

Issue: Group III Written Notice with Termination (failure to report inmate offering money); Hearing Date: 04/11/14; Decision Issued: 04/24/14; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 10293; Outcome: Partial Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10293

Hearing Date: April 11, 2014
Decision Issued: April 24, 2014

PROCEDURAL HISTORY

A Group III Written Notice was issued to the Grievant on January 15, 2014, for:

[Grievant] admitted not reporting an offender offering money for staff to bring in tobacco, using the word “snitch” in discussing with another offender which led to two assaults on offenders and failure to report another officer was offered money to bring in contraband.¹

Pursuant to this Group III Written Notice, the Grievant was terminated on January 15, 2014.² On February 3, 2014, the Grievant timely filed a grievance to challenge the Agency’s actions.³ On February 26, 2014, the Office of Employment Dispute Resolution (“EDR”) assigned this Appeal to a Hearing Officer. On April 11, 2014, a hearing was held at the Agency’s location.

APPEARANCES

Advocate for Agency
Advocate for Grievant
Agency Party
Grievant
Witnesses

ISSUE

1. Did the Grievant admit to not reporting an offender offering money for staff to bring in contraband?
2. Did the Grievant use the word “snitch” in discussions with another offender, leading to two assaults on offenders?
3. Did the Grievant fail to report another officer was offered money to bring in contraband?

¹ Agency Exhibit 1, Tab 1, Page 1

² Agency Exhibit 1, Tab 1, Page 1

³ 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.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, I make the following findings of fact:

The Agency provided me with a notebook containing five tabs, but during the course of the hearing, a separate Tab 6 was created and consisted of four pages and three documents. The document that was held at Tab 2 was deleted from evidence, as it was not the correct evidence. That notebook, as amended, was accepted in its entirety as Agency Exhibit 1, without objection.

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

The Group III Written Notice in this matter set forth an offense date of November 18, 2013. Regarding what took place on November 18, 2013, an Internal Incident Report (“Report”) was filed by Lieutenant A.⁸ The Report indicated that the Grievant and Offender X had a verbal confrontation. The Report also indicated that Offender X alleged that the Grievant labeled him as a “snitch,” for the Intelligence Unit. During her testimony, the Grievant indicated that Offender X was angry with her because she, while working in the Control Booth, closed a door while he was walking through it. The Grievant indicated that this was not done intentionally, that the Control Panel was not working properly, thus causing the door to close when it should not have. In her oral testimony, the Grievant denied making such a statement and informing the Intelligence Unit that Offender X was a “snitch.” The Report went on to indicate that the Grievant admitted making a similar statement, but regarding another offender. The Report further indicated that the entire matter was being referred to the Intelligence Unit for further investigation. This is the only thing that took place on the offense date that is set forth in the Written Notice.

Had the Grievant’s Advocate objected to testimony regarding other events that took place on other dates, I would have sustained those objections. However, there was no such objection. It appears from all of the documentary evidence filed with me and from all of the testimony elicited at the hearing, that the Intelligence Unit did nothing regarding a further investigation of the alleged incident of November 18, 2013. If the Intelligence Unit did do anything, they failed to memorialize any of it in writing. The Agency produced nothing in writing to indicate that the Intelligence Unit had performed an investigation and/or decided that there was not enough evidence to move forward. Indeed the Agency produced not a single piece of paper indicating that the Intelligence Unit had done anything and it is my experience that the Intelligence Unit always keeps copious notes regarding interviews as it moves through an investigation. Because there was no report from the Intelligence Unit, I will infer that it found no wrongful conduct or culpability by the Grievant regarding the incident that took place on November 18, 2013.

The Warden who signed the Written Notice testified before me and indicated that the use of the word “snitch,” is an extremely important matter as it is such a flammable term. However, he testified that, while being aware of the allegation made against this Grievant for using that term on or about November 18, 2013, he did nothing until he received a document titled Enemy Summary Form.⁹

⁸ Agency Exhibit 1, Tab 6, Page 1

⁹ Agency Exhibit 1, Tab 6, Page 4

On December 26, 2013, Offender Y submitted such a form requesting that the Grievant be added to his Enemy List, stating that she was “spreading rumors that I work for investigators.” Only at this point, approximately 38 days after the first alleged use of the word “snitch,” did the Warden deem that something required his personal attention.

On January 8, 2014, the Warden wrote to the Grievant and placed her on pre-disciplinary leave.¹⁰ This Notice apparently followed a meeting between the Warden and the Grievant on that same date.

