Issue: Group III Written Notice with Termination (failure to follow policy and falsifying records); Hearing Date: 04/04/12; Decision Issued: 04/09/12; Agency: VEC; AHO: William S. Davidson, Esq.; Case No. 9794; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9794

Hearing Date: April 4, 2012
Decision Issued: April 9, 2012

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on January 12, 2012, for:

> As a result of your inappropriate conduct in violation of 1-95 Internal Security and Ethic policy for the Virginia Employment Commission and Falsifying records. [1]

Pursuant to the Group III Written Notice, the Grievant was terminated on January 12, 2012. [2] On January 24, 2012, the Grievant timely filed a grievance to challenge the Agency's actions. [3] On March 14, 2012, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On April 4, 2012, a hearing was held at the Agency's location.

APPEARANCES

Attorney for the Agency
Grievant
Witnesses

ISSUE

Did the Grievant violate Agency Policy 1-95?

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*

[1] Agency Exhibit 1, Tab A, Page 8
[2] Agency Exhibit 1, Tab A, Page 8
[3] Agency Exhibit 1, Tab A, Page 1

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 Tabs A-M. This notebook was accepted in its entirety as Agency Exhibit 1, with one (1) agreed-upon deletion from the Exhibit found at Tab A, Page 7. During the course of the hearing, the Agency proffered an Exhibit which would become, Agency Exhibit 1, Tab N. That Exhibit was accepted by the Hearing Officer, but only for the first sentence of the penultimate paragraph of page 2 of that document.

The Grievant provided the Hearing Officer with a notebook containing eight (8) tabbed sections. This notebook was accepted in its entirety as Grievant Exhibit 1.

Agency Policy 1-95(I), states in part as follows:

> ...This policy statement establishes an Internal Security and Ethics Policy for the Virginia Employment Commission (VEC). It is intended

[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)

to emphasize the importance of integrity and ethical behavior, and to ensure that employees understand what behavior is acceptable or unacceptable, and the actions to be taken in the event improper behavior is encountered. [7]

Policy 1-95(III)(A), states in part as follows:

...Employees are required to read and sign the attached certificate on or before their first day of work, acknowledging their receipt of, awareness of, and agreement to abide by this policy. Signed certificates will be forwarded to Human Resource Management Services to be filed in the applicable employee's personnel record. Periodically, employees may be required to refamiliarize themselves with this policy and update their certification, acknowledging understanding and compliance. [8]

Policy 1-95(III)(D)(3), states as follows:

It is a violation of this policy for any employee to attempt to duplicate or forge the signature of any claimant, applicant, employer, employee, or co-worker on any form used by the VEC. [9]

The Grievant, on three (3) separate occasions, executed an Acknowledgment Certificate certifying that she had read and agreed to abide by Agency Policy 1-95. [10]

The Grievant did not testify before the Hearing Officer. On December 14, 2011, the Grievant wrote a letter to the local office manager. The Grievant's letter of December 14, 2011, was in response to a letter dated December 13, 2011. The Grievant dated her letter December 14, 2011, on the cover page, however, all subsequent pages are dated December 15, 2011. At page 6 of that letter, the Grievant stated as follows:

I have not done anything dishonest when it comes to my work at the Virginia Employment Commission. I have not signed anyone's application for Educational Benefits under the Trade Program without their knowledge and permission and this was a last resort when the VOS/Trade system would not accept the data entered due to some problem... [11]

Here, the Grievant is admitting that she signed applicant's names on applications. This is clearly a violation of Policy 1-95. Further, in her December 14, 2011 letter, the Grievant stated, at Page 6, in part as follows:

...When the first situation came up regarding my signing a form for a Trade Participant, in August, 2011, I met with the manager of the

[7] Agency Exhibit 1, Tab B, Page 33
[8] Agency Exhibit 1, Tab B, Page 34
[9] Agency Exhibit 1, Tab B, Page 36
[10] Agency Exhibit 1, Tab B, Pages 40 through 42
[11] Agency Exhibit 1, Tab A, Page 15

> Richmond North Office. I asked the participant, [Mr. B], to come into the office and had him sign paperwork that indicated he had given me permission to sign and that he had knowledge of my signing his request for Trade education benefits... [12]

Again, the Grievant is admitting that she signed a form for an applicant.

Testimony that the Hearing Officer received during the hearing would indicate that the paperwork that the Grievant had this applicant sign, giving her permission to sign his name, was executed after she had signed his signature.

On December 19, 2011, the Grievant sent another letter to her manager. In that letter, the Grievant stated that, after reviewing information provided to her by the Agency, she concluded the following:

> ...That I obtained verbal or written permission from every person I submitted a packet on to sign and submit their packet if the computer system would not take the data I entered due to technical or system problems while they were at my desk for a one on one meeting. At no time did I sign or submit a packet for any individual without their approval to do so... [13]

Again, the Grievant is admitting that she submitted packages where she signed on behalf of the applicant.

The Grievant, in her various letters regarding her grievance, admitted in writing in several instances where she signed the name of one (1) of her applicants, to forms. The Grievant always justified this based on one excuse or another. It is clear that each of these signatures produced by the Grievant was in violation of Policy 1-95.

