

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 03/06/14;
Decision Issued: 03/11/14; Agency: DSS; AHO: William S. Davidson, Esq.; Case
No.10274; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10274

Hearing Date: March 6, 2014
Decision Issued: March 11, 2014

PROCEDURAL HISTORY

A Group I Written Notice was issued to the Grievant on October 18, 2013 for Unsatisfactory Performance.¹

Pursuant to this Group I Written Notice, no action was taken against the Grievant and the Written Notice was placed in her personnel file.² On November 17, 2013, the Grievant timely filed a grievance to challenge the Agency's actions.³ On February 5, 2014, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On March 11, 2014, a hearing was held at the Agency's location.

APPEARANCES

Advocate for Agency
Grievant
Witnesses

ISSUE

Did the Grievant exhibit Unsatisfactory Performance?

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

¹ Agency Exhibit 1, Tab 6, Page 1

² Agency Exhibit 1, Tab 6, Page 2

³ Agency Exhibit 1, Tab 7, Pages 3 through 8

⁴ See Va. Code § 2.2-3004(B)

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

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

The Agency provided me with a notebook containing twelve tabs, only nine of which had documents. That notebook was accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant provided me with a notebook containing five tabs. That notebook was accepted in its entirety as Grievant Exhibit 1, without objection.

I heard approximately four hours of testimony from the Grievant, one witness for the Grievant and the Grievant's supervisor, who was the Agency's sole witness. When the Grievant testified, she acknowledged that her work performance was unsatisfactory. I asked the Grievant to please repeat that statement as it obviously went to the heart of the Agency's allegation in its

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)

Group I Written Notice. The Grievant repeated the statement and indicated that her performance had been unsatisfactory.

I questioned the Grievant and asked her what she was seeking through this Grievance procedure. She stated that she would like for all references to, “Failure to Follow Supervisor’s Instructions,” or any similar language be stricken from her Employee Work Profile (“EWP”).

I asked the Agency Advocate if he had any objections to the removal of any language from the Grievant’s current EWP that indicated she failed to follow supervisor’s instructions. He stated that as long as the ultimate findings and conclusions remained in the EWP, he had no objections. I asked the Grievant if this was satisfactory to her and she indicated that it was. I told the Grievant that, with her testimony of acknowledging that her work performance was unsatisfactory, I would uphold the Group I Written Notice.

The Grievant introduced evidence that she felt represented inconsistent treatment,⁸ bullying,⁹ ignoring due process rights¹⁰ and retaliation.¹¹ I find that the evidence regarding inconsistent treatment, bullying, ignoring due process rights and retaliation to be wholly without merit. The Grievant acknowledged that she is working for another state agency and is no longer an employee of this agency before me in this matter. The Grievant acknowledged that she did not complain about any such treatment to any supervisor or to the Human Resources Department within this Agency or to EDR. The Grievant’s only witness, who attempted to buttress these arguments, testified that she did not raise the issues with anyone in management, Human Resources or EDR. That witness testified that she never received any type of Written Notice or any type of written performance evaluation.

While it is certainly possible that the manager in question in this matter used a tone of voice that this Grievant found unsatisfactory, I find no evidence that he bullied this Grievant or her witness and I also find no evidence of any due process right issue and I find no evidence of inconsistent treatment. The Grievant argued that fellow co-workers could use different forms than she was allowed to use but she was unable to get past the fact that the co-workers’ forms did not prevent them from performing their job function in a satisfactory way. It is clear to me that the Grievant’s manager was attempting to get her to use forms that he felt would allow her to complete her job performance in a satisfactory manner.

The only allegation as to retaliation was the time differential between when the due process letter was given to the Grievant and when she actually received her Written Notice. I find that there is no retaliation issue where a Written Notice is actually issued after a due process letter has been presented to a Grievant.

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 Grievant Exhibit 1, Tab 2

⁹ Grievant Exhibit 1, Tab 3

¹⁰ Grievant Exhibit 1, Tab 4

¹¹ Grievant Exhibit 1, Tab 5

accordance with rules established by the Department of Employment Dispute Resolution...”¹² 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.

DECISION

For reasons stated herein, I find that the Agency has borne its burden of proof regarding the Group I Written Notice. Accordingly, and pursuant to verbal agreement from both parties at the hearing, the Agency will remove any language from the Grievant’s current EWP that indicated she failed to follow supervisor’s instructions, but language regarding the ultimate findings and conclusions will remain in the Grievant’s current EWP.

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
101 North 14th Street, 12th Floor
Richmond, VA 23219

¹² Va. Code § 2.2-3005

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.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE
MANAGEMENT DIVISION OF HEARINGS
RECONSIDERATION DECISION OF HEARING OFFICER
In Re: Case No. 10274

Hearing Date: March 6, 2014
Decision Issued: March 11, 2014
Request for Clarification Received: March 25, 2014
Response to Request: March 27, 2014

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review by both the Department of Human Resource Management ("DHRM") and the Office of Employee Dispute Resolution ("EDR"). A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A copy of all requests must be provided to the other party and to the DHRM Director. I have received a request from the Grievant to clarify a term used in my original Decision.

OPINION

In my original Decision, I made reference to the Grievant's Employee Work Profile ("EWP").¹ The Grievant has requested that this reference be clarified to reflect that the form(s) in question be referenced as the "Employee Evaluation." In reviewing the exhibits presented to me in this matter, it appears that the full description of the documents referenced were either: Employee Work Profile Evaluation Form or Interim Evaluation Form.

Accordingly, in each instance where EWP is referenced, I direct that the parties recognize that the full title of the form referenced was the Employee Work Profile Evaluation Form or Interim Evaluation Form.

DECISION

I conclude that "Employee Work Profile Evaluation Form" or "Interim Evaluation Form," should be substituted in any and all instances where "EWP" is referenced in the original Decision, dated March 11, 2014.

¹ Decision dated March 11, 2014, Pages 3 and 4

APPEAL RIGHTS

Pursuant to Section 7.2(d) of the Grievance Procedure Manual , the Hearing Officer's original Decision becomes a final hearing Decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the Hearing Officer has issued his remanded Decision.

JUDICIAL REVIEW OF FINAL HEARING DECISION

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.² Any such appeal must be based on the assertion that the final hearing Decision is contradictory to law.³



William S. Davidson
Hearing Officer

² 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).

³ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).