

Issues: Group II Written Notice (not alert while on duty), Group II Written Notice (failure to follow policy/instructions) and Termination; Hearing Date: 10/29/12; Decision Issued: 11/01/12; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 9907; Outcome: Partial Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9907

Hearing Date: October 29, 2012
Decision Issued: November 1, 2012

PROCEDURAL HISTORY

The Grievant was issued two (2) Group II Written Notices. The first Notice was issued on May 29, 2012 for:

On April 24, 2012 [Grievant] was not alert in his classroom nor attentive to his surroundings inside the secure perimeter of the correctional facility. Specifically, [Grievant's Supervisor] observed [Grievant] in his classroom with his head down, resting on his upper chest with his back to the door. [Grievant] did not respond to [Grievant's Supervisor's] knock on his door, nor did he respond to [Grievant's Supervisor's] presence in the classroom. [Grievant] remained in his slumber position without movement and only responded after [Grievant's Supervisor] called his name several times.¹

The second Notice was issued on June 20, 2012 for:

[On April 17, 2012] Investigator A found a sleeve of saltine crackers and candy in a locked file cabinet in [Grievant's] classroom. [Grievant] is aware that food items are forbidden in the classroom as stated in the Student Contract each student is required to sign. Not only did he not report or confiscate the items, by his own admission he locked them away in a file cabinet with the intention of returning them to the student.²

Pursuant to the second Group II Written Notice, the Grievant was terminated on June 20, 2012.³ On June 25, 2012, the Grievant timely filed a grievance to challenge the Agency's actions.⁴ On August 28, 2012, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On October 29, 2012, a hearing was held at the Agency's location. This matter was originally scheduled to be heard on September 25, 2012, but was continued to October 11, 2012, because the Grievant retained counsel on September 18, 2012, to represent him in this matter. The hearing was further continued from October 11, 2012 to October 29, 2012, because of an illness of the Grievant.

APPEARANCES

¹ Agency Exhibit 1, Tab 1, Page 1

² Agency Exhibit 1, Tab 2, Page 1

³ Agency Exhibit 1, Tab 2, Page 1

⁴ Agency Exhibit 1, Tab 3, Page 1

Advocate for Agency (telephonically)
Agency Party
Attorney for Grievant
Grievant
Witnesses

ISSUE

1. Was the Grievant not alert or attentive to his surroundings in his classroom, and if so, did this violate any policy of the Department of Corrections or the Department of Correctional Education?
2. Did the Grievant violate any policy of the Department of Corrections or the Department of Correctional Education by locking a sleeve of saltine crackers and two (2) pieces of candy in a file cabinet in his classroom?

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. 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. ⁵ However, proof must go beyond conjecture. ⁶ In other words, there must be more than a possibility or a mere speculation. ⁷

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 eight (8) tabs and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant did not provide a documentary evidence notebook. Grievant's counsel noted that he would rely on documents contained in the Agency notebook for any documentary evidence that he wished to introduce.

In this matter, it is important to be aware of the offense dates and the issue dates of each of these Written Notices. The offense date for the first Written Notice regarding the allegation of the Grievant not being alert and attentive in his classroom was April 24, 2012, and the issue date for that Written Notice was May 29, 2012. The offense date for the second Written Notice regarding the saltine crackers and candy was April 17, 2012, and the issue date for that Written Notice was June 20, 2012. Accordingly, these two (2) offenses took place within a seven (7) day period of time.

Investigator A testified before the Hearing Officer in this matter. He testified about his written report that is found at Agency Exhibit 1, Tab 4, Pages 1 and 2. That Exhibit states in part as follows:

On Tuesday April 17, 2012 the Investigation Unit was informed about several items that were found during a search of [Grievant's] classroom #2. During the search, Officer B discovered 176 white oblong pills in 2 separate saltine cracker sleeves, 75 nude photos of women and several nude magazine clippings in the bottom of a file cabinet... ⁸

Because of the pills and the pictures of nude women, it was decided that locked file cabinets in the Grievant's classroom should be searched. The Grievant was instructed to remove locks from these file cabinets and they were searched. During that search, the Investigator, "...discovered a sleeve of the saltine crackers and two pieces of candy." ⁹

⁵ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁶ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁷ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

⁸ Agency Exhibit 1, Tab 4, Page 1

⁹ Agency Exhibit 1, Tab 4, Page 1

More than two (2) months passed between the offense date for this matter and the issue date for the Group II Written Notice. The Grievant's Supervisor testified before the Hearing Officer that a part of the delay was because of the investigation relating to the pills and pictures of nude women. Thus, while the offense for which this Written Notice was issued occurred first, this Written Notice was the second to be issued. No evidence was introduced before the Hearing Officer regarding the 176 white oblong pills or 75 nude photos of women.

