

Issue: Group III Written Notice with Termination (failure to follow policy and theft);  
Hearing Date: 05/21/13; Decision Issued: 05/23/13; Agency: UVA; AHO: William  
S. Davidson, Esq.; Case No. 10089; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 10089

Hearing Date: May 21, 2013  
Decision Issued: May 23, 2013

**PROCEDURAL HISTORY**

A Group III Written Notice was issued to the Grievant on April 2, 2013, for:

Offense Category 13- Failure to follow supervisor's instructions and/or policy and 72 - Theft: Multiple Instances: On March 4, 2013, a member of the Dining Hall staff observed [Grievant] removing four (five gallon) jugs of water from the work area. A review of security camera footage video showing [Grievant] taking food items and leaving the premises, sometimes accompanied by her husband...<sup>1</sup>

Pursuant to the Group III Written Notice, the Grievant was terminated on April 2, 2013.<sup>2</sup> On April 9, 2013, the Grievant timely filed a grievance to challenge the Agency's actions.<sup>3</sup> On April 29, 2013, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On May 21, 2013, a hearing was held at the Agency's location.

**APPEARANCES**

Attorney for Agency  
Agency Party  
Grievant  
Witnesses

**ISSUE**

Did the Grievant fail to follow supervisor's instruction and/or policy and, in so doing, did the Grievant commit an act of theft from the Agency.

**AUTHORITY OF HEARING OFFICER**

---

<sup>1</sup> Agency Exhibit 1, Tab 2, Pages 1 through 3 [See attached Written Notice for a more detailed description]

<sup>2</sup> Agency Exhibit 1, Tab 2, Page 1

<sup>3</sup> Agency Exhibit 1, Tab 1, Pages 1 and 2

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.<sup>4</sup> 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.<sup>5</sup> However, proof must go beyond conjecture.<sup>6</sup> In other words, there must be more than a possibility or a mere speculation.<sup>7</sup>

### **FINDINGS OF FACT**

---

<sup>4</sup> See Va. Code § 2.2-3004(B)

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

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

<sup>7</sup> *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 ten (10) tabs. The 10<sup>th</sup> tab contained a DVD from the security cameras at the Agency's location. 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 worked at the Arena in the Dining Hall. The Hearing Officer heard from the Location Manager for that facility. During this witness' testimony, the Hearing Officer was directed to several photographs located at Agency Exhibit 1, Tab 3. These photographs show the Grievant leaving the facility with food and/or containers in her hands. One (1) of the photographs shows the Grievant leaving the facility with a cart full of food and then returning with that cart with empty water bottles.<sup>8</sup> Further, this witness explained the video contained on the DVD at Agency Exhibit 1, Tab 10. That DVD clearly showed the Grievant leaving the facility with many boxes of food and, with the assistance of her husband, entering the facility with empty water bottles and leaving the facility with full water bottles. The video clearly illustrated that the Grievant was leaving the facility with personal property of the facility, in addition to the food and water.

At her Predetermination Hearing, the Grievant acknowledged that she was the person who is shown in the still photographs. She further acknowledged that she was removing food from the facility. She acknowledged that it was her husband who was visible in the photographs and, at the hearing, she acknowledged that it was her husband shown on the DVD. In the Predetermination Hearing, the Grievant stated that she was only taking, "garbage and food for her chickens." She also stated that she took food and fixed her husband's dinner from that food. Finally, at the Predetermination Hearing, the Grievant stated, "I have never taken anything out that wasn't going to be thrown away...Only old food...Food was taken for husband and chickens."<sup>9</sup>

In her testimony before the Hearing Officer, the Grievant confirmed all that she said at her Predetermination Hearing. The Grievant insisted that she had never taken anything other than old food and that it was either for her chickens or her husband. The Grievant alleged that this was a common practice amongst employees, but she was unable to produce any witness who would confirm this. Most of her witnesses indicated that they had no knowledge of other employees taking food. One (1) of her witnesses refused to testify and one (1) witness testified that on one (1) occasion he took more than "one to-go box." The Location Manager testified that he allowed employees to take one (1) "to-go box," every night from the food that was going to be thrown away.

The Dining Facility is run by a third party. That third party has an Employee Handbook, which the Grievant is compelled to follow.<sup>10</sup> The Handbook states in part as follows:

---

<sup>8</sup> Agency Exhibit 1, Tab 3, Pages 1 through 6

<sup>9</sup> Agency Exhibit 1, Tab 4, Page 3

<sup>10</sup> Agency Exhibit 1, Tab 6, Pages 1 through 22

The following list is not intended to be all-inclusive, but merely illustrates certain types of behavior ARAMARK deems unacceptable, and which may result in disciplinary action up to and including termination, with or without any written warnings...

...Unauthorized use, waste, removal or attempted removal of company/client/or employee material or property (e.g., funds, food, records, documents, tools, or equipment) from company and/or client premises without proper authorization. This includes any items that have been discarded...

...Allowing unauthorized personnel to enter non-public work areas...<sup>11</sup>

The Grievant acknowledged receipt of this Handbook and its various addendums on February 13, 2007.<sup>12</sup> Under the addendum is listed a group of terminable offenses. One (1) of those states as follows:

Theft or unauthorized removal of state or Company records, property or other persons' property (to include employees, management, visitors, students, etc.)<sup>13</sup>

It is clear from the pictorial evidence and the evidence presented on the DVD by the security cameras at the Agency's location, that the Grievant removed substantially more than "one to-go box," from the facility on several occasions. It is also clear that the Grievant removed water from the facility on at least one (1) occasion. It is also clear that the Grievant allowed her husband to use her Access Card to enter the facility on at least one (1) occasion. It is clear to this Hearing Officer that the Grievant committed theft on multiple occasions.

### **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..."<sup>14</sup> 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

---

<sup>11</sup> Agency Exhibit 1, Tab 6, Pages 10 and 11

<sup>12</sup> Agency Exhibit 1, Tab 7, Page 1

<sup>13</sup> Agency Exhibit 1, Tab 7, Page 3

<sup>14</sup> Va. Code § 2.2-3005

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.

While the Grievant has been an employee for this Agency for a number of years, longevity in and of itself is not a required reason to mitigate a clear policy violation. Further, the Grievant has an active Group II Written Notice in her file.<sup>15</sup>

### **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 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 14<sup>th</sup> Street, 12<sup>th</sup> 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 14<sup>th</sup> Street, 12<sup>th</sup> 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.

---

<sup>15</sup> Agency Exhibit 1, Tab 9, Page 1

You may request a judicial review if you believe the decision is contradictory to law.<sup>16</sup> 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.<sup>17</sup>

[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

---

<sup>16</sup>An 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).

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