One of the Grievant's applicants was Mr. B. This applicant signed an Assessment Summary and Justification form on July 12, 2010. [14] It appears that someone signed his name on a Trade Adjustment Assistance Program application on January 18, 2011. [15] On September 7, 2011, the Grievant had Mr. B return to the VEC to sign a document authorizing her to sign on his behalf. [16] Clearly, the signature on the Trade Adjustment Assistance Program application of January 18, 2011, is a forgery. Indeed, Mr. B was asked if that was his signature and he circled it and wrote, "no," indicating that it was not his signature. It is significant that, after this entire matter began to be investigated, the Grievant sought Mr. B in order that he sign a document authorizing her to sign his name. Pursuant to Policy 1-95, retroactive permission to sign an applicant's name has no more validity than concurrent permission to sign their name.

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[12] Agency Exhibit 1, Tab A, Page 15
[13] Agency Exhibit 1, Tab A, Page 23
[14] Agency Exhibit 1, Tab F, Page 273
[15] Agency Exhibit 1, Tab F, Page 274
[16] Agency Exhibit 1, Tab E, Page 168

The Hearing Officer heard testimony regarding from another applicant, Ms. M. This witness signed a Virginia Employment Commission document on June 21, 2010. [17] Pursuant to the investigation that took place in this matter, Ms. M verified her signature on that document. Ms. M's signature was found on an Application for TAA Training document dated January 7, 2011. Ms. M reviewed that signature and determined that it was not her signature. [18] Ms. M's signature was signed to a Virginia Employment Commission Reemployment Plan document on December 27, 2010. Again, Ms. M was asked to review the signature on that document and she indicated that it was not her signature. [19] The Grievant signed as a TAA Representative on the December 27, 2010 document. The Grievant's signature was immediately below the purported signature of the applicant. While the Hearing Officer is certainly not a handwriting expert, those two (2) signatures appear to have been produced by the same person.

The Hearing Officer heard much testimony about other signatures that were not the actual signatures of the applicants. Inasmuch as the Grievant, in writing, acknowledged that she signed applicant's signatures and looking specifically at the examples of Mr. B and Ms. M, the Hearing Officer finds that the Agency has bourne its burden of proof regarding, in at least those two (2) examples, that the Grievant violated Policy 1-95.

The Grievant, in her documentary filings, indicated that she felt that she had been retaliated against, harassed, bullied and/or discriminated against. The Grievant introduced two (2) witnesses who appeared to be testifying in support of these allegations, not the allegations regarding forgery.

It appears that the Grievant was concerned that she was not selected for a Workforce Services Supervisor position. [20] The testimony that was produced before the Hearing Officer was that position was posted, there was a screening interview, there was a second interview by a different group, and an applicant was selected. The Hearing Officer heard testimony that the Grievant did not grieve her failure to receive that position. From the evidence, both oral and documentary, the Hearing Officer finds that there was no discrimination, harassment, retaliation or bullying regarding the Grievant's failure to receive that position.

The Grievant's witnesses testified to the fact that there was a training session in which the Grievant's mistakes were discussed. The Hearing Officer, based on the quality of that testimony, finds that there is no evidence to suggest that the Grievant was discriminated against, retaliated against, harassed or bullied. The testimony before this Hearing Officer is that the Grievant has filed no independent grievance other than to now claim that her termination was due to retaliation, harassment, discrimination or bullying. The Hearing Officer finds no evidence to support those allegations and finds that the Agency terminated the Grievant solely because of an admitted violation of Policy 1-95.

Regarding harassment and/or hostile work environment, the Director of EDR, in a Qualification Ruling of Director dated May 14, 2004, stated in part as follows:

> A claim of hostile work environment qualifies for a grievance hearing

[17] Agency Exhibit 1, Tab E, Page 86
[18] Agency Exhibit 1, Tab E, Page 83
[19] Agency Exhibit 1, Tab E, Page 85
[20] Agency Exhibit 1, Tab M, Page 310

> only if an employee presents evidence raising a sufficient question as to whether the challenged actions are based on race, color, religion, political affiliation, age, disability national origin or sex. The grievant does not assert that the alleged harassment was based on any of these factors. Rather, his claim essentially describes conflict between the grievant and the District Director concerning "philosophical differences concerning public administration and compliance with...policy and procedures." Such claims of supervisory conflict are not among the issues identified by the General Assembly that may qualify for a hearing. [21]

At no time has the Grievant alleged or produced evidence that her claim of harassment or hostile work environment was based on race, color, religion, political affiliation, age, disability national origin or sex.

Regarding retaliation, the Director of EDR, in a Qualification Ruling of Director dated February 12, 2009, stated in part as follows:

> For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity; (2) the employee suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual. [22]

The Grievant has offered no evidence, either documentary or oral, that would suggest a causal link between the materially adverse action and a protected activity.

Regarding retaliation, the Director of EDR, in a Qualification Ruling of Director dated August 10, 2011, stated in part as follows:

> Grievances that may be qualified for a hearing include actions related to discrimination. To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination - there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination. [23]

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[21] Qualification Ruling of Director, case no.: 2004-662, dated May 14, 2004
[22] Qualification Ruling of Director, case no.: 2009-2132, dated February 12, 2009
[23] Qualification Ruling of Director, case no.: 2011-3015, dated August 10, 2011

The Grievant has offered no evidence, either documentary or oral, that would suggest that her termination was the result of prohibited discrimination based on a protected status.

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..." [24] 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.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has bourne its burden of proof in this matter and that the Group III Written Notice with termination was appropriate.

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

[24] Va. Code § 2.2-3005

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.[25] 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.[26]

[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

[25]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).

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