

Issues: Group II Written Notice (unsatisfactory performance), Termination (due to accumulation), and Discrimination (age, gender); Hearing Date: 06/17/13; Decision Issued: 06/27/13; Agency: DOC; AHO: John R. Hooe, III, Esq.; Case No. 10092; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of : Case Nos. 10092

Hearing Date: June 17, 2013
Decision Issued: June 27, 2013

PRELIMINARY MATTERS

During the telephone pre-hearing conference conducted on May 28, 2013 between the Grievant, the Agency Representative and the Hearing Officer it was agreed that the hearing in this matter would be conducted on June 17, 2013 commencing at 10:00 a.m. at the [facility].

As agreed by the parties during the pre-hearing telephone conference, the parties exchanged copies of exhibits and list of witnesses prior to the hearing date, both of which were also provided to the Hearing Officer in a timely manner.

APPEARANCES

Grievant
Representative for Agency
Agency Advocate
Two Witnesses for Agency
Two Witnesses for Grievant

ISSUES

1. Was the Grievant guilty of “unsatisfactory performance”, Group II offense as set out in the Written Notice dated March 14, 2013?
2. If so, is the written notice issued March 14, 2013 a second Group II Written Notice which can result in termination?
3. Were mitigating factors considered? If not, why?

EXHIBITS

The Agency Exhibits admitted into evidence are contained in a single notebook with the following contents:

- Tab 1 - The Written Notice issued January 30, 2013 for a Group II offense
- Tab 2 - Written Notice issued March 14, 2013 for a Group II offense
- Tab 3 - Grievant's form A with attachments
- Tab 4 - A series of emails involving the Grievant dated between January 8, 2013 and March 7, 2013
- Tab 5 - General timeline regarding the Grievant's performance covering the period from July 14, 2011 to March 14, 2013
- Tab 6 - Grievant's employee work profile
- Tab 7 - Notice of improvement needed and related documents (10 pages)
- Tab 8 - Operating Procedure 920.2 effective December 1, 2012
- Tab 9 - Operating Procedure 050.1 effective December 1, 2012
- Tab 10 - Operating Procedure 135.1 effective April 1, 2011 as amended through January 12, 2012

The Grievant's Exhibits entered into evidence were not contained in a notebook but included faxed pages numbered 1 through 42, including the cover page.

FINDINGS OF FACT

The Grievant filed a timely appeal from a second Group II Written Notice issued on March 14, 2013 which resulted in her termination.

The Grievant did not dispute that she received a Group II Written Notice issued on January 30, 2013 for a "failure to follow instructions." (Agency Tab 1) The inactive date for the written notice was January 30, 2016.

A second Group II Written Notice for "unsatisfactory performance" was issued on March 14, 2013. In the notice at Section IV it was set out that the Grievant had been a probation officer since December 17, 2001 and that efforts were made to work with the Grievant since the time deficiencies were noted in her job performance. It was further noted that a rating of "below contributor" was given to the Grievant on the last performance evaluation, with a plan of corrective action. The notice states that when the Grievant's performance was not brought up to the "contributor" level the Group II Written Notice was issued on January 21, 2013 and with continued substandard job performance, the second Group II Written Notice and termination resulted on March 14, 2013.

The Agency's first witness testified that shortly after he became the chief probation

officer on November 10, 2011 he met the Grievant. He outlined the details of the first Group II Written Notice (January 30, 2013) and the details of the second Group II Written Notice (March 14, 2013). He testified that as to the requirements of the Operating Procedure 050.1 "Offender Records Management" (Agency Tab 9) that each employee was trained in VACORIS, which is an organized system of information retrieval and review that is part of an overall management, planning and research capacity for the DOC. (Tab 9, Page 4) He testified that the Grievant's caseload continued to be unmanageably high because the Grievant was not working her cases as they needed to be worked in order to reduce her caseload.

Agency Exhibit 1, Page 4, sets out that during an informal counseling session on July 16, 2012, the following benchmarks were set: Approximately 14 cases needed to be addressed and resolved/progress made by August 1, 2012 and all cases must be caught up in compliance by October 22, 2012. Prior to completing the Grievant's performance evaluation for the 2012 performance year, a second round of case reviews was completed in October of 2012 to gauge the Grievant's progress. After reviewing the cases, a Corrective Action Plan was implemented due to the Grievant's "below contributor" rating on her 2012 evaluation. A third round of case reviews was completed in January of 2013 at which time many cases continued to have deficiencies identified and several cases that had specific instructions that were not followed from previous case reviews.

At Agency Tab 2, Page 2, it was noted that on March 14, 2013 the DCPO and the CPO met with the Grievant to discuss her progress since the issuance of the action plan dated February 7, 2013. After setting out the details of continuing non-compliance, it is noted that when the action plan was implemented on February 7, 2013 there were 37 cases identified that needed to have action taken on them but as of March 14, 2013 there appeared to have been no action taken on at least 33 of the cases as there are no notes indicating anything had been done in "CORIS." In addition, seven of the cases were flagged in "CORIS" as being high-risk cases per COMPAS.

During the cross-examination of the Chief Probation Officer by the Grievant, the Chief Probation Officer agreed that the Grievant has many strong points and denied that he (the Chief Probation Officer) had ever discriminated against the Grievant either on the basis of sexuality or age. When the Grievant suggested to the Chief Probation Officer that she would not have had the large caseload if she had been selected to handle specialty case loads, the Chief Probation Officer denied that any favoritism or discrimination was used in selecting the probation officers to handle the lower number specialty caseloads.

The Agency's second witness was the Deputy Chief Probation Officer who has known the Grievant from the beginning of her employment. He testified that he did not recall the Grievant ever claiming any kind of discrimination or favoritism at any of his interviews with the Grievant during the time that he was her supervisor. He stated that he saw the Grievant frequently, that she appeared to always be working, often work late and had many strengths as a

probation officer.

The Grievant's first witness testified that she is also a probation officer and has known the Grievant for 8 years. She stated that she believed that the Chief Probation Officer favored the young, male, athletic probation officers and that three of the "young" probation officers were given specialized caseloads by the Chief Probation Officer. She stated that her current caseload is 140 and that a year ago the Chief Probation Officer told her that if she couldn't adapt "maybe the job is not for you." She testified that she cannot do her job with 140 cases, that she has been a probation officer 22 years and that the need to work beyond regular hours is happening "across the board". She also testified that the Grievant was the second oldest worker in the probation office.

The Grievant's second witness testified that she has been the Grievant's roommate for two years and has noticed that the Grievant's stress level has increased tremendously due to her huge caseload and that the Grievant's health has rapidly declined. She testified that the Grievant has worked on weekends and frequently eats lunch in the office.

In rebuttal, Agency witness Chief Probation Officer testified that three of the six specialized caseload officers are older than the Chief Probation Officer. In Grievant's form A (Agency Tab 3) the Grievant sets out that her dismissal was "unfairly given, was unjustified, and that I was singled out by my Agency Head and Supervisor due to my age, my long career with the State, and due to my sexual orientation." She alleges that prior to the Chief Probation Officer taking office she had never received any yearly performance evaluation rating that was "below contributor"; that he has forced her to try and manage the highest caseload in the entire district; and that she has been singled out as the only district probation officer whose entire caseload has been reviewed multiple times while other probation officers' caseloads have been reviewed only the number of times mandated by departmental policy. The Grievant also states that even though she had seniority in the district and an excessive amount of skills through training and experience, the Chief Probation Officer did not select her for a specialty caseload but instead selected officer's who were his close friends and then send them to train for positions for which she was already trained.

In the Grievant's statement (Agency Tab 3) the Grievant goes on to state that the Chief Probation Officer's actions with respect to the specialty caseload management was in violation of 2.05 Equal Employment Opportunity and that his goal was contrary to that set out in the Standards of Conduct (i.e. the goal of the Commonwealth is always for the employee to be a constructive, contributing member of the work force) by telling the Grievant that "the job has changed...and I was no longer an adequate probation officer." The Grievant asserted in her statement that in addition she could not reduce her caseload because he continued to assign her cases with her caseload count being 143 when she was fired from her job on March 14, 2013.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et.

seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints.....

