

Issue: Group II Written Notice (leaving work without permission); Hearing Date: 04/12/11; Decision Issued: 04/26/11; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 9545; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9545

Hearing Dates: April 12, 2011
Decision Issued: April 26, 2011

PROCEDURAL HISTORY

The Grievant was issued a Group II Written Notice on September 22, 2010 for:

On 9-8-10, [Grievant] came to the entry are of the muster room at 0546 after muster had already started and was observed by Employee A; however, he did not come in and attend the muster that started at 0545. He left and called Employee A and stated that since he was a minute late and would get a counseling, he might as well be an hour late and was going to leave to take care of something. Employee A told him that he was needed on post three separate times but [Grievant] left the facility and did not return until 0700. ¹

Pursuant to the Group II Written Notice, no action was taken against the Grievant and the Written Notice was placed in his employee file. ² On October 20, 2010, the Grievant timely filed a grievance to challenge the Agency's actions. ³ On March 17, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On April 12, 2011, a hearing was held at the Agency's location.

APPEARANCES

Advocate for the Agency
Witnesses

ISSUE

1. Was the Grievant late to the muster?
2. Did the Grievant leave work without permission?

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

¹ Agency Exhibit 1, Tab 1, Page 1

² Agency Exhibit 1, Tab 1, Page 1

³ Agency Exhibit 1, Tab 1, Page 2

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

At approximately 9:05 a.m. on the morning of April 12, 2011, the Grievant contacted the Human Resources Officer for the Agency and informed her that he was at [the hospital] with his son. He informed her that he would not be coming to the hearing and, "the Agency won." The Hearing Officer commenced the hearing and had the Human Resources Officer testify to those facts under oath. This matter was continued generally and the Hearing Officer instructed the Human Resources Officer to be in touch with the Grievant and inquire as to whether or not he desired to have this matter reconvene at a later date or was it his desire to no longer go forward with his grievance. The Hearing Officer instructed the Human Resources Officer to notify the Hearing Officer's office with the Grievant's response. If the Grievant desired to go forward then, the Hearing Officer stated that he would establish a new date for this matter. If the Grievant did not wish to go forward, then the Hearing Officer would issue a decision based on the evidence contained in the Agency's notebook.

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)

The Agency provided the Hearing Officer with a notebook containing five (5) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant did not provide the Hearing Officer with a notebook.

Pursuant to the Hearing Officer's instructions, the Human Resource Officer contacted the Grievant and inquired as to whether or not he wanted to establish a new hearing date pursuant to his being at the hospital with his son. As it turns out, the Grievant lied to the Human Resources Officer when he stated that he was at the hospital with his son. In point of fact, he went to the Central Office of the Department of Corrections and arrived there at approximately 8:45 a.m., on the morning of the hearing. When told that he was at the wrong location, he stated that he would call the institution and inform them that he was at the wrong location.

The Grievant did call but fabricated a story as to why he was not at the proper location for the hearing.

Neither the Agency nor the Hearing Officer have been contacted by the Grievant since April 12, 2011 regarding his desire to reschedule the hearing. Inasmuch as he fabricated a reason for not being at the original hearing, it is unlikely that he would be granted a new hearing date. Accordingly, as the Grievant presented no oral or written evidence in this matter and as the Grievant fabricated a story as to why he did not attend the hearing, the Hearing Officer dismisses the grievance based upon the Grievant's nonparticipation.

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..."⁷ 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 dismisses this grievance because of the Grievant's nonparticipation and failure to present evidence of any sort. Relying solely upon the

⁷Va. Code § 2.2-3005

Agency's written documentation, the Hearing Officer finds that the Agency has borne its burden of proof regarding this matter and upholds the Agency's position.

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.⁸ 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.⁹

⁸An 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).

⁹Agencies 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