Regarding the second Group II Written Notice, the Grievant's Supervisor testified that he walked past the Grievant's classroom on April 24, 2012, and noted that the door was closed and the lights were out. Upon reflection, he testified that he was worried about the Grievant and he went back, knocked on the door, entered the room and proceeded to where the Grievant was seated. He testified that the Grievant's back was to him and that the Grievant's head was slumped on his chest. He further testified that the lights, which are governed by a motion detector, came on when he entered the room. He called the Grievant's name several times before the Grievant finally opened his eyes to address his Supervisor. The Supervisor testified that the motion detector was on a cycle of approximately ten (10) minutes, such that lights would not turn off until there had been no motion in the room for approximately ten (10) minutes. The Grievant's Supervisor testified that the Grievant appeared to him to be asleep, but it was his understanding that he could not charge the Grievant with being asleep unless he had another witness to observe that fact. Accordingly, he charged the Grievant with being, "not alert in his classroom nor attentive to his surroundings."

The offense date for this matter was April 24, 2012, and the issue date of the Written Notice was not until May 29, 2012. Thus, while the offense for which this Written Notice was issued occurred second, this Written Notice was the first to be issued. The Grievant's Supervisor testified that the delay in this matter was that the General Assembly was considering merging the Department of Corrections and the Department of Correctional Education and that, quite frankly, they did not know to whom this matter should be reported or which human resources office would govern this matter.

Pursuant to the Written Notice for the offense date of April 24, 2012, with an issue date of May 29, 2012, (not alert nor attentive), the Grievant was suspended and was told to not come on the premises for his location. On that same day, May 29, 2012, the Grievant met with the Grievant's Supervisor and another employee of this Agency and was told that, "the Warden don't want you back inside the institution."¹⁰

On June 15, 2012, the Grievant received a certified letter from the Agency informing him of a disciplinary hearing that would take place on June 18, 2012. That matter was continued until the next day, June 19, 2012. That meeting took place at the Agency location, even though the Grievant had been advised to not return to that location when he received the Written Notice for an offense of April 24, 2012, with an issue date of May 29, 2012. At the conclusion of that meeting, the Grievant returned to his home. After returning home, the Grievant received a phone call from his Supervisor asking if, "I could meet him in the parking lot in Franklin, Virginia at the Wal Mart the next day (June 20, 2012.)" He said, "he needed to talk with me in privacy about some options."¹¹

¹⁰ Agency Exhibit 1, Tab 3, Page 3

¹¹ Agency Exhibit 1, Tab 3, Page 4

The Grievant testified that he agreed to meet with his Supervisor in the parking lot at Walmart on June 20, 2012. When that meeting took place at approximately 11:00 a.m., his Supervisor told him that he had three (3) options. They were, (i) retire, (ii) resign, or, (iii) be terminated. The Grievant testified that he told his Supervisor that he was not going to resign nor retire. At this point, his Supervisor handed him the Group II Written Notice regarding the crackers and candy. This Written Notice had an offense date that was prior in time to the Written Notice for which a hearing was held at the Agency on June 19, 2012. The Grievant's Supervisor offered no explanation as to why this second Written Notice, which had an offense date prior in time to the first Written Notice, was not delivered to the Grievant while he was at the meeting of June 19, 2012.

Indeed, the Grievant's Supervisor testified that the only way he knew to deliver this Written Notice was to find a way to deliver it off site, as the Grievant had been barred from coming to the Agency. The Supervisor conveniently forgot that he had met with the Grievant less than 24 hours earlier at the Agency site. No satisfactory explanation was given as to why the Written Notice was not hand-delivered on June 19, 2012, or sent by certified mail. The Hearing Officer finds that delivery in a Walmart parking lot is unique at best.