The Grievant produced a document titled, Potential Disciplinary Action Notice, dated January 8, 2014, and that document appears to have been prepared by the Warden.¹¹ The Agency did not object to the veracity of this document.

The Warden’s summary of this January 8, 2014, meeting resulted in four potential areas of discipline. The first involves the alleged statement to Offender Y. The Warden further states that the Grievant told Officer Z to report the alleged incident and that the Grievant made no report herself.

I heard from Officer Z and he testified that on a date, (not November 18, 2013), Offender Y did in fact show him a \$100 bill. He left that offender and went to the Control Booth and related this incident to the Grievant. He testified that the Grievant told him that he had to report that to the Supervisor. The Supervisor for both Officer Z and the Grievant was Sergeant R. Officer Z testified that he did not make a report to his Supervisor either in writing or verbally. The Grievant testified that she did in fact tell Sergeant R of the incident as it was related to her by Officer Z. The Grievant testified that Sergeant R told her that, “If Officer Z did not have the money in hand or hadn’t written it up, that the incident did not occur and he did not want to hear anything else about it.”¹²

Sergeant R testified before me. The entirety of his testimony, when taking into account his demeanor, his body language and his apparent lack of respect for the entire proceeding, fully supports the Grievant’s testimony when she said that this Supervisor simply could not be bothered. The Sergeant acknowledged that he had been told of the incident and simply indicated that he, “could not be bothered.” It is interesting to note that the Sergeant received no punishment whatsoever for this incident.

Officer Z was in a probationary status at that point as a new employee. He received a Group II Written Notice with no suspension and no other punishment other than the issuance of the Group II Written Notice. Regarding the Grievant, the Agency is using this event as a justification of an issuance of a Group III Written Notice with termination. The Officer who was actually a party to the incident did not report it, the Grievant did report it, and the Supervisor to whom she reported it did nothing and the Agency did nothing to that Supervisor. For some unexplained reason, the Agency deems that the employee who was not a party to the incident, and who did do what she should have done, should be terminated while her Supervisor has no

¹⁰ Grievant Exhibit 1, Tab 2, Page 1

¹¹ Grievant Exhibit 1, Tab 2, Pages 2-3

¹² Grievant Exhibit 1, Tab 4, Page 1

punishment and the employee who was party to the incident and who failed to report it should only receive a Group II Written Notice.

When I compare the Potential Disciplinary Action Notice of January 8, 2014, the Disciplinary Action Notice of January 15, 2014, the testimony of the Warden and the testimony of the Grievant, I find that the most likely, truthful position is that the Grievant did in fact have Offender Y ask her if she wanted to make some money by bringing him some tobacco, that she did not report this statement to anyone in supervision, and that at some point she used the word “snitch,” when talking to an offender. I find that the Agency did not deem the use of the word “snitch” to be a significant problem when it was alleged to have been used in the Report. It seems to have only become a significant matter when the Enemy Summary Form was filed. There is an allegation that an inmate was assaulted and the Warden so testified.

During the course of arriving at a hearing date, I twice ordered the Agency to produce all documentation regarding Investigative Reports, Incident Reports, witness statements, interview statements, notes and any other documentation considered in the termination of this Grievant. No reports of an offender being assaulted were presented at the hearing by the Agency. There was only the bald verbal statement by the Warden that two offenders were assaulted. Clearly, when an offender is assaulted, the Agency produces documentation of that assault and clearly none was presented before me. Accordingly, I have no evidence that an assault of any offender took place.

I find that the Grievant admits to the use of the word, “snitch,” and that the Grievant knew or should have known that the use of such a word is extraordinarily volatile in this setting. The Agency directed me to Operating Procedure 135.1(V)(D)(2)(P), which states as follows:

Refusal to obey instructions that could result in a weakening of security.

I find that this Grievant did not violate any instructions that would fit within this category. I find that the Grievant used a term that she should have known was volatile in its use and, accordingly, the more appropriate Written Notice is a Group II Written Notice.

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...”¹³ 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

¹³ 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.

DECISION

For reasons stated herein, I find that the Agency has not borne its burden of proof regarding the issuance of the Group III Written Notice. I find that the Grievant should instead be issued a Group II Written Notice and be reinstated to the same position or an equivalent position with no suspension. I award the Grievant full back pay, from which interim earnings must be deducted, and a restoration of full benefits and seniority.

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

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.¹⁴ 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.¹⁵

[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

¹⁴An 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).

¹⁵Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.