

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 06/11/13;
Decision Issued: 06/14/13; Agency: DOC; AHO: William S. Davidson, Esq.; Case
No. 10076; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10076

Hearing Date: June 11, 2013
Decision Issued: June 14, 2013

PROCEDURAL HISTORY

A Group II Written Notice was issued to the Grievant on August 2, 2012, for:

Failure to follow policy and failure to provide appropriate oversight of the refurbishing of kitchen equipment by a vendor who defrauded the Commonwealth. The employee did not properly manage the review and approval of documentation specific to the use of the purchasing charge card; failure to properly review all documentation as well as complete the reconciliation as required by DOA Procedure 20355 as well as the required annual DOA Cardholder training. As referenced on the attached transcript, employee has consistently completed required training in 2010, 2011, and 2012 which would indicate knowledge of proper procedural expectations.¹

Pursuant to the Group II Written Notice, the Grievant received no discipline other than the issuance of the Written Notice.² On August 27, 2012, the Grievant timely filed a grievance to challenge the Agency's actions.³ On April 24, 2013, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. This matter was originally scheduled to be heard on May 23, 2013, however, pursuant to scheduling conflicts withing the respective parties' calendars, this matter was continued to June 11, 2013. Accordingly, on June 11, 2013, a hearing was held at the Agency's location.

APPEARANCES

Advocate for Agency
Agency Party
Grievant
Witnesses

¹ Agency Exhibit 1, Tab 1, Page 2

² Agency Exhibit 1, Tab 1, Page 1

³ Agency Exhibit 1, Tab 2, Page 1

ISSUE

Did the Grievant fail to follow policy regarding the refurbishment of kitchen equipment by an outside vendor?

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.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

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)

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 seven (7) tabs. During the hearing, two (2) additional documents were introduced without objection. That notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing four (4) tabs and that notebook was accepted in its entirety as Grievant Exhibit 1.

The Grievant in this matter was the Director of Food Services for the Agency.⁸ As such, as a part of his job, he served in a management position and was responsible for verifying the veracity of certain costs borne by the Agency.

The facts in this matter were relatively simple and uncontradicted. The Agency had in place a program whereby it attempted to train people who were incarcerated by this agency prior to their release. One of the programs trained inmates in the repair of kitchen appliances. Inmate A received such training and became a probationer. As such, he obtained a business license and petitioned the Agency for agency business in repairing kitchen equipment.⁹ The probationer's letter was sent to a long-time employee of the Agency (Employee B), who reported directly to the Grievant. This employee recommended to the Grievant that the probationer's services be retained for refurbishment of institutional food services equipment. The Grievant's direct supervisor testified before the Hearing Officer that he approved this request and, accordingly, this probationer was hired.

Over a period of approximately sixteen (16) months, the probationer submitted invoices in the approximate amount of \$70,000.00. These invoices were paid using a State credit card which was under the control of Employee B. Pursuant to an anonymous tip, an investigation was started regarding whether or not the probationer was performing the task for which he was invoicing the State and whether or not he was defrauding the State. Pursuant to this investigation, it was determined that some of the services that were purportedly performed had no relationship to the refurbishment of food service equipment and some of the services which related to institutional food service equipment were not in fact performed.

As a part of his responsibility, the Grievant, on a timely basis, was supposed to review the transaction logs, the invoices and the bank statements that were generated pursuant to these invoices to see to it that the State credit card was being used for proper and valid charges. Topic number 20355, Purchasing Credit Card, states in part as follows:

...The following RECONCILIATION Procedures must be followed:

Supervisor: Review and approve, **by signing and dating**, the reconciled statement before forwarding it to the accounting department

⁸ Agency Exhibit 1, Tab 5, Page 1

⁹ Grievant Exhibit 1, Tab 3, Page 1

within a time frame agreed upon by the purchasing and accounting units. By this process, you are agreeing that all information provided on the log and its attachments are correct and valid State expenses.¹⁰

Department of Corrections Small Purchase Charge Card (PCard) Program Instruction Guide, states in part as follows:

Supervisor/Reviewer Checklist

...Cardholder signature and date, in ink, is on log and cardholder statement.

... Compare each transaction amount on the Bank of America VISA statement to that documented on the log.

...Sign (complete signature, in ink) and date the log and cardholder statement.¹¹

The Grievant, in his testimony, admitted that he had failed to sign thirteen (13) of the transaction logs. Further, the Grievant did not timely approve the Bank of America VISA statement. For example, Bank of America produced a statement dated March 15, 2011. The Grievant did not sign off on this statement until August 19, 2011, and he did not see to it that the cardholder dated or signed it.¹² Likewise, a similar statement was produced by Bank of America on April 15, 2011, and it was not signed by the Grievant until August 19, 2011. Again, the Grievant did not secure or require the cardholder's signature to be dated.¹³ Further, a similar statement was produced by Bank of America on May 15, 2011, and it was not signed by the Grievant until August 19, 2011. And, again, the Grievant did not secure or require the cardholder's signature to be dated.¹⁴

Accordingly, it is clear that the Grievant did not comply with his management responsibilities in properly verifying the transaction logs, the Bank of America credit card statements and supporting invoices.

Both Agency witnesses and Grievant witnesses, who testified before the Hearing Officer, testified, without reservation, that the Grievant was an exemplary employee. All witnesses testified that, had the Grievant realized or taken the time to realize that there was a fraud or a potential fraud being transacted in this matter, he would have immediately reported it. The problem in this case is that he did not take the time and energy to properly review the transaction logs, the invoices or the Bank of America credit card statements. It is clear to the Hearing Officer that he was not a party to any fraud or potential fraud, and it is equally clear that he was unaware of any fraud or potential fraud. However, that is not relevant to whether or not he performed his managerial responsibilities in reviewing these documents.

¹⁰ Agency Exhibit 1, Tab 6, Page 30

¹¹ Agency additional documentation introduced at hearing - Department of Corrections Small Purchase Charge Card (PCard) Program Instruction Guide, Page 13

¹² Grievant Exhibit 1, Tab 3, Page 48

¹³ Grievant Exhibit 1, Tab 3, Page 52

¹⁴ Grievant Exhibit 1, Tab 3, Page 56

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...”¹⁵ 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 Agency took into account the Grievant’s long-time and exemplary service and mitigated this from what the Agency considered as a Group III violation, to a Group II offense with no punishment other than the issuance of the Notice. While the Hearing Officer might have considered this to be a Group II offense which could have been mitigated to a Group I offense, as stated earlier in this Decision, the Hearing Officer is not a super personnel officer and will give appropriate deference to actions of the Agency that are consistent with law and policy.

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 to 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

¹⁵ *Va. Code § 2.2-3005*

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.¹⁶ 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.¹⁷

[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

¹⁶An 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).

¹⁷Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.