

Issue: Disciplinary termination due to poor performance; Hearing Date: 08/02/11;
Decision Issued: 08/08/11; Agency: VDOT; AHO: William S. Davidson, Esq.; Case
No. 9648; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9648

Hearing Date: August 2, 2011
Decision Issued: August 8, 2011

PROCEDURAL HISTORY

The Grievant was issued a Memorandum dated January 29, 2011 for:

As a result of your 90 [day] re-evaluation rating of “BELOW CONTRIBUTOR” per DHRM policy 1.40, Performance and Planning Evaluation, your employment with the agency is terminated effective immediately, today, Saturday, January 29, 2011.¹

Pursuant to the Memorandum, the Grievant was terminated.² On February 23, 2011, the Grievant timely filed a grievance to challenge the Agency’s actions.³ On July 5, 2011, 2011, the Department of Employment Dispute Resolution (“EDR”) assigned this Appeal to a Hearing Officer. On August 2, 2011, a hearing was held at the Agency’s location.

APPEARANCES

Advocate for the Agency
Advocate for the Grievant
Grievant
Witnesses

ISSUE

1. Did the Grievant violate the terms of DHRM Policy 1.40, thereby justifying her termination?
2. Did the Agency fail to adequately accommodate the Grievant’s physical limitations and, to the extent that the Agency did so fail, did such failure have any effect on the Grievant’s job performance?

AUTHORITY OF HEARING OFFICER

¹ Agency Exhibit 1, Tab 2, Pages 1 and 2

² Agency Exhibit 1, Tab 2, Pages 1 and 2

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. Specifically, these sections are Tabs 1-7 and 9. The Grievant submitted documentation at the hearing, and that evidence was accepted without objection and placed in the Agency's notebook at Tab 8.

The Grievant in this matter was a traffic controller for the Agency. At the time of her termination, she worked at a regional Traffic Operation Control center ("TOC"). In her position at the TOC, she would react to information coming in to the TOC regarding traffic incidents, storm damage on the roads within her regional TOC, contractors working on the roads within her regional TOC and any other matters which would cause the TOC to post warnings on the

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)

electronic warning system or to direct emergency responders in order to maintain an orderly flow of traffic. In order to perform her duties, the Grievant would need to be able to functionally use a telephone and to functionally enter data into an appropriate computer system.

While the Grievant worked at a prior location for the Agency, management at that location provided the Grievant with an ergonomic keyboard and mouse for her computer in an attempt to alleviate what the Grievant deemed to be a physical disability. When the Grievant moved to her current facility, her keyboard and mouse were not compatible with the hardware system being used at that facility. The Grievant testified that she requested that the Information Technology Department provide her with the necessary hardware so that her keyboard and mouse would work. The Grievant and the Agency testified that management at this new location asked her to provide documentation that indicated that she did in fact have carpal tunnel syndrome. At no time did the Grievant provide such documentation to this management and the Grievant testified that she refused to do so because she could not afford to return to her doctor to get the necessary documentation.

On October 26, 2010, the Grievant received an Employee Work Profile (“EWP”), HR-67-2 Performance Evaluation. That Performance Evaluation rated the Grievant’s performance at Below Contributor. Further, under Supervisor’s comments, it stated as follows:

After more than 14 months, [Grievant] demonstrates the knowledge, skills and abilities (KSAs) of an entry level trainee. She possesses the ability to become proficient in her core responsibilities as a traffic controller; however, she shows little or no desire to learn the requirements of her position. Despite an in-depth training program, proficiency testing (3 attempts), and repeated attempts to encourage and coach [Grievant] to comprehensively learn her duties and become an effective team player, she continues to perform at substandard levels. Due to [Grievant’s] deficiencies and behaviors she requires constant supervision, which creates a hardship on her coworkers and supervisors (unable to work back shifts, unable to work unsupervised).⁷

The Grievant was provided a copy of this document but refused to provide a self-assessment regarding this matter. The Grievant testified that she did not provide the self-assessment because she was too busy with other grievances.

On October 26, 2010, this EWP was discussed with the Grievant at a meeting which was attended by the Grievant, her immediate supervisor and a note-taker.

On November 3, 2010, the Agency initiated a Performance Re-Evaluation Plan for the Grievant.⁸ The Grievant declined to sign this form indicating receipt. However, the Grievant was present during the meeting on November 3, 2010, with her immediate supervisor and a note-taker where the expectations of this Plan were explained to her.

Pursuant to the Performance Re-Evaluation Plan, a meeting was held between the Grievant and her immediate supervisor and a note-taker on November 29, 2010, to review the

⁷ Agency Exhibit 1, Tab 3, Page 3

⁸ Agency Exhibit 1, Tab 7, Pages 1 and 2

Grievant's progress. In the notes taken at that meeting, the Grievant was advised that she had shown no marked improvement.⁹ The Grievant again was made aware of the results of not achieving the goals set forth in the Performance Re-Evaluation Plan.