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct to provide appropriate corrective action.

The Virginia Department of Corrections sets out its Standards Of Conduct Operating Procedure 135.1 (Agency Exhibit 10). The Written Notice issued on March 14, 2013 designates the offense as a second Group II offense. Operating Procedure 135.1 indicates at V.C.1. that these include acts and behavior that are more severe in nature and are such that an accumulation of two Group II Offenses normally should warrant removal. Group II offenses includes "failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy." V.C.2.a.

DECISION

The Hearing Officer finds that the Agency proved by a preponderance of the evidence that the Grievant is guilty of the alleged violation, that the nature of the violation warrants a Group II Written Notice, that the Group II Written Notice issued on March 14, 2013 was a second Group II Written Notice and that considering all of the mitigating

circumstances, including those set out at Section IV of the Written Notice (Agency Tab 2), termination of employment was justified.

The Hearing Officer finds that the Grievant's evidence did not demonstrate that the Chief Probation Officer intentionally acted to assure the Grievant's failure to successfully manage her caseload or to successfully take the corrective action required by her supervisors. The Hearing Officer further finds that the Grievant's evidence did not demonstrate that the Chief Probation Officer discriminated on the basis of age or sexual orientation.

APPEAL RIGHTS

A hearing decision must be consistent with law, policy, and the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings). A hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to administrative review by both EDR and the DHRM Director based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or email. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests for administrative review must be provided to the other party, EDR and the Hearing Officer.

Important Note: Requests for administrative review must be in writing and received by the reviewer within fifteen calendar days of the date of the original hearing decision. "Received by" means delivered to, not merely post-marked or placed in the hands of a delivery service.

Requesting Administrative Review:

1. **A challenge that the hearing decision is inconsistent** with state or agency policy is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. The director's authority is limited to ordering the Hearing Officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-371-7401 or emailed.
2. **A challenge that the hearing decision is not in compliance with the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings),** as well as a request to present newly

discovered evidence, is made to EDR . This request must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance. EDR's authority is limited to ordering the Hearing Officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the office of Employment Dispute Resolution, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-786-0111 or emailed.

In response to any requests for administrative review, the opposing party may submit a written challenge (rebuttal) to the appropriate reviewer. If the opposing party chooses to submit a rebuttal, it must be received by the reviewer within ten calendar days of the conclusion of the original fifteen day appeal period. A copy of any such rebuttal must also be provided to the appealing party, EDR, and the Hearing Officer.

Administrative review decisions issued by the Director of DHRM and EDR are final and not appealable. If the DHRM Director or EDR orders the Hearing Officer to reconsider the hearing decision, the Hearing Officer must do so. If request for administrative review have been made to both the DHRM Director and EDR, the Hearing Officer need not reconsider his/her decision, if ordered to do so on remand, until both administrative reviews are issued or otherwise concluded unless otherwise directed by EDR in the interest of procedural efficiency. If requests for administrative review have been made to both the Director of DHRM and EDR, EDR shall generally respond first. Administrative reviews by the Director of DHRM should be issued within thirty calendar days of the conclusion of any other administrative reviews.

Final Hearing Decision. A Hearing Officer's original decision becomes a final hearing decision, with no further possibility of administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the Hearing Officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Once an original hearing decision becomes final, either party may seek review by the Circuit Court on the ground that the final hearing decision is contradictory to law. Neither the Hearing Officer nor the Department of Human Resources Management (or any employee thereof) shall be named as a party in such an appeal.

An employee does not need EDR's approval before filing a notice of appeal. However, an agency must request and receive approval from EDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal. The request for approval to appeal must be received by EDR within 10 calendar days, which means delivered to, not merely postmarked or placed in the hands of

a delivery service. The agency may makes its request by email or fax. The agency must provide a copy of its appeal request to the employee. EDR will provide a response within 10 calendar days of the agency's request.

A notice of appeal must be filed with the Clerk of the Circuit Court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision. At the time of filing, a copy of the notice of appeal must be provided to the other party and EDR. The judicial review procedure shall be as more particularly set out in the Grievance Procedure Manual.

John R. Hooe, III
Hearing Officer