

Issue: Group III Written Notice with Termination (multiple failures to follow policy & instruction); Hearing Date: 09/28/12; Decision Issued: 10/04/12; Agency: VDOT; AHO: William S. Davidson, Esq.; Case No. 9902; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9902

Hearing Date: September 28, 2012
Decision Issued: October 4, 2012

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on June 14, 2012, for:

Just recently it was discovered that in RFP #140-11-CS/Contract #32548, [Grievant] made a significant change to the special terms and conditions. [Grievant] failed to follow the instructions of [Grievant's] former supervisor on the handling of RFP 140-11-CS VDOT Transportation Operations Data Distribution Services (Video, 511 and Data). Also, it was determined that [Grievant's] former supervisor requested that you have the changes reviewed by the Attorney General's office before proceeding. [Grievant] disregarded your former supervisor's instructions and proceeded with the changed without review by the Attorney General's office or supervisory approval. [Grievant] followed the request of the end user without seeking approval from [Grievant's] management or the Attorney General. [Grievant] also provided an email [Grievant] was going to ignore guidance from [Grievant's] supervisor. Instead, actions taken by [Grievant] on this RFP, without management approval resulted in the agency losing the ownership of the data. It has not been the practice of the agency to sign over ownership of data.

In RFP # 160-11-CS, [Grievant] allowed an evaluation committee member, to conduct negotiations, which should only be done by a Contract Officer or an Administrative Services supervisor or manager. There is also a statement on file signed by the evaluation committee member regarding their role in this process which prevents the evaluation committee member from conducting negotiations.

Also in RFP # 160-11-CS, [Grievant] issued a "Notice of Intent to Award" [Grievant] had been instructed by [Grievant's] current supervisor, to make corrections for approval prior to taking any further action. [Grievant] responded in an email it was too late [Grievant] saw email the email after [Grievant] took the action.¹

¹ Agency Exhibit 1, Tab 2, Page 6

Pursuant to the Group III Written Notice, the Grievant was terminated on June 14, 2012.² On June 18, 2012, the Grievant timely filed a grievance to challenge the Agency's actions.³ On August 22, 2012, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. The Grievant retained counsel after the pretrial conference, and his attorney did not have any available dates for this hearing until September 28, 2012. Accordingly, on September 28, 2012, a hearing was held at the Agency's location.

APPEARANCES

Advocate for Agency
Agency Party
Attorney for Grievant
Grievant
Witnesses

ISSUE

1. Did the Grievant fail to follow his supervisor's request to seek a review by the Attorney General's office to changes in language used regarding RFP 140-11-CS VDOT Transportation Operations Data Distributions Services (Video, 511 and Data)?
2. Did the Grievant allow an evaluation committee member to conduct negotiations regarding RFP 160-11-CS?
3. Did the Grievant issue a Notice of Intent to Award prior to making corrections mandated by his supervisor regarding RFP #160-11-CS?

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

² Agency Exhibit 1, Tab 2, Page 6

³ Agency Exhibit 1, Tab 1, Page 1

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 ten (10) tabs and this notebook was accepted in its entirety as Agency Exhibit 1, with the exception of Pages 2 and 3 at Tab 9, which were excluded.

The Grievant provided the Hearing Officer with a notebook containing eight (8) tabs and forty (40) pages of loose documentation, and this notebook and loose documentation were accepted in their entirety as Grievant Exhibit 1.

The Hearing Officer heard several hours of rather complicated and convoluted testimony regarding RFP #140 and RFP # 160. Ultimately, these issues are resolved with a relatively simple set of facts.

Regarding RFP #140, on April 6, 2011, the Grievant received from his manager an Addendum No. 1 To All Bidders. This Addendum had been proofread and marked with

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)

suggested changes by his manager.⁷ On the fourth page of that Addendum, the Grievant's manager wrote in the margin regarding replacement language as follows:

Has AG approved this language?⁸

On April 7, 2011, the Grievant incorporated his manager's suggested changes from the draft of April 6, 2011, and then posted Addendum No. 1 To All Bidders.⁹ Subsequently, the Grievant's manager proofread and made suggested changes to his April 7, 2011, version of the Addendum and delivered that document to the Grievant on or about April 14, 2011. All of the manager's suggested changes to the April 7, 2011, document are merely stylistic. None of the changes appear to be substantive.

The Agency introduced before the Hearing Officer, the VDOT Procurement Refresher Training Guidelines.¹⁰ At Step 2-Prepare the Request for Proposal (RFP)(9), the following is stated:

Special Terms and Conditions: Select from Appendix B, Section II, all applicable special terms and conditions. Other special terms and conditions may be developed and included, **if approved by your agency's legal advisor.**¹¹ Emphasis added

In his oral testimony before the Hearing Officer, the Grievant admitted that he did not respond to his manager regarding her question about having the Attorney General's office approve the changed language. The Grievant testified that only one (1) sentence had either been changed or added to the approved language and he felt that language was of such a nature as to not require Attorney General approval. On April 7, 2011, at approximately 8:30 a.m., the Grievant sent to another member of this Agency an email wherein he stated in part as follows:

The language issue saying that the AG needs to approve I'm ignoring that I believe you just word smith around the ASPM Manual clause that I sent you.¹²

The Grievant testified that, because of time pressures, he simply had to make a policy call. The Grievant further testified that he never intentionally failed to follow instructions. The Grievant and his witnesses testified at great lengths regarding whether or not this Agency suffered any harm because of the failure to have the Attorney General's office approve the change in the form language that was used in this Addendum. The issue before the Hearing Officer is not whether or not there was damage, but whether or not the Grievant failed to follow a manager or supervisor's direct instruction. The Hearing Officer finds that the Grievant was aware that his manager had requested of him that the language in this Addendum be approved by the Attorney General's office and, while the Hearing Officer is sympathetic to time pressures, the

⁷ Agency Exhibit 1, Tab 5, Pages 7 through 10

⁸ Agency Exhibit 1, Tab 5, Page 10

⁹ Agency Exhibit 1, Tab 5, Pages 3 through 6

¹⁰ Agency Exhibit 1, Tab 4, Pages 1 through 30

¹¹ Agency Exhibit 1, Tab 4, Page 25

¹² Agency Exhibit 1, Tab 5, Page 22

Hearing Officer finds that the Grievant directly either refused or chose not to follow that management directive. The Hearing Officer was not impressed by the Grievant's testimony nor his witnesses' testimony that a person at his level could not directly contact the appropriate assistant Attorney General.

Regarding RFP-160-11-CS, the first issue was whether or not the Grievant allowed an evaluation committee member to conduct negotiations. On November 17, 2011, the Contract Officer for this matter sent a memorandum to the members of the evaluation committee. The Contract Officer was the Grievant.¹³ The penultimate paragraph states in part as follows:

...I will serve in the position of Evaluation Committee Chairperson. In addition, please note that Evaluation Committee Members are requested to avoid any communication with potential Offerors regarding this procurement program. Please refer all inquiries or questions you may receive from potential Offerors to me.¹⁴

The Grievant was the Contract Officer and he was also the Evaluation Committee Chairperson.

In his oral testimony, the Grievant indicated that he did not read the memorandum that he sent and was unaware of the language that barred committee members from communication with potential offerors.

Likewise, on November 17, 2011, one of the committee members executed an Understanding of Responsibility and in so doing, indicated that she could not communicate with firms regarding this RFP.¹⁵ Specifically, this committee member executed a document that stated in part as follows:

During the course of this procurement, I understand that **all** communication with firms regarding this **RFP** must be handled by the Contract Officer. I agree not to contact firms responding to this **RFP** and if any of these firms attempt to contact me directly, I agree to refer the firm to the chairperson...¹⁶

As it turns out, this committee member was in communication with firms who were interested in this RFP.¹⁷ The Grievant was copied on all of these communications and the Hearing Officer heard from the Grievant that he was aware of and had authorized these communications. Further, the Hearing Officer heard from a witness for the Grievant who had many years of service with this Agency. He testified to the inability to conduct their business if the committee members were barred from communicating inasmuch as the committee members were often the subject matter experts. Unfortunately, the Hearing Officer is not here to determine the reasonableness or lack thereof of Agency rules and regulations. It is exquisitely

¹³ Agency Exhibit 1, Tab 7, Pages 4 through 5

¹⁴ Agency Exhibit 1, Tab 7, Page 5

¹⁵ Agency Exhibit 7, Pages 1 through 3

¹⁶ Agency Exhibit 7, Page

¹⁷ Agency Exhibit 1, Tab 8, Pages 1 though 19

clear that the Grievant sent out a memorandum over his signature indicating that no such communication should take place and it is also equally clear that this committee member signed off on a document indicating that she was not to conduct such communication. The fact that she always copied the Grievant and the fact that the Grievant authorized her communications does not obviate the fact that her actions were in violation of the Grievant's own instructions and her own agreement to not communicate. Accordingly, the Hearing Officer finds that the Grievant did allow, in violation of Agency procedures, an evaluation committee member to conduct negotiations and to be in touch with providers who were interested in dealing with RFP-160-11-CS.

Regarding RFP-160-11-CS and whether or not the Grievant issued a Notice of Intent to Award, prior to making necessary corrections as instructed by his supervisor, the Hearing Officer finds that the Agency has not borne its burden of proof regarding this matter. On February 24, 2012, at approximately 3:30 p.m., the Grievant was sent an email from a manager instructing him that, "I noted several areas of the procurement file needing correction" and also stating to the Grievant, "the Notice for Intent to Award should not be posted until I see that the corrections have been made to the file."¹⁸

At approximately 3:50 p.m., on February 24, 2012, the Grievant sent to this manager a reply email telling the manager that, "too late have posted before I got this email." The Hearing Officer heard from both the manager and the Grievant regarding this exchange of emails. It seems probable to the Hearing Officer that the manager's email was sent, not read, the Notice of Intent was posted, and then the manager's email was read. It is not unlikely that a person such as the Grievant was not checking email on a moment-to-moment basis. At 4:14 p.m., on February 24, 2012, the manager responded to the Grievant and thanked him, "for the quick response." There was nothing in this email indicating that the posting should be pulled down and removed. Ultimately, the documents that were missing from the file were documents on hand and were placed into the file either on February 24, 2012 or shortly thereafter.

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..."¹⁹ 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

¹⁸ Agency Exhibit 1, Tab 6, Page 10

¹⁹ Va. Code § 2.2-3005

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.

There was an existing active Group II Written Notice and the Agency found no reason for mitigation in this matter.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof in this matter with regards to issues 1 and 2 and termination of the Grievant was appropriate.

APPEAL RIGHTS

You may file an administrative review request if any of the following apply:

1. 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. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

2. If you believe that the hearing decision does not comply with the grievance procedure, you may request EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. You may fax your request to 804-786-0111, or address your request to:

Office of Employment Dispute Resolution
101 North 14th Street, 12th Floor
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 of the original hearing decision. A copy of all requests for administrative review must be provided to the other party, EDR and the hearing officer. 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.²⁰ 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.²¹

[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

²⁰An 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).

²¹Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.