On December 10, 2010, a second meeting was held with the Grievant to review her progress under the Performance Re-Evaluation Plan. At this time, the Grievant was instructed that she had demonstrated very little or no improvement in several areas as outlined in the Performance Re-Evaluation Plan.¹⁰

On December 30, 2010, a third meeting was held with the Grievant, her immediate supervisor and a note-taker regarding the progress under the Performance Re-Evaluation Plan. At this meeting, the Grievant was informed that, while she seemed to have improved in one (1) area, she declined in another.¹¹ The Grievant was made fully aware of errors that continued to occur in her work performance.¹²

Prior to the issuance of the Performance Re-Evaluation Plan of November 3, 2010, the Grievant was provided with Notice of Improvement Needed/Substandard Performance documents on April 1, 2010, July 6, 2010, and September 13, 2010.¹³ Accordingly, during the year of 2010, this Grievant was provided with three (3) Notice of Improvement Needed/Substandard Performance Reports, she was placed on a Performance Plan, and she was reviewed three (3) times pursuant to that Plan, and yet her performance did not improve.

DHRM Policy 1.40- Performance Planning and Evaluation, defines Below Contributor Rating as follows:

Results or work that fails to meet performance measures. To receive this rating, an employee must have received at least one documented Notice of Improvement Needed/Substandard Performance form within the performance cycle.¹⁴

DHRM Policy 1.40 also provides as follows:

If the agency determines that there are no alternatives to demote, reassign, or reduce the employee's of [sic] duties, termination based on the unsatisfactory re-evaluation is the proper action. The employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3) month re-evaluation period.¹⁵

The HR Director for the Agency testified that there were no vacancies at this Agency to which this Grievant could be moved; there was no possibility of demotion as she was already at

⁹ Agency Exhibit 1, Tab 4, Page 1.

¹⁰ Agency Exhibit 1, Tab 5, Page 1

¹¹ Agency Exhibit 1, Tab 6, Page 1

¹² Agency Exhibit 1, Tab 6, Pages 2 through 4

¹³ Agency Exhibit 1, Tab 9

¹⁴ Agency Exhibit 1, Tab 2, Page 3

¹⁵ Agency Exhibit 1, Tab 2, Page 14

the lowest level within the Agency; and there was no ability to reduce her duties because she was already at the lowest position within the Agency.¹⁶

Accordingly, the Hearing Officer finds that the Agency has borne its burden of proof in showing that the Grievant, pursuant to DHRM Policy 1.40, had work results that failed to meet performance measures and that the Agency properly implemented the requirements of DHRM Policy 1.40 in terminating the Grievant for inadequate work performance.

The Grievant, in her Grievance Form A, stated as follows:

...Due to physical limitations of carpal tunnel syndrome as acquired since working with VDOT, per my doctor, the Division of Safety and Health provided me with ergonomic equipment to perform my job...¹⁷

The Agency, at the Grievant's prior location, accommodated the Grievant by providing her with a special keyboard and mouse. When the Grievant moved to this location, she was requested to provide documentation to support her allegation of a physical disability. The Grievant refused to do so.

At the hearing, the Grievant introduced into evidence two (2) doctor prescription pad notes that stated as follows:

Please allow patient to be evaluated and given ergonomic keyboard, mouse and desk chair due to symptoms of severe pain and carpal tunnel syndrome.¹⁸

This statement was dated July 30, 2008. The second doctor's prescription pad note stated as follows:

Please allow patient to be evaluated and given ergonomic keyboard, mouse and desk chair due to symptoms of severe pain and carpal tunnel syndrome.¹⁹

This statement was dated January 21, 2009.

The Grievant testified that she did not provide this exceedingly simple and sparse documentation to the management at her new location because she could not afford to return for a new evaluation by her doctor. It is clear that the sole documentation that she had were from visits in July of 2008 and January of 2009. Producing this documentation would have cost the Grievant nothing, other than perhaps the cost of simply bringing it to work. Further, it is clear from this documentation that there is no diagnosis of carpal tunnel syndrome but rather an indication of symptoms. The Grievant offered exceedingly scant evidence as to why this would

¹⁶ Agency Exhibit 1, Tab 7, Page 7

¹⁷ Agency Exhibit 1, Tab 1, Page 2

¹⁸ Agency Exhibit 1, Tab 8, Page 1

¹⁹ Agency Exhibit 1, Tab 8, Page 1

cause her to enter simply wrong information into the computer system. Indeed, other than to allege that she suffered from carpal tunnel syndrome, the Grievant essentially offered no evidence as to how that impacted her at work and why that impact would cause her to make so many mistakes in her data entry and in the performance of her prescribed job functions.

In her Grievance Form A, the Grievant made an allegation of needing sick leave pursuant to a car accident. The Grievant introduced no evidence before the Hearing Officer regarding that matter. The Grievant alleged that there were regular information changes at work and they were not communicated effectively and that caused some of her problems. The Grievant did not address the fact that she was the only person who was having these problems. The Grievant further made an allegation as to an ear infection and how that impacted her ability to communicate. Again, the Grievant offered no evidence regarding this alleged ear infection. The Grievant also alleged that she was not taught how to effectively communicate with team members. The Grievant seems to think that the Agency has a duty to teach her, not only how to function, but how to speak with her coworkers. The Grievant testified that she had issues with several of her managers and, indeed, in her testimony she seemed to portray a paranoia that all of her supervisors were conspiring against her. The Grievant readily testified that she told no one in management about these concerns as she was too busy with prior grievances.

The Hearing Officer finds that the Grievant has not borne her burden of proof showing that the Agency discriminated against her in any way or failed to accommodate any physical or mental needs that she required. The Grievant was given the simplest of tasks to merely produce documentation of a physical disability and she failed to do so because it was inconvenient to her.

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...”²⁰ 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 that there is no cause to further mitigate this matter.

DECISION

²⁰Va. Code § 2.2-3005

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 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 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.²¹ 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.²²

²¹An 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).

²²Agencies 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