

Issue: Group III Written Notice with Termination (patient abuse); Hearing Date: 12/20/12; Decision Issued: 12/21/12; Agency: DBHDS; AHO: William S. Davidson, Esq.; Case No. 9985; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9985

Hearing Date: December 20, 2012
Decision Issued: December 21, 2012

PROCEDURAL HISTORY

A Group III Written Notice was issued to the Grievant on October 29, 2012, for:

Violation of Departmental Instruction #201, Reporting and Investigating Abuse and Neglect of Clients. A facility investigation confirmed that on 10/17/12, you pulled individual (ES) pajama pants down and struck him two times on his bare buttocks.¹

Pursuant to the Group III Written Notice, the Grievant was terminated on October 29, 2012.² On November 3, 2012, the Grievant timely filed a grievance to challenge the Agency's actions.³ On November 26, 2012, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On December 20, 2012, a hearing was held at the Agency's location.

APPEARANCES

Advocate for Agency
Witnesses

ISSUE

Did the Grievant violate Departmental Instruction #201 by striking individual (ES)?

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

¹ Agency Exhibit 1, Tab 1, Page 1

² Agency Exhibit 1, Tab 1, Page 2

³ Agency Exhibit 1, Tab I, Page 1

reserved the exclusive right to manage the affairs and operations of state government.⁴ 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 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.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 documentary evidence notebook containing nine (9) tabs. That notebook was accepted in its entirety, without objection, as Agency Exhibit 1.

The Grievant did not produce any documentary evidence.

The Grievant did not appear before the Hearing Officer in this matter. Agency Exhibit 1 set forth all of the Agency's documentary evidence regarding this matter. The Hearing Officer

⁴ See Va. Code § 2.2-3004(B)

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)

heard testimony from a registered nurse, an employee of the Agency, who witnessed the Grievant strike one (1) of the patients of this Agency twice on his buttocks. This is a clear violation of Policy. In her statements to the Investigator who investigated this matter, the Grievant did not deny striking this individual twice and expressed sincere remorse for doing so.

Pursuant to the oral testimony of the registered nurse who witnessed this event, the documentation contained in Agency Exhibit 1, and the Grievant's failure to deny the alleged striking, and indeed admitting to such striking, the Hearing Officer finds that the Agency has borne its burden of proof in this matter.

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.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof in this matter and that termination of the Grievant is proper.

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

⁸ Va. Code § 2.2-3005

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.⁹ 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.¹⁰

[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

⁹An 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).

¹⁰Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.