

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 08/18/11; Decision Issued: 08/24/11; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 9610; Outcome: No Relief; **Administrative Review: AHO Reconsideration Request received 09/08/11; Reconsideration Decision issued 09/21/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling request received 09/08/11; EDR Ruling No. 2012-3102 issued 12/19/11; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9610

Hearing Date: August 18, 2011
Decision Issued: August 24, 2011

PROCEDURAL HISTORY

The Grievant was issued a Group I Written Notice dated August 4, 2010 for Unsatisfactory Performance.¹

Pursuant to the Written Notice, the Grievant received no punishment and the Written Notice was placed in his employee file.² On September 1, 2010, the Grievant timely filed a grievance to challenge the Agency's actions.³ On June 2, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. However, due to conflicts with the Agency's calendar and the Grievant's calendar, a hearing was unable to be scheduled in this matter until August 18, 2011. Accordingly, on August 18, 2011, a hearing was held at the Agency's location.

APPEARANCES

Advocate for the Agency
Attorney for Grievant
Agency Representative
Grievant
Witnesses

ISSUE

1. Did the Grievant perform at an unsatisfactory level?
2. Did the Agency discriminate against the Grievant because of his national origin?

AUTHORITY OF HEARING OFFICER

¹ Agency Exhibit 1, Tab 1, Page 1

² Agency Exhibit 1, Tab 1, Page 1

³ Agency Exhibit 1, Tab 1, Page 2

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. To the extent that the Grievant alleges *discrimination*, the burden is on the Grievant to show by a preponderance of the evidence that such discrimination occurred. 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 seven (7) tabbed sections and that notebook was accepted as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing twenty-nine (29) tabbed sections and that notebook was accepted as Grievant Exhibit 1.

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)

On or about November 7, 2008, the Grievant received an Employee Work Profile Performance Evaluation indicating that his performance was Below Contributor.⁷

On or about October 13, 2009, the Grievant received a Notice of Improvement Needed/Substandard Performance form indicating that:

...you must make immediate improvement in the performance of your duties. Continued poor performance as described below may result in an overall "Below Contributor" rating on the annual performance evaluation conducted in this performance cycle.⁸

On or about October 1, 2009, the Grievant received an e-mail from his immediate supervisor indicating a need for him to "do your September annuals at 0815 tomorrow morning (10/2/09)."⁹

On or about October 2, 2009, the Grievant received another e-mail from his immediate supervisor reiterating his job performance expectations and pointing out to him those things that he needed to correct in order to be a "Contributor" employee.¹⁰

On or about January 13, 2010, the Grievant received from the Assistant Warden a Memorandum summarizing a meeting which she had with him on December 11, 2009. In this Memorandum, the Assistant Warden stated that the Grievant's overall rating for his 2009 performance review was again that of Below Contributor. The Assistant Warden pointed out that the Grievant had chosen to not timely file a response to his performance review.¹¹

On or about January 20, 2010, the Grievant received a Memorandum from his Unit Manager specifying when his ninety (90) day re-evaluation period would commence. The Grievant was told in this Memorandum that, "...continued poor performance may result in further disciplinary action under [the] Standards of Conduct." There were eleven (11) areas of specific performance deficiencies set forth in this Memorandum.¹²

On or about February 18, 2010, the Grievant was provided with an Interim Evaluation Form. This Form stated that:

At this time none of the performance areas are meeting job criteria or responsibilities

Monthly Contact Sheets have not been turned in for January or February 2010
No annual reviews have been received for January or February 2010

⁷ Agency Exhibit 1, Tab 3, Page 4

⁸ Agency Exhibit 1, Tab 4, Page 1

⁹ Agency Exhibit 1, Tab 2, Page 10

¹⁰ Agency Exhibit 1, Tab 2, Page A4

¹¹ Agency Exhibit 1, Tab 2, Page 6

¹² Agency Exhibit 1, Tab 2, Page 5

After not receiving the contact sheets or annual reviews, an audit of 20 random offender files resulted in the following: Of your 71 offender files 29% were reviewed, of that 29% - 80% of the files were not current on the annuals and 100% of the files had no current contact for January or February of 2010. ¹³

On or about April 22, 2010, the Grievant received an Employee Work Profile Performance Evaluation indicating that his performance level was Below Contributor. ¹⁴

On or about July 20, 2010, the Grievant sent the Warden a Memorandum titled, Job Performance Rebuttal Statements. In that document, the Grievant stated as follows:

I would like to say that I take full responsibility in acknowledging that I could and should have been more diligent in filing my contacts as soon as I returned to my office from visiting with the offenders...while I do have some shortcomings, I am doing a lot of things right...I agree that there is room for improvement in my area of record keeping. ¹⁵ (Emphasis added)

Finally, on or about August 6, 2010, the Grievant received an Interim Evaluation Form indicating areas of substandard performance. ¹⁶

Subsequently, this Grievant was transferred to another location within this Agency. The Grievant introduced into evidence a Group II Written Notice which was issued to him on May 26, 2011, at his new location. ¹⁷ The Hearing Officer is not certain of the reason behind the introduction of this Exhibit by the Grievant. The Hearing Officer did not rely upon or use this Exhibit to reach his Decision in this matter.

The documentary evidence in this case is overwhelming with regards to the Grievant being put on notice of his substandard performance. The Grievant admits his own substandard performance in his Memorandum to the Warden dated July 20, 2010. ¹⁸ There was considerable evidence before the Hearing Officer as to general confusion relating to which counselors were in charge of which inmates and where files would or would not be located within the institution. While it is clear that there was, at best, disorganization at the institutional level, the Hearing Officer does not find that lack of organization justified this Grievant not properly documenting the institutional files.

The Grievant alleged that his punishment was directed at him solely because of his national origin. The burden of proof is on the Grievant to show that he was discriminated against because of his national origin. The Grievant has simply not borne this burden of proof. The Grievant testified that an Assistant Warden at this Agency told him that she was sorry that he had been treated differently than other counselors when she spoke to him regarding this grievance. That testimony from the Grievant is essentially the only testimony that the Grievant produced at the hearing to indicate that he was treated differently. The Assistant Warden testified

¹³ Agency Exhibit 1, Tab 2, Page 4

¹⁴ Agency Exhibit 1, Tab 5, Page 9

¹⁵ Agency Exhibit 1, Tab 2, Page A1

¹⁶ Agency Exhibit 1, Tab 2, Page 1

¹⁷ Grievant Exhibit 1, Tab 20, Page 1

¹⁸ Agency Exhibit 1, Tab 2, Page A1

telephonically and the Grievant had the chance, through counsel, to question her about that statement. No such questions were asked.

The Grievant called a witness who testified that she was a party to a meeting between the Grievant and his immediate supervisor. This witness testified that she thought the Grievant was spoken to in a harsh manner and in a non-respectful way. She offered no testimony as to how other employees were treated under similar factual situations and her testimony did not indicate that she was present in enough meetings to indicate that there was a pattern of harsh and disrespectful treatment of the Grievant.

In considering the totality of the Grievant's testimony and the testimony of the other witnesses for the Grievant, the Hearing Officer is simply not persuaded that the Grievant was singled out for this Group I offense pursuant to his national origin.

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..."¹⁹ 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 Hearing Officer finds no reason to mitigate this matter.

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 decision to issue the Group I Written Notice to 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:

¹⁹Va. Code § 2.2-3005

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.²⁰ 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.²¹

[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

²⁰An 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).

²¹Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9610

Hearing Date:	August 18, 2011
Decision Issued:	August 24, 2011
Grievant's Reconsideration Request Received:	September 8, 2011
Response to Reconsideration:	September 21, 2011

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review by both the Department of Human Resource Management ("DHRM") and the Department of Employee Dispute Resolution ("EDR"). A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the Hearing Officer. A copy of all requests must be provided to the other party and to the EDR Director. A request to the Hearing Officer to Reconsider his Decision must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.²²

OPINION

The Grievant seeks reconsideration of the Hearing Officer's Decision based on the Grievant's belief that the Hearing Officer failed to properly consider mitigation in reaching his Decision.

Normally, as set forth in Section 7.2(a)(1) of the Grievance Procedure Manual, a request for reconsideration deals with newly discovered evidence or evidence of incorrect legal conclusions. Because of the need for finality, documents not presented at the hearing cannot be considered upon administrative review unless they are "newly discovered evidence." Newly discovered evidence is evidence that was in existence at the time of the hearing but was not known (or discovered) by the aggrieved party until after the trial ended. However, the fact that a party discovered the evidence after the trial does not necessarily make it "newly discovered." Rather, the party must show that:

²² §7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

1. The evidence is newly discovered since the judgment was entered;
2. Due diligence on the part of the movant to discover the new evidence has been exercised;
3. The evidence is not merely cumulative or impeaching;
4. The evidence is material; and
5. The evidence is such that is likely to produce a new outcome if the case were retried or is such that would require the judgment to be amended.²³

Here, the Grievant has not provided the Hearing Officer with any newly discovered evidence. The Grievant, by counsel, merely restates those portions of the evidence presented before the Hearing Officer that he feels justifies a mitigation in this matter. The Hearing Officer must deal with the evidence presented before him in its totality and the Hearing Officer must decide which oral statements and written documents most likely represent the truth in the matter presented before him.

The Grievant contends his disciplinary action should be mitigated. The Hearing Officer has the sole authority to weigh all of the evidence and to consider whether the facts of the case constitute misconduct and whether there are mitigating circumstances to justify a reduction or removal of the disciplinary action. Under Virginia Code § 2.2-3005, the Hearing Officer has the duty to receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by EDR Resolution. EDR's *Rules for Conducting Grievance Hearings* ("Rules") provide in part:²⁴

The *Standards of Conduct* **allows** agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or...an employee's long service, or otherwise satisfactory work performance." 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.²⁵ (Emphasis added)

The *Rules* further state in part:

Therefore, if the Hearing Officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.²⁶

As is clear from the above, the *Standards of Conduct* allows agencies to mitigate. However, the Hearing Officer must give deference to the Agency's consideration, unless the

²³ Administrative Review Ruling of Director, Dated December 12, 2009, Ruling No. 2010-2467, Page 3

²⁴ Director's Ruling Number 2011-2879, dated February 23, 2011

²⁵ *Rules for Conducting Grievance Hearings* § VI(B) (alteration in original)

²⁶ *Id*

Hearing Officer finds that the Agency's discipline exceeds the limits of reasonableness. Of course, in this matter, the discipline was simply the writing of a Group I Written Notice. Nothing more was done pursuant to this entire matter. The only thing that discipline exceeds is if there was no discipline. Further, the Hearing Officer specifically found that the Grievant engaged in the behavior described in the Written Notice and the Hearing Officer found that the behavior constituted misconduct and the Agency was consistent with law and policy.

One of the objectives of disciplinary action is to engage in corrective action so that an employee learns what behavior is unacceptable. It would appear to the Hearing Officer that the Grievant does not believe that he engaged in inappropriate behavior. His only argument is that, if he did, then others did as well and therefore, he is guilty of nothing.

The Hearing Officer has carefully considered all of the factoids that Grievant's counsel has set forth in his Request for Reconsideration and finds that they do not cause the Hearing Officer to reconsider his original Decision. While the Agency's performance in this matter was not perfect, and it very rarely is, the Hearing Officer specifically finds that the Agency, in its punishment of the Grievant, did not exceed the limits of reasonableness.

DECISION

The Hearing Officer concludes that none of the reasons given by the Grievant rise to the level that would require him to set aside his original Decision in this matter. The Hearing Officer has carefully considered the Grievant's arguments and has concluded that there is no basis to change the Decision issued on August 24, 2011.

APPEAL RIGHTS

A Hearing Officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the Hearing Officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.²⁷

²⁷ 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).

William S. Davidson
Hearing Officer