

Issue: Group II Written Notice with Suspension (failure to follow instructions); Hearing Date: 02/07/14; Decision Issued: 02/11/14; Agency: DMBE; AHO: William S. Davidson, Esq.; Case No.10256; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 10256

Hearing Date: February 7, 2014  
Decision Issued: February 11, 2014

**PROCEDURAL HISTORY**

A Group II Written Notice was issued to the Grievant on May 8, 2013, for the following reason:

Failure to follow instructions - As indicated on your weekly report, on April 12, 2013 you reported working on your Short Term Disability Claim from 11:00 am until 3:00 pm. Despite several requests from your supervisor, you failed to follow my instructions regarding completing and submitting a leave slip for this period of time. Neither DHRM Policy No. 4.57 "Virginia Sickness and Disability Program" nor any other DHRM allows for employees to use state work hours to complete a personal short term disability claim.<sup>1</sup>

Pursuant to this Group II Written Notice, the Grievant was suspended for three days.<sup>2</sup> On June 3, 2013, the Grievant timely filed a grievance to challenge the Agency's actions.<sup>3</sup> On January 9, 2014, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On February 7, 2014, a hearing was held at the Agency's location.

**APPEARANCES**

Counsel for Agency  
Counsel for Grievant  
Grievant  
Witnesses

**ISSUE**

Did the Grievant fail to follow supervisor's instructions?

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

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

<sup>3</sup> Agency Exhibit 1, Tab 1, Page 2

## **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.<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**

After reviewing the evidence presented and observing the demeanor of each witness, I make the following findings of fact:

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<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)

The Agency provided me with a notebook containing 21 tabs. Grievant's counsel made objections to Tabs 6, 7, 8, 9, 10, 14, 18, 19 and 20, based on relevancy. I indicated that I would take those objections under advisement and would allow Grievant's counsel to raise them again during the course of the hearing, if any of the documents under those tabs were presented through witnesses by the Agency. No further objection was made by Grievant's counsel and accordingly, the Agency notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided me with a notebook containing 14 tabs. That notebook was accepted in its entirety as Grievant Exhibit 1.

The factual matters in this case are extraordinarily simple. The Grievant, on at least a monthly basis, generates a printed calendar of what he did for the month or what he will be doing for the month. He produced such a calendar for the month of April, 2013.<sup>8</sup> That calendar, which was a product of the Grievant, indicated that on April 12, 2013, the Grievant would be spending four hours working on applying for short-term disability.<sup>9</sup>

The Grievant's immediate supervisor reviewed this calendar after the end of the month of April and noticed this four-hour block of time for completing the short-term disability form. On April 29, 2013, the supervisor sent an email to the Grievant that stated as follows:

On April 12, 2013, from 11:00 AM to 3:00 PM, you indicated on your calendar that you were working on applying for short term disability at the DMBE office. **In accordance with Human Resource Policy**, this activity, applying for short term disability, cannot be performed during your normal work hours. Therefore, please submit to me before close of business tomorrow, April 30, 2013, a leave form for four (4) hours annual leave on April 12, 2013. **Should you have questions, please submit to me by e-mail.**<sup>10</sup> (Emphasis added)

On April 30, 2013, the Grievant responded to his supervisor with an email that stated as follows:

Please send me a copy of this rule so I can verify this rule. After review of the rule, I will be glad to turn in a leave slip.<sup>11</sup>

I find that at this point, the Grievant has merely accepted his supervisor's invitation to submit questions by email. The supervisor's email was not sent until 6:19 p.m., on April 29, 2013. Accordingly, I find that the Grievant's response at 11:26 a.m., on April 30, 2013, is timely and is merely accepting the supervisor's invitation to submit questions by email. Clearly, at this point, there is no "failure to follow a supervisor's instruction."

