

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 05/21/12;
Decision Issued: 05/24/12; Agency: DBVI; AHO: William S. Davidson, Esq.; Case
No. 9807; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR
Ruling Request received 06/04/12; EDR Ruling No. 2012-3368 issued 07/13/12;
Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9807

Hearing Date: May 21, 2012
Decision Issued: May 24, 2012

PROCEDURAL HISTORY

The Grievant was issued a Group II Written Notice on January 6, 2012, for:

The supervisor directed the employee to pick up paper droppings from the hole punch machine that spilled onto a chair and onto the floor on three separate occasions prior to the employee's lunch period. The employee did not comply with the request as instructed.¹

Pursuant to the Group II Written Notice, the Grievant received no disciplinary action other than the issuance of the Written Notice.² On January 31, 2012, the Grievant timely filed a grievance to challenge the Agency's actions.³ On April 24, 2012, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On May 21, 2012, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Grievant
Witnesses

ISSUE

Did the Grievant fail to comply with her supervisor's instructions to pick up paper droppings?

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

¹ Agency Exhibit 1, Tab 4, Page 1

² Agency Exhibit 1, Tab 4, Page 1

³ Agency Exhibit 1, Tab 5, Page 1

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 five (5) tabs. This notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing Tabs A through E. This notebook was accepted in its entirety as Grievant Exhibit 1.

The basic facts in this matter are not complicated. On December 15, 2011, shortly after 8:00 a.m., the Grievant’s immediate supervisor came to the workplace and found several hole punches on a workstation surface, the chair at the workstation and the floor. In her testimony, this supervisor stated that she talked to the Grievant about the mess at approximately 8:20 a.m. This supervisor testified that she asked the Grievant to clean the mess shortly after 9:00 a.m. She further testified that she asked the Grievant to clean the mess shortly after 10:00 a.m. In her oral testimony before the Hearing Officer, this witness testified that she asked the Grievant a third time to clean the mess shortly after 12:00 p.m.

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)

In a memorandum dated December 15, 2011, which was produced at 12:32 p.m., on that date, this supervisor indicated that she and the Grievant had a “conversation about the mess,” during the morning of December 15, 2011. ⁷ In the memorandum of December 15, 2011, this supervisor stated in part as follows:

Around 10:00 a.m., I again asked [Grievant] to please get the pieces of paper up. ⁸

This same supervisor produced a second memorandum on December 15, 2011, and it was created at 3:05 p.m. ⁹ In this memorandum, the Grievant’s supervisor states that she requested the Grievant to clean the mess at 8:20 a.m., again at 10:00 a.m., and again before lunch.

The Grievant denied that this supervisor requested her to clean the mess at any time other than the request made after 12:00 p.m., and the Grievant stated that she was on her lunch break at that time. The Grievant testified that she told her supervisor that she was at lunch and that she would deal with the mess after her lunch break.

While there was some discrepancy in the times that the supervisor gave in her oral testimony and the contemporaneous memorandum that she created, both her oral testimony and the memorandum indicate that she requested the Grievant to clean the mess three (3) separate times. The supervisor testified that the Grievant refused to do so after all three (3) requests and the Grievant testified that she was only requested once and that was during her lunch period.

Based on the veracity and likely truthfulness or lack thereof of the various witnesses, the Hearing Officer finds that the Agency has borne its burden of proof to establish that the Grievant was requested on three (3) separate occasions to pick up the paper punch holes. Inasmuch as the Grievant refused to do so, that does rise to the level of insubordination and failure to follow the direct instructions of a supervisor.

The Grievant introduced testimony and documentary evidence as to various medical conditions that she had that may have prevented her from picking up the hole punches. She focused on the fact that there were chemicals in a supply closet, where she may have found a broom. The Grievant offered no evidence as to why the hole punches could not have been picked up without the aid of a broom.

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...” ¹⁰ 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.

⁷ Agency Exhibit 1, Tab 2, Page 2

⁸ Agency Exhibit 1, Tab 2, Page 2

⁹ Agency Exhibit 1, Tab 3, Page 2

¹⁰ Va. Code § 2.2-3005

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 borne its burden of proof in this matter and that the issuance of the Group II Written Notice 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

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.¹¹ 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.¹²

[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

¹¹An 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).

¹²Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.