

Issues: Group III Written Notice (insubordination, unsatisfactory performance, failure to follow instructions, abuse of State time, compute misuse), Group III Written Notice (interference with State operations), and Termination; Hearing Date: 02/22/11; Decision Issued: 02/24/11; Agency: DOLI; AHO: William S. Davidson, Esq.; Case No. 9508; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 9508

Hearing Dates: February 22, 2011  
Decision Issued: February 24, 2011

**PROCEDURAL HISTORY**

The Grievant was issued a Group III Written Notice on September 23, 2010 for:

[Grievant] is being issued a Written Notice for violation of Offense Codes 11, 13, 35, 51, 52, 56 as pertaining to:

Policy Number 1.75 - Use of the Internet and Electronic Communications Systems

- Personal use of the electronic communication systems (e-mail) is prohibited

if it:

“Interferes with the user’s productivity or work performance”

And

Standards of Conduct - Wherein:

An employee is expected to:

- a) Devote full time and effort to job responsibilities during work hours
- b) Use state equipment, time, and resources judiciously and as authorized <sup>1</sup>

The Grievant was issued a second Group III Written Notice on September 23, 2010 for:

You have filed criminal charges of assault and felony abduction against your supervisor on August 10, 2010, pertaining to incidents that occurred on April 5, 2010 and May 4, 2010. You had previously filed workplace violence charges for these incidents upon which the criminal charges were based, and these incidents were investigated by the Department and found to have no merit.

On August 16, 2010, the General District Court of Richmond dropped the felony abduction charges against your supervisor. On September 16, 2010, the assault charges you filed were dismissed in the General District Court of

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<sup>1</sup> Agency Exhibit 1, Tab 5, Page 1

Richmond. The refusal of the Commonwealth's Attorney to prosecute these charges proves the validity of the Department's internal investigation and by pursuing the criminal charges you have aggravated the offense.

As a result of these unsubstantiated criminal charges that you filed, both you and your supervisor were placed on administrative leave, resulting in a loss of over 400 hours of state time. This loss placed a severe burden on the department and consequent loss of productivity.<sup>2</sup>

Pursuant to each of the Group III Written Notices, the Grievant was terminated on September 23, 2010.<sup>3</sup> The Grievant timely filed a grievance to challenge the Agency's actions. On January 24, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On February 22, 2011, a hearing was held at the Agency's location.

### **APPEARANCES**

Counsel for the Agency

### **ISSUE**

1. Did the Grievant:

- Interfere with State Operations?
- Be insubordinate?
- Have unsatisfactory performance?
- Fail to follow instructions and/or policy?
- Abuse State time?
- Use State property or records in an unauthorized manner?
- Misuse computer/Internet?

### **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:

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<sup>2</sup> Agency Exhibit 1, Tab 3, Page 1

<sup>3</sup> Agency Exhibit 1, Tab 5, Page 2 and Tab 3, Page 1

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.<sup>4</sup> However, proof must go beyond conjecture.<sup>5</sup> In other words, there must be more than a possibility or a mere speculation.<sup>6</sup>

### **FINDINGS OF FACT**

After reviewing the evidence presented, the Hearing Officer makes the following findings of fact:

The Agency provided the Hearing Officer with a notebook containing nineteen (19) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant produced no documentary evidence.

The Grievant did not appear at the hearing. Counsel for the Agency 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 based on the contents of Agency Exhibit 1.

### **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...”<sup>7</sup>

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<sup>4</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>5</sup> *Southall, Adm’r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>6</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

<sup>7</sup> Va. Code § 2.2-3005

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 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 14<sup>th</sup> Street, 12<sup>th</sup> 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.<sup>8</sup> 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.<sup>9</sup>

[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]

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William S. Davidson  
Hearing Officer

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<sup>8</sup>An 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).

<sup>9</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.