

Issue: Group II with suspension (failure to perform assigned work); Hearing Date: 07/19/11; Decision Issued: 07/21/11; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 9626; Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9626

Hearing Date: July 19, 2011
Decision Issued: July 21, 2011

PROCEDURAL HISTORY

The Grievant was issued a Group II Written Notice on March 14, 2011 for:

Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy. On numerous occasion[s] yo[u] have fail[ed] to pay bills in a timely manner. These bills were for [names of vendors]. These payments were in excess of \$49,000.00, which violated the Prompt Pay Act of Virginia. For this reason this Group II Written Notice is being issued. ¹

Pursuant to the Group II Written Notice, the Grievant received a three (3) day suspension from work. ² On April 13, 2011, the Grievant timely filed a grievance to challenge the Agency's actions. ³ On June 15, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On July 19, 2011, a hearing was held at the Agency's location.

APPEARANCES

Advocate for the Agency
Grievant
Witnesses

ISSUE

1. Did the Grievant fail to follow supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy by her failure to pay certain Agency bills in a timely manner?

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. 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 eight (8) tabbed sections and, during the course of the hearing, those sections of the notebook which were objected to preliminarily by the Grievant, were subsequently accepted without objection by the Grievant. Accordingly, the Agency's notebook was fully accepted as Agency Exhibit 1.

The Grievant provided the Hearing Officer with sixteen (16) pages of documentary evidence. These sixteen (16) pages were placed in the front of Agency Exhibit 1 and were accepted without objection.

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 Grievant was employed by the Agency as an Office Services Assistant.⁷ As such, one of her duties was to provide clerical and administrative assistance to the Agriculture Senior Manager and Agriculture Program at [location].⁸ [Location] consists of approximately 300 acres and annually produces in excess of 2 million pounds of produce. In the course of managing this farm, the Farm Manager decides what materials need to be ordered.

Both the Farm Manager for the Agriculture Business and the Business Manager for the Agriculture Business testified before the Hearing Officer. Their testimony indicated that the following general procedure was followed: (i) The Farm Manager decided the necessity to order a product or a service, (ii) The Farm Manager communicated that need to the Grievant either orally or in writing, (iii) The Grievant took the Farm Manager's instructions and reduced them to an appropriate form, (iv) The Farm Manager reviewed this form and forwarded it to the Business Manager, (v) The Business Manager reviewed it and, if found appropriate, approved it and forwarded it to a Purchasing Officer, (vi) The Purchasing Officer put an offer out for bids and accepted the appropriate bid, (vii) The Purchasing Officer then notified the Business Manager of this acceptance, and the successful vendor was notified, (viii) The successful vendor produced the product or performed the service and then notified [location] of the completion of the duties either by an invoice or other documentation, (ix) Upon receipt of such invoice or documentation, the Grievant compiled that documentation indicating that the requested product or service had been rendered along with the order form and gave those to the Farm Manager, (x) The Farm Manager reviewed these, confirmed that the service or product had been rendered to his satisfaction, and then sent the documents to the Business Manager, (xi) The Business Manager then approved these documents and sent them to yet another person to execute payment.

Pursuant to the Group II Written Notice issued to the Grievant on March 14, 2011, it is alleged that the Grievant failed to follow supervisor's instructions and that, on numerous occasions, she failed to pay bills in a timely manner. It is clear from the evidence that the Grievant does not pay any bills.

Various bills are set forth in the Written Notice. One of those bills was in the amount of \$21,878.50 from [Vendor].⁹ The [Vendor] invoice appears to be dated October 7, 2010. However, the evidence presented before the Hearing Officer was that no one knows when that invoice was actually received, if at all, by the Grievant. There is a stamp on the invoice indicating that the services or items were received on October 7, 2010, but all witnesses acknowledged that that stamp was placed after the fact and that does not indicate that the invoice was received on October 7, 2010.¹⁰ There is a further stamp on that document indicating that it was received on January 24, 2011 and that it was subsequently approved for payment by the Business Manager on January 26, 2011. The Agency did not bear its burden of proof to show that this document ever was received by the Grievant prior to January 24, 2011. If there was a failure by the Grievant to perform her assigned work, it would be a failure of taking the [Vendor] invoice and the appropriate order form to the Farm Manager, thereby indicating that the services or items had been performed or received. The Agency's own evidence at best indicates that the appropriate invoice was received on January 24, 2011 and the bill was approved for payment on

⁷ Grievant Exhibit 1, Tab 1, Page 1

⁸ Grievant Exhibit 1, Tab 1, Page 1

⁹ Agency Exhibit 1, Tab 2, Page 2

¹⁰ Agency Exhibit 1, Tab 2, Page 2

January 26, 2011. Thus, there is no question here, based on these facts, but that the Grievant performed her job in a satisfactory time frame.

Another bill that was in question is a bill that was produced by [Vendor].¹¹ That bill was in the amount of \$8,222.50 and appears to be dated August 26, 2010. The testimony before the Hearing Officer in this matter was that the Grievant received this bill in a totally illegible form and that she called the vendor no less than three (3) times requesting a legible invoice. The Grievant testified that the Farm Manager was present when several of these calls were made and that he was aware that she could not read the invoice and that she had requested a legible invoice. The Farm Manager did not deny this. The document that was introduced into evidence before the Hearing Officer clearly is a document that someone had traced over to make it legible.¹² That document indicates by stamp that it was received by the Central Business Office on March 2, 2011 and that it was approved for payment on March 2, 2011. Again, it would appear that, based on that data, the bill was paid in a timely fashion. The Agency argues that the Grievant should have done more to obtain a legible copy of the invoice. While this may be true, the Grievant argues that the Farm Manager was aware of these problems and, accordingly, was also aware that the services or items had been rendered and yet he did nothing. Accordingly, the Hearing Officer finds that the Agency has not borne its burden of proof in showing that the Grievant did not perform her assigned work with regards to the [Vendor] invoice.

Finally, the Agency produced evidence that an invoice for [Vendor], in the amount of \$7,312.48, was not paid in a timely fashion.¹³ The Grievant acknowledged in her testimony that this invoice apparently became lost on her desk and that was at least a cause, if not the actual cause, for it being paid in a dilatory fashion. Inasmuch as the Grievant admitted to this fact, the Hearing Officer finds that the Agency has borne its burden of proof that the Grievant failed to perform her assigned work with regards to this particular invoice.

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...”¹⁴ 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.

¹¹ Agency Exhibit 1, Tab 3, Page 2

¹² Agency Exhibit 1, Tab 3, Page 2

¹³ Agency Exhibit 1, Tab 4, Pages 2 and 3

¹⁴ Va. Code § 2.2-3005

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 Group II Written Notice and three (3) day suspension.

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.¹⁵ 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.¹⁶

[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

¹⁵An 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).

¹⁶Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.