

Issue: Group I Written Notice with Suspension (disruptive behavior); Hearing Date: 8/30/11; Decision Issued: 08/31/11; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 9660; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 9660

Hearing Date: August 30, 2011  
Decision Issued: August 31, 2011

**PROCEDURAL HISTORY**

The Grievant was issued a Group I Written Notice dated May 3, 2011, for:

Disruptive Behavior. On April 15, 2011 Captain A instructed Officer B to relieve you from your post of Support Control. Officer B reported back to Captain A that you refused to allow him to relieve you. He also report[ed] that you made inappropriate comments to him when he tried to follow the Captain's instructions. Then Captain A and Officer B reported back to you in Support Control and Captain A gave you instructions to "open the door." He had to instruct you three times to open the door before you would comply with his instructions. You also were continually telling Captain A in a loud and argumentative tone that you were not going to report to the yard or to a building.<sup>1</sup>

Pursuant to the Written Notice, the Grievant received a five (5) day suspension.<sup>2</sup> On May 9, 2011, the Grievant timely filed a grievance to challenge the Agency's actions.<sup>3</sup> On July 27, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On August 30, 2011, a hearing was held at the Agency's location.

**APPEARANCES**

Advocate for the Agency  
Advocate for Grievant  
Agency Representative  
Grievant  
Witnesses

**ISSUE**

1. Was the Grievant guilty of disruptive behavior?

**AUTHORITY OF HEARING OFFICER**

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<sup>1</sup> Agency Exhibit 1, Tab 1, Page 1 & 2

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

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

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:

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 did not introduce a documentary evidence notebook.

The evidence before the Hearing Officer in this matter is extraordinarily simple. In the early morning hours of April 15, 2011, the Grievant was working at Support Control. This post is the nexus of communication and movement throughout the Agency. It was reported to Captain A that another officer felt that the Grievant might be tired and needed a break. Captain

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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)

A testified that he directed Officer B to go to Support Control and to relieve the Grievant in order that she might have a break and refresh herself. Shortly thereafter, Officer B reported back to Captain A that the Grievant refused to allow him to relieve her.

Thereafter, Captain A went to Support Control and ordered the Grievant to open the door to allow him to enter. She refused. He ordered her a second time and she opened the door and allowed the Captain to enter. The Captain testified that the Grievant used a loud and abrasive voice with him and told him that she was not going to leave Support Control. Ultimately, the Grievant did leave Support Control and was directed to another location within the facility to finish that shift.

There was some discrepancy between the oral testimony and the documentary evidence as to whether or not the Captain had to order the Grievant to open the door two (2) or three (3) times. In any event, there was no dispute that she failed to open the door the first time she was ordered to do so. Such a refusal of an order from a direct superior is clearly behavior that disrupts the efficient operation of this Agency. The Hearing Officer finds that the Agency has borne its burden of proof regarding the Grievant's disruptive behavior.

The only evidence that the Grievant offered was that her knees hurt. She admitted that there was no current medical restriction in her file when this event took place. The Grievant testified that she made the Captain aware that her knees were hurting when she started the shift and asked that she be relieved early, if possible. The Captain testified that he did not remember that conversation. Regardless, none of this would justify a refusal to obey the orders of a superior officer.

### **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>7</sup> 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.

At the time of this grievance, the Grievant had two (2) active Group I Written Notices and an active Group II Written Notice.<sup>8</sup> The Written Notice that is before this Hearing Officer meant that the Grievant had four (4) active Written Notices. Normally, that would result in

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<sup>7</sup>Va. Code § 2.2-3005

<sup>8</sup> Agency Exhibit 1, Tab 5, Pages 1 through 3

termination.<sup>9</sup> However, in this matter, the Agency mitigated a potential termination to a five (5) day suspension. The Hearing Officer finds that the Agency has properly considered 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 decision to issue the Group I Written Notice and subsequent five (5) day suspension 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:

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.

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<sup>9</sup> Agency Exhibit 1, Tab 7, Page 8

You may request a judicial review if you believe the decision is contradictory to law.<sup>10</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>11</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>10</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>11</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.