

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 06/12/12;
Decision Issued: 06/14/12; Agency: VSP; AHO: William S. Davidson, Esq.; Case
No. 9833; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9833

Hearing Date: June 12, 2012
Decision Issued: June 14, 2012

PROCEDURAL HISTORY

The Grievant was issued a Group I Written Notice on February 27, 2012, for:

On December 6, 2011, you failed to comply with the lawful instructions of your supervisor, AB, Procurement Director, by refusing acknowledgment of, as well as signing and returning, a memorandum presented to you (and your coworkers) during a Staff Meeting articulating professional and personal conduct expectations in the procurement office/workplace. Your conduct amounts to a Second Group Offense (Group II) as defined by General Order ADM 12:02, paragraph 12b(1) of the State Police Manual as it states: "failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy."¹

Pursuant to the Group I Written Notice, the Grievant received no disciplinary action other than the issuance of the Written Notice.² On March 26, 2012, the Grievant timely filed a grievance to challenge the Agency's actions. On May 21, 2012, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On June 12, 2012, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Counsel for Grievant
Grievant
Witnesses

ISSUE

Did the Grievant violate General Order ADM 12:02, paragraph 12b(1) of the State Police Manual, by failing to follow a supervisor's instructions?

¹ Agency Exhibit 1, Tab 3, Page 4

² Agency Exhibit 1, Tab 3, Page 4

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 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. ³ However, proof must go beyond conjecture. ⁴ In other words, there must be more than a possibility or a mere speculation. ⁵

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 ten (10) tabs. This notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant did not have a separate notebook and stated that she would rely upon the documentation provided in Agency Exhibit 1.

³ Ross Laboratories v. Barbour, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁴ Southall, Adm'r v. Reams, Inc., 198 Va. 545, 95 S.E. 2d 145 (1956)

⁵ Humphries v. N.N.S.B., Etc., Co., 183 Va. 466, 32 S.E. 2d 689 (1945)

The facts in this matter are not complicated. On December 6, 2011, the Grievant's supervisor convened a staff meeting at which the Grievant was a participant. At that meeting, the Grievant's supervisor distributed a two (2) page memorandum with the subject, "Workplace Decorum." ⁶ The supervisor testified before the Hearing Officer that she distributed this memorandum, provided time for each participant to read it, provided further time for discussion and, finally, asked that it be signed and dated in the appropriate spots on the second page. The supervisor testified that all persons present signed the document and returned it to her on that same day with the exception of the Grievant and one (1) other employee. The second person who did not sign it, returned it to the supervisor, signed and dated, on December 7, 2011. This supervisor further testified that on December 7, 2011, she verbally requested that the Grievant provide her with the signed document on three (3) separate occasions. The document was not provided to the supervisor despite her requests.

The Grievant testified that the supervisor read the document to all of the parties present at the December 6th meeting, rather than giving them time to read it themselves. The Grievant acknowledged that she did not sign and return it to her supervisor on December 6, 2011, and that she had various discussions with this supervisor on December 7, 2011. Ultimately, the Grievant placed an unsigned and undated memorandum on her supervisor's desk on December 7, 2011, and forwarded a copy of the memorandum to another member of management for this Agency. This took place on December 7, 2011, and it contained a message from the Grievant to this supervisor, which was handwritten and required a third page. ⁷ The Grievant signed her name under her handwritten message to this second supervisor.

The memorandum merely sets forth existing rules and regulations within this Agency's workplace and does not offer any new policy or change any old policy. It is simply a recitation of existing standards and a reminder to the staff that they must comply with these existing standards.

The Agency's position is that the Grievant did not sign and return the memorandum to her immediate supervisor, as requested by the supervisor; once on December 6, 2011, and three (3) separate times on December 7, 2011. The Grievant's posture is that she signed the memorandum and sent it to a higher ranking supervisor. The Hearing Officer finds that argument to be specious. The Grievant was requested to sign and date the memorandum in a block that was set forth, indicating that she had read and understood the memorandum, and return it to her immediate supervisor. The Grievant did not sign, in any way, to indicate that she had read and understood the memorandum, nor did she date the document, nor did she return it to her immediate supervisor, who requested it.

The Hearing Officer finds that the Grievant's signature at the end of her handwritten note is just that, a signature to her note and not a signature to the memorandum. The Hearing Officer acknowledges that the Grievant may disagree with the rules and regulations of the Agency, however, in this matter it is clear that the Grievant did not comply with a direct order on December 6, 2011, and three (3) further requests on December 7, 2011.

⁶ Agency Exhibit 1, Tab 4, Pages 1 and 2

⁷ Agency Exhibit 1, Tab 4, Pages 1-3

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...”⁸ 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.

Failure to comply with a supervisor’s instructions would qualify as a Group II offense. As set forth in its Written Notice in this matter, the Agency mitigated this matter from a Group II offense to a Group I offense, based upon the Grievant’s otherwise satisfactory work performance and work history.⁹

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 I 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

⁸Va. Code § 2.2-3005

⁹ Agency Exhibit 1, Tab 3, Page 4

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.¹⁰ 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.¹¹ [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

¹⁰An 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).

¹¹Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.