

Issue: Group II Written Notice with Suspension (unsatisfactory performance); Hearing Date: 01/27/17; Decision Issued: 02/01/17; Agency: Longwood University; AHO: William S. Davidson, Esq.; Case No. 10922; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10922

Submission of Evidence and Legal Authorities: January 27, 2017
Decision Issued: February 1, 2017

PROCEDURAL HISTORY

On October 14, 2016, the Grievant was issued a Group II Written Notice, which stated as follows:

Complaint that [Grievant] by [RA] is founded and he did speak to her while he was in his official capacity in a demeaning and unprofessional manner.¹

Pursuant to the Written Notice before me, the Grievant was suspended for two days.² On October 19, 2016, the Grievant timely filed a grievance to challenge the Agency's actions.³ A hearing was held before the Vice President of the Agency on October 31, 2016. Pursuant to that hearing, the grievance was determined to be appropriate, but the two-day suspension was reduced to one day.⁴ On December 14, 2016, this appeal was assigned to me. Due to calendar conflicts, the hearing was continued and counsel for both parties deemed it appropriate to submit evidence to me, based on stipulations and written briefs. Accordingly, on January 27, 2017, stipulations and pleadings were filed with me.

APPEARANCES

Attorney for Agency - pursuant to written stipulations and briefing
Attorney for Grievant - pursuant to written stipulations and briefing

ISSUES

1. Was the Group II Written Notice issued on October 14, 2016, warranted and appropriate under the circumstances?

¹ Agency Exhibit 1

² Agency Exhibit 1

³ Agency Exhibit 3

⁴ Agency Exhibit 4

2. Could the Agency use as a factor in its determination of the grievance before me, a Group II Written Notice, which was issued to the Grievant on February 21, 2014?

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.

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. 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

⁵ See Va. Code § 2.2-3004(B)

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)

FINDINGS OF FACT

The parties submitted nine joint exhibits. They are marked as Exhibits 1-9. Further, the parties entered into several stipulations; they are as follows:

-This matter is governed by Virginia Code §§ 2.2-3000 through 3008 and the Department of Human Resource Management Grievance Procedure Manual.

-[Agency] issued a Group II Written Notice to [Grievant] on 10/14/2016 for an Offense dated 9/1/2016. As a result of this Group II Written Notice, [Agency] suspended [Grievant] from work for two days. [The] Vice President for Student Affairs, subsequently reduced the punishment to a one day suspension.

-[Agency] should not have considered a Group I Written Notice issued to [Grievant] on 5/7/12.

-[Grievant] referred to [Agency] Resident Assistant [“RA”] as “babe” and “Alicia Keys” when responding to a call on 9/1/16. [Grievant] denies that he mocked the RA during the same call.

-The polygraph examination referenced in the Detective’s report is irrelevant to the Group II Written Notice issued on 10/14/2016 and should not be considered.

-If a hearing were conducted in this matter, the testimony of non-party witnesses would be substantially similar to the Detective’s written report.

Based on the stipulations, it is agreed that the Grievant referred to RA as “babe” and “Alicia Keys.” Further, it is stipulated that, had the parties testified before me, the non-party witnesses’ testimony would be substantially similar to the Detective’s report found at Exhibit 2. The Detective reports that RA stated to him, in part, as follows:

... When [Grievant] arrived, he knocked on door and she opened it at which time he stated something to the effect of “hello babe” or “how you doing babe” which she indicated made her feel really uncomfortable and nervous with almost a tightness in her chest but she stated that she let it go and focused on the medical call...⁹

Further, the Detective stated that RA told him that later in this event, he asked, “What do you think about this Alicia Keys?”¹⁰

Finally, the Detective stated that the totality of these events made RA “feel really embarrassed and hurt to be made fun of in front of those other students by a person in a position of authority but that it made it even worse when she considered how difficult it would be for her to be taken seriously and interact with those involved and possibly others in the building...”¹¹

⁹ Agency Exhibit 2, Page 3

¹⁰ Agency Exhibit 2, Page 3

¹¹ Agency Exhibit 2, Pages 3 and 4

The Agency's Standard Operation Procedures states under Section IV(C)(1), in part, as follows:

Employees shall display respect...and maintain a professional working environment at all times...¹²

The Agency's Standard Operation Procedures states under Section IV(C)(3), in part, as follows:

Employees shall address...members of the general public courteously and shall not use...insulting...language.¹³

The Agency's Standard Operation Procedures states under Section IV(C)(4), in part, as follows:

Employees shall at all times be civil and courteous...¹⁴

While I must admit that I personally do not understand what a reference to Alicia Keys means, none of the evidence produced indicated how or why that would be upsetting. The only information produced in the documents and/or argument before me was that Alicia Keys is a singer. I am not certain how being referred to as a singer is demeaning or objectionable. However, the use of the word "babe" clearly is potentially insulting or provoking and could be perceived as neither civil or courteous. While it would have been interesting to inquire of the parties present when these statements were made as to the body language and the tone and timbre of the Grievant's voice, I am left with what, in most ordinary circumstances, would be a statement that should not offend anyone except the most delicate. However, given the stipulations exhibits before me, I can only conclude that this RA was in fact upset.

Accordingly I find that the use of the word "babe" justifies the Group II Written Notice. I further find that there is no issue regarding consideration of the Group II Written Notice that was issued to the Grievant on February 21, 2014. Apparently, that Written Notice was not grieved and became policy. It remains active until February 21, 2017, and was clearly available to be considered by the Agency in its determination 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." 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

¹² Agency Exhibit 9, Page 202-4

¹³ Agency Exhibit 9, Page 202-4

¹⁴ Agency Exhibit 9, Page 202-4

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.

I find no reason to mitigate the Written Notice before me.

DECISION

For reasons stated herein, I find that the Agency has borne its burden of proof in this matter and that the issuance of the Group II Written Notice to the Grievant, with one day suspension, was 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
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.¹⁵ 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.¹⁶

[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

¹⁵An 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).

¹⁶Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.