

Issue: Termination due to continued poor performance; Hearing Date: 05/22/14; Decision Issued: 05/23/14; Agency: VEC; AHO: William S. Davidson, Esq.; Case No. 10337; Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10337

Hearing Date: May 22, 2014
Decision Issued: May 23, 2014

PROCEDURAL HISTORY

On or about January 28, 2014, the Grievant was issued a Termination Letter which stated in part as follows:

As we have discussed you have not passed your performance plan that was discussed with you on October 23, 2013. We have considered a transfer or a demotion in accordance with the state performance policy. These are not an option since we have no other positions available. Effective today you are being terminated for failure to meet your performance expectations and for unsatisfactory results from the most recent Danville Trade Act Review...¹

Pursuant to this Termination Letter, the Grievant was terminