why the Grievant could not attend the hearing on Monday, December 6, 2010. This document is introduced as Hearing Officer Exhibit 1. After the Hearing Officer consulted with the appropriate parties at EDR, it was determined that the hearing should be continued and rescheduled for another date. The hearing was rescheduled for Monday, December 20, 2010.

APPEARANCES

¹ Agency Exhibit 1, Tab 1, Page 1

² Agency Exhibit 1, Tab 1, Page 2

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

⁴ Agency Exhibit 1, Tab 2, Page 1

ISSUE

1. Did the Grievant falsify records as determined by investigation # 707-2010-026?
2. Did the Grievant verbally abuse an individual in residence as determined by investigation # 707-2010-026?

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.⁵ However, proof must go beyond conjecture.⁶ In other words, there must be more than a possibility or a mere speculation.⁷

FINDINGS OF FACT

⁵ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁶ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁷ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

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 twelve (12) tabbed sections, with material only behind ten (10) tabs. That notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant produced no documentary evidence.

On December 15, 2010, the Grievant faxed to the Hearing Officer a document that purported to evidence her desire to not go forward with this grievance. It stated as follows:

I do not wish to proceed or continue with this grievance hearing that will be held on December 20th, 2010 at 9:00 AM, so therefore I am withdrawing myself from it.⁸

Pursuant to a phone conversation that the Grievant had with the Hearing Officer's paralegal, and the wording of the Grievant's fax of December 15, 2010, it was unclear to the Hearing Officer as to whether or not the Grievant was withdrawing her grievance or whether she was simply choosing not to appear at the hearing. Accordingly, the continued hearing of December 6, 2010 was recommenced on Monday, December 20, 2010. The Agency Representative presented the documentary evidence that was contained in Agency Exhibit 1 and the Grievant presented no evidence. Accordingly, the Hearing Officer finds that the Agency has borne its burden of proof in this matter.

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..."⁹ 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

⁸ Grievant's fax dated 12/15/10

⁹ Va. Code § 2.2-3005

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof regarding this matter and upholds the Agency's position to terminate the Grievant.

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.¹⁰ 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.¹¹

¹⁰An 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).

¹¹Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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