Regarding the Written Notice concerning saltines and candy, the Agency cites as its only authority, a Student Contract that states in part as follows:

Food or beverages are not to be brought into or consumed in the
classroom.¹²

This is a contract between the student and the teacher. During the course of testimony, the Investigator and/or the Grievant's Supervisor, eluded to the possibility that, having this food amounted to fraternization or the appearance of fraternization. Upon questioning by the Hearing Officer, the advocate for the Agency admitted that this was not a fraternization issue and the Agency did not provide the Hearing Officer with any references to policies regarding fraternization or the appearance of fraternization. Indeed, the only policy that the Agency has provided to the Hearing Officer is the Student Contract and the Standards of Conduct.

The Grievant's Supervisor, upon questioning by the Hearing Officer, testified that, had the Grievant simply thrown the crackers and candy in the trash can, there would be no Written Notice for that offense. Indeed, he testified that was the standard course. Further he testified that, if the Grievant had put the crackers and candy in his pocket and left with them at the end of the day, we would not be dealing with that as an offense. While not asked this question, it seems logical that, had the Grievant consumed the crackers and candy on the spot, we would not be dealing with this matter. Neither the Investigator nor the Grievant's Supervisor could provide the Hearing Officer with any written policy regarding what should be done with such items. The closest testimony to a policy was the Supervisor's statement that, "normally they are simply thrown in the trash can."

The Hearing Officer was provided no state policy that would establish that saltine crackers and two (2) pieces of candy amount to contraband. If it truly was contraband, then the Hearing Officer is certain that the Grievant's Supervisor would not have testified that such items

¹² Agency Exhibit 1, Tab 6, Page 1

could be discarded into a trash can or be removed from the premises by the Grievant. Accordingly, the Hearing Officer finds that the Agency has not borne its burden of proof regarding the contraband issue. The Hearing Officer also finds it unique in its timing that this issue was used to reach the second Group II offense so that there could now be the ability to terminate based on two (2) Group II Written Notices.

Regarding the Written Notice for not being alert and attentive, the testimony before the Hearing Officer was that there were no students, as the facility was in lock-down. There is a dispute as to whether or not the Grievant was actually asleep or not alert or not attentive. The Grievant testified that he heard his Supervisor enter the room and simply did not respond to him because he did not want to respond to him. He gave various reasons for his failure to respond to his Supervisor, but the bottom line is that he did not want to respond to his Supervisor. The Hearing Officer finds that it is more probable that the Grievant was asleep than that he was just resting his eyes. Accordingly, the Hearing Officer finds that the Grievant was not alert and was not attentive.

Further, the Hearing Officer finds that the Grievant's willful disregard of his supervisor rose to a level of insubordination which in and of itself would constitute a Group II offense. For this Group II Written Notice, the Agency did not in any way punish the Grievant other than the actual issuance of the Written Notice.

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..."¹³ 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.

The testimony before the Hearing Officer in this matter was that the Grievant has worked for this Agency for thirty-six (36) years. The Agency offered no testimony to indicate that the Grievant's service was anything other than satisfactory. In neither Written Notice did the Agency set forth any discussion regarding mitigating factors. In his examination, when asked if he had considered mitigating circumstances, the Grievant's Supervisor testified. "It was pretty clear what I had to do."

¹³Va. Code § 2.2-3005

Accordingly, the Hearing Officer finds that the Agency specifically did not consider mitigation in this matter. Inasmuch as the Hearing Officer's ruling in this matter will result in the Grievant being placed back in employment by the Agency, he will not further use mitigation. However, should the Agency decide that it wishes to appeal this matter, the Hearing Officer will state that, if the Group II Written Notice for possession of saltines and two (2) pieces of candy were upheld, he would have mitigated this matter such that the Grievant would return to employment with the Agency.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has not borne its burden of proof in this matter with regards to the Written Notice dealing with the saltine crackers and candy. The Hearing Officer orders reinstatement to the employee's former position or, if occupied, to an equivalent position. The Hearing Officer orders that the Agency award full back pay, from which interim earnings must be deducted, to the Grievant and that he have a restoration of full benefits and seniority. Should counsel for the Grievant desire to recover attorney's fees, he must, within fifteen (15) days of the date of this Decision, file a petition for such fees with this Hearing Officer.

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 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. 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.¹⁴ 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.¹⁵

[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

¹⁴An 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).

¹⁵Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.