

Issues: Group II Written Notice (damaging State property), Group III Written Notice (falsifying records), and Termination; Hearing Date: 11/15/12; Decision Issued: 11/15/12; Agency: DJJ; AHO: William S. Davidson, Esq.; Case No. 9954; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No.: 9954

Hearing Date: November 15, 2012
Decision Issued: November 15, 2012

PROCEDURAL HISTORY

A Group II Written Notice was issued to the Grievant on October 4, 2012, for:

Damaging state property and failing to report it. On 7-23-12, at approximately, 0833 hours, you were operating state vehicle #23-902S. Video shows you striking a pole on the side of the garage as you were attempting to back out. You then continued to exit the facility without inspecting the condition of the vehicle, transported residents to another facility and upon return parked the vehicle and failed to report the accident. The evidence indicates that you were the operator at the time the damage was incurred and your actions potentially jeopardized the safety of the residents you were transporting. IOP#100-4 (Incident Reports/Procedures) states: "On-duty staff that observe or become aware of an incident occurring in a JCC shall immediately notify the Security Supervisor of the facility and complete an IIR."¹

A Group III Written Notice was issued to the Grievant on October 4, 2012, for:

Falsifying state records and providing false or misleading information to investigators. On 8-22-12, an Official Investigation was concluded which revealed you were the operator at the time the damage was incurred to state vehicle #23-902S and that the Institutional Incident Report you filed (after the fact and only when confronted with the evidence of the damage to the vehicle) and other information provided to the investigators is inconsistent with this evidence. Specifically, the evidence indicates that it is not plausible that you were unaware of having struck the pole on the side of the garage with the vehicle, and then willfully provided false information during the investigation of this incident. This is a direct violation of DJJ Administrative Directive #05-009.2 (Staff Code of Conduct) which states: "The following actions relating to unprofessional conduct of employees of DJJ may result in disciplinary action: Refusal to cooperate with or provide information during an investigation or providing false or misleading information to investigators."²

Pursuant to the Group II Written Notice and the III Written Notice, the Grievant was terminated on October 4, 2012.³ On October 5, 2012, the Grievant timely filed a grievance to

¹ Agency Exhibit 1, Tab B, Page 1

² Agency Exhibit 1, Tab A, Page 1

³ Agency Exhibit 1, Tab B, Page 1 and Tab A, Page 1

challenge the Agency's actions.⁴ On October 24, 2012, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On November 15, 2012, a hearing was held at the Agency's location.

APPEARANCES

Advocate for Agency
Agency Party
Witnesses

ISSUE

1. Did the Grievant damage state property and fail to report such damage in violation of IOP#100-4?
2. Did the Grievant falsify state records and provide false or misleading information to investigators in violation of DJJ Administrative Directive #05-009.2?

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. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.⁵ 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.

⁴ Agency Exhibit 1, Not indexed

⁵ See Va. Code § 2.2-3004(B)

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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, 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.⁶ However, proof must go beyond conjecture.⁷ In other words, there must be more than a possibility or a mere speculation.⁸

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 through Z, and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided no documentary evidence.

The Grievant did not appear at this hearing, nor was the Grievant was not at the phone number that he provided the Hearing Officer for the pre-trial conference. The Hearing Officer left two (2) messages with the Grievant after the pre-trial conference call, letting the Grievant know that he should call the Hearing Officer if he had any questions regarding this hearing. The Hearing Officer received evidence at the hearing that the Grievant did receive the Agency’s notebook containing documentary evidence. The Hearing Officer heard from the Agency Investigator who investigated this matter and that investigator, along with Agency Exhibit 1, provided the Hearing Officer with sufficient proof to show that the Agency has borne its burden regarding the two (2) Written Notices issued to the Grievant.

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...”⁹ 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,

⁶ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁷ *Southall, Adm’r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁸ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

⁹ Va. Code § 2.2-3005

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 Hearing Officer finds that the Agency did consider mitigation in this matter, but there was nothing that justified mitigating either the Group II Written Notice or the Group III Written Notice.

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 and the Group III Written Notice with termination were 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 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 804-786-1606, 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.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.