

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 06/19/13; Decision Issued: 06/19/13; Agency: DJJ; AHO: William S. Davidson, Esq.; Case No. 10091; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10091

Hearing Date: June 19, 2013
Decision Issued: June 19, 2013

PROCEDURAL HISTORY

A Group II Written Notice was issued to the Grievant on December 27, 2012, for:

On 11/29/12 at 1638 hours, while in HB-200, you and another officer were supervising a resident on the dayroom floor. That resident took the set of unit keys from your pocket as you and the other officer sat together at one of the dayroom tables. After removing the keys from your pocket, this resident was able to go through the keys until he found the one that fit the resident cell doors. After locating the key for the cell doors, this resident ran over to the room that housed another resident, who was on protective custody (PC), unlocked his door, entered his room and assaulted him. It was not until the resident began to unlock the other resident's cell door, did you and the other officer leave your seats to address the resident. You followed the resident into the room and stopped the assault by restraining the resident and removing him from the room. After removing the resident from the room, you and the other officer released him from the restraint hold, allowing the resident to continue his disruptive behavior, i.e. standing on the table, pacing the unit dayroom and threatening to assault whoever attempted to place him back into his room. This incident severely compromised the safety and security of the institution. A review of the incident found that you were in violation of the following policies: IOP 212-4.2 # 1, 4 & 10 (Movement and Supervision of Residents), IOP 218-4.0 #2 (Use of Physical Restraints)¹

Pursuant to the Group II Written Notice, the Grievant was suspended without pay for ten (10) days.² On January 21, 2013, the Grievant timely filed a grievance to challenge the Agency's actions.³ On May 20, 2013, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On June 19, 2013, a hearing was held at the Agency's location.

APPEARANCES

Agency Party
Grievant

¹ Agency Exhibit 1, Tab C, Page 1

² Agency Exhibit 1, Tab C, Page 1

³ Agency Exhibit 1, Tab B, Page 2

ISSUE

Could the Grievant use his accrued leave time for the ten (10) day suspension in order that he not lose any pay?

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

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)

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 five (5) tabs. That notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with no documentary evidence.

The evidence before the Hearing Officer in this matter was that the Grievant received the Group II Written Notice on December 27, 2012. The Grievant did not contest the facts set forth in the Written Notice. The Grievant testified that the Assistant Superintendent for Security informed him that he could use his personal leave in place of being docked for a ten (10) day suspension.⁸ Further, this was corroborated by a letter dated February 7, 2013, from the Superintendent of the Grievant's workplace. The Superintendent sent the Grievant a letter on that date stating in part as follows:

...The Assistant Superintendent [sic] for Security, informed you that the use of personal leave was an acceptable alternative to getting pay docked for your receiving a Group II notice under our Standards of Conduct. I met with [the Assistant Superintendent], who related that he indeed informed you of such...⁹

However, in that same letter, the Superintendent corrected this error and pointed out to the Grievant that Department of Human Resource Management Policy 1.60, does not allow a Grievant to use personal leave time to substitute for a loss in pay.

Policy No. 1.60(D), Standards of Conduct, states in part as follows:

All disciplinary suspensions are without pay.¹⁰

The State policy is very clear in this matter. While it is unfortunate that the Grievant's supervisor was factually incorrect when relating his opinion as to State policy, the fact that he was incorrect does not change State policy.

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

⁸ Agency Exhibit 1, Tab B, Page 2

⁹ Agency Exhibit 1, Tab B, Page 4

¹⁰ Agency Exhibit 1, Tab D, Page 12

accordance with rules established by the Department of Employment Dispute Resolution...” 11 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 Grievant’s number of years of longevity and his previous performance evaluations were taken into account to mitigate this offense to a Group II Written Notice. ¹²

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 with a corresponding loss of pay for ten (10) days.

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

¹¹ Va. Code § 2.2-3005

¹² Agency Exhibit 1, Tab C, Page 1

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.¹³ 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.¹⁴

[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

¹³An 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).

¹⁴Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.