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<sup>8</sup> Agency Exhibit 1, Tab 11, Page 2

<sup>9</sup> Agency Exhibit 1, Tab 11, Page 2

<sup>10</sup> Agency Exhibit 1, Tab 12, Page 2

<sup>11</sup> Agency Exhibit 1, Tab 12, Page 2

At 12:46 p.m., on May 2, 2013, the Grievant's supervisor responded to the Grievant's email of April 30, 2013, and in his response, he indicated that there was no particular Human Resource Policy that specifically stated that an employee could not use personal time to fill out a short term disability form. However, the supervisor did state, in part, as follows:

...working on short term disability is personal and not associated with your employee work profile (EWP). Please provide me with the appropriate leave form for April 12, 2013, accounting for hours not spent working on activities related to Commonwealth of Virginia, DMBE business.

**Please submit the requested leave form before close of business today.**<sup>12</sup> (Emphasis added)

It is clear that, as of 12:46 p.m., on May 2, 2013, the Grievant's supervisor was directing him to submit a leave form before close of business on that day. The Grievant's response was in an email dated May 2, 2013, at 2:28 p.m., wherein the Grievant stated to his supervisor as follows:

As you stated, there is no rule one way or another, even though you implied there was a rule in your first e-mail. Since there is no specific rule, then management should side with the employee. Since I was asked by management to provide this information, it follows that no slip needs to be turned in.<sup>13</sup>

I find that it is clear that the Grievant made a conscious decision to not comply with his supervisor's instructions to submit a leave form on or before the close of business on May 2, 2013.

The Grievant testified that he went to his supervisor's supervisor on or about May 2, 2013, and requested that she review this matter. He further testified that she indicated that she would and that he thought that everything was held in abeyance until she had an opportunity to review the facts in this matter and get back to the Grievant regarding whether or not he should submit a leave form. I heard from that particular supervisor at the hearing. She categorically denied the Grievant's assertion that he met with her about this matter and/or that she told him to not respond to his immediate supervisor's instructions to file a leave slip. Based upon the demeanor of the witnesses as they testified before me, I find the more credible testimony to be that the Grievant did not have the alleged conversation with this second-line supervisor. It is relevant to note that, in all of the prior steps of this grievance, the Grievant never broached the topic of speaking with the second-line supervisor. This allegation first arose at the hearing before me.

Having found that the Grievant did in fact fail to follow a supervisor's instructions, I will now deal with what I find to be an extraneous issue raised by the Grievant.

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

<sup>13</sup> Agency Exhibit 1, Tab 12, Page 1

On or about May 6, 2013, the Grievant was issued a Due Process Memorandum.<sup>14</sup> That Memorandum states in part as follows:

This confirms our conversation wherein we talked about your using State work hours to apply for personal Short Term Disability. After being instructed to provide a leave slip for this time, on two occasions, April 29, 2013, and also on May 2, 2013, you failed to follow my instructions. **Your failure to comply with my instructions could result in you receiving a Group II written notice** and up to five days of suspension for failure to follow supervisor's instructions...<sup>15</sup> (Emphasis added)

The Grievant interprets this language to mean that his "continuing failure to comply," could result in a Group II Written Notice. I determine that this language clearly addresses his "prior failure to comply." Any other construction of this language would mean that all Grievants could cure any grievance after the fact. That is clearly not the intent of this language.

### **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>16</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 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.

On March 8, 2013, the Grievant received a Group I Written Notice, which is still active and on March 14, 2013, the Grievant received a Written Counseling Statement. It appears to me that the Agency took into consideration length of service, previous performance evaluations and the active Group I Written Notice and the recent Written Counseling Memorandum, when it considered mitigation.<sup>17</sup> I find no reason to mitigate this matter further.

### **DECISION**

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<sup>14</sup> Agency Exhibit 1, Tab 1, Page 6

<sup>15</sup> Agency Exhibit 1, Tab 1, Page 6

<sup>16</sup> Va. Code § 2.2-3005

<sup>17</sup> Agency Exhibit 1, Tab 2, Page 1

For reasons stated herein, I find that the Agency has borne its burden of proof regarding the Group II Written Notice and that suspension of the Grievant for three days 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.

You may request a judicial review if you believe the decision is contradictory to law.<sup>18</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>19</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]

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<sup>18</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>19</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

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William S. Davidson  
Hearing Officer