

Issue: Formal Performance Improvement Counseling Form with Termination  
(unauthorized removal of State property); Hearing Date: 05/24/11; Decision Issued:  
05/26/11; Agency: UVA Health System; AHO: William S. Davidson, Esq.; Case No.  
9590; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 9590

Hearing Date: May 24, 2011  
Decision Issued: May 26, 2011

**PROCEDURAL HISTORY**

The Grievant was issued a Formal Performance Counseling Form on February 23, 2011 for:

On 18 Feb 2011 it was reported the [the Grievant] took a UVA cell phone from Ms. A's office without her knowledge. HR Policy 701 page 6 states "Depending upon the employee's overall work record, serious misconduct issues that may result in termination without prior progressive performance improvement counseling are, but not limited to:"

Theft or unauthorized removal or use of property, or unauthorized use of personnel.

A pre-determination meeting was held on 2/21 @ 4:15PM with [the Grievant]. Discussed was her taking a UVA phone from Ms. A's office without approval. [The Grievant] stated that the button on her personal cell phone no longer worked and she was unable to make calls. [The Grievant] stated she knew that the same model phone (UVA phone) had been turned in to Ms. A. [The Grievant] stated she needed parts from the UVA phone to repair her personal cell phone. [The Grievant] stated she would only need the parts for one week then she would return the phone. [The Grievant] stated that all her UVA contact information was in her personal cell phone and without it she would not have the numbers for her supervisor or manager. Ms. B asked why these numbers were not in her business phone provided by [the department] and [The Grievant] stated she only uses her personal cell phone.<sup>1</sup>

Pursuant to this Formal Performance Counseling Form, the Grievant was terminated.<sup>2</sup> On February 24, 2011, the Grievant timely filed a grievance to challenge the Agency's actions.<sup>3</sup> On April 28, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On May 24, 2011, a hearing was held at the Agency's location.

**APPEARANCES**

Advocate for the Agency

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<sup>1</sup> Agency Exhibit 1, Tab 3, Page 19

<sup>2</sup> Agency Exhibit 1, Tab 3, Page 19

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

Grievant  
Witnesses

### **ISSUE**

1. Did the Grievant violate HR Policy 701 regarding the theft or unauthorized removal or use of property?

### **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.<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 and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

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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)

The Agency provided the Hearing Officer with a notebook containing seven (7) tabbed sections and that notebook was accepted in its entirety and without objection as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing two (2) tabbed sections and that notebook was accepted in its entirety and without objection as Grievant Exhibit 1.

The essential facts that govern this matter were not in dispute. The Grievant works for this Agency and, pursuant to the requirements of her job, is provided with a telephone to be used at work. The Grievant also has her own personal telephone. Both the Grievant's witnesses and the Agency's witnesses testified to the fact that, on occasion, the Agency-issued phone was used for personal business and the personal phone of Agency employees could be used for Agency business. There came a time where the Grievant's personal phone was not properly functioning. The cumulative, uncontradicted testimony of the witnesses was that the Grievant entered the open office of the Administrative Assistant and removed a broken phone from a box of such phones that was located under this person's desk.

The Hearing Officer heard testimony from a Senior Systems Engineer, who had given his phone to the Administrative Assistant some time earlier because his phone was broken. The damage to his phone was caused when it was dropped and the damage consisted of the glass front plate being broken. The Hearing Officer heard testimony from this witness that the phone itself would work but that you could not activate many of the functions because of the broken glass.

He provided a written statement to the Agency and his testimony before the Hearing Officer substantially corroborates his written statement.<sup>7</sup> He testified that the Grievant called him some time on or about February 16, 2011, and asked for his personal phone code. He testified that he provided this code to her and asked a few questions inasmuch as this was an unusual request. Two (2) days later, on or about February 18, 2011, the Grievant, now in his presence, again asked him for his personal phone code and he physically entered it into the phone that she had at that time. When he did this, he noticed that the data that came up on the Grievant's phone was his data.

This witness testified that, in his opinion, one (1) of three (3) possible events had occurred: (i) the Agency had fixed his broken phone and had given it to the Grievant, or, (ii) the Grievant took the internal parts from his phone and placed them in her phone, or, (iii) the Grievant somehow managed to do a download from his phone to her phone. This witness testified that he told the Grievant that her use of his phone and its removal from the Office of the Administrative Assistant simply did not "pass the smell test." This witness also testified that he believed that the Grievant's supervisor heard him when he was discussing the fact that what the Grievant had done did not "pass the smell test."

This witness further testified that he felt a paragraph had been left off of his statement located at Agency Exhibit 1, Tab 5, Page 1. He testified that he would have added to his statement that he did not think the Grievant did anything with malicious intent.

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<sup>7</sup> Agency Exhibit 1, Tab 5, Page 1

The Hearing Officer heard from the Administrative Assistant, from whose office the phone was removed. She testified that she is in charge of purchasing new phones as needed and for disposing of old and broken phones as needed. She testified that she did not give the Grievant permission to remove a phone from her office. She testified that she was not at work on the day that this event occurred. She testified that, in her opinion, scavenging for parts from a University phone for use in an employees personal phone was a violation of University policy. She testified that the University paid for the phones and that they are University property and that the University ultimately either gives them away to organizations or people who perhaps would be deemed as charities, or they are destroyed.

The Hearing Officer next heard from the Grievant's immediate supervisor. He testified to an Informal Counseling session that was held with the Grievant on September 22, 2010 and a Performance Improvement Plan that was entered into by the Grievant on November 16, 2010.<sup>8</sup> This witness also testified to the Grievant's annual review for the time period of November 1, 2009 through October 31, 2010, indicating that the Grievant was below average in her essential job functions and her participation as a team member and being accountable for her own responsibilities,<sup>9</sup> as well as a Formal Performance Counseling Form between the Grievant and the Agency, which is dated October 27, 2010.<sup>10</sup> He also testified to a Step 3 Formal Performance Counseling Form between the Agency and the Grievant, which is dated January 10, 2011.<sup>11</sup>

The Step 3 Formal Performance Counseling Form was not grieved. Pursuant to that form, the Grievant was placed on a performance warning from January 10, 2011 through April 10, 2011.<sup>12</sup> Pursuant thereto, the Grievant was on notice that all performance expectations for her job must be met during this Performance Warning Period and that failure to meet performance expectations would result in termination.

Pursuant to the matters that are before this Hearing Officer, a predetermination meeting was held with the Grievant on February 21, 2011.<sup>13</sup>

Medical Center Human Resources Policy 701 provides in part as follows:

Depending upon the employee's overall work record, serious misconduct issues that may result in termination without prior progressive performance improvement counseling are, but not limited to:

...Theft or unauthorized removal or use of property...<sup>14</sup>

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<sup>8</sup> Agency Exhibit 1, Tab 3, Pages 1 and 4

<sup>9</sup> Agency Exhibit 1, Tab 3, Pages 5 through 10

<sup>10</sup> Agency Exhibit 1, Tab 3, Pages 13 and 14

<sup>11</sup> Agency Exhibit 1, Tab 3, Pages 15 and 16

<sup>12</sup> Agency Exhibit 1, Tab 3, Page 16

<sup>13</sup> Agency Exhibit 1, Tab 3, Page 17

<sup>14</sup> Agency Exhibit 1, Tab 4, Pages 5 and 6

The uncontradicted evidence before the Hearing Officer, both in oral statements at the hearing and in documentary evidence, is that the Grievant's personal cell phone was broken; the Grievant removed an Agency-provided, but disabled, phone from an open office at the Agency; and the Grievant used parts from that disabled phone to repair her personal phone and did so without permission. The Grievant's supervisor testified that he did not give her permission and the Administrative Assistant testified that she did not give the Grievant permission to use such Agency property. The evidence was also clear that the office where the phones were located was open, that there was an Agency employee working in the office when the phone was removed and that employee likely helped the Grievant determine where the phones were located. That particular employee testified that the Grievant told her that the Grievant's manager had told the Grievant where there were some old phones. This witness did not testify that the Grievant told her that this manager had said that the Grievant could use such a phone. Regardless, that manager specifically stated that he did not authorize the Grievant to use any of these phones.

The Grievant did not testify. Accordingly, there is no oral or written evidence in the record denying that the Grievant removed a telephone from the Office of the Administrative Assistant nor that the Grievant either repaired the screen on that phone, removed parts from that phone to place into her own personal phone or managed to execute a download of the data in that phone into her own personal phone.

The issue is whether or not this action by the Grievant amounted to theft or unauthorized removal or use of the Agency's property. The Grievant attempted, through the witnesses that she called, to prove that the Agency had never properly instructed its employees on the definition of theft or unauthorized removal or use of property that belonged to the Agency. The Grievant's own witnesses testified that, while they could not remember a manager specifically addressing the concept of not stealing the Agency's property or not using the Agency's property without prior and proper authorization, they all understood what that meant.

The Grievant, through her witnesses, attempted to establish the fact that she did not have malicious intent when she removed the phone. In general, the witnesses did not know what her intent was, although, essentially all witnesses, both Grievant's and Agency's, indicated that they did not think that the Grievant was malicious in her intent.

Unfortunately, intent is not the issue before the Hearing Officer. The evidence is clear that the Grievant, without authorization, removed and used the property of this Agency. It is equally clear that the Grievant was operating within the time frame of a 90 day performance warning pursuant to the Step 3 Formal Performance Counseling Form.<sup>15</sup> The Grievant could be terminated for either a violation of Policy 701 or for a violation of the general terms of her Step 3 Formal Performance Counseling Form.

### **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>16</sup>

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<sup>15</sup> Agency Exhibit 1, Tab 3, Page 16

<sup>16</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.

The Grievant offered no evidence, either oral nor written, which directed the Hearing Officer to other grounds of mitigation.

### **DECISION**

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof in 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>17</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>18</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>17</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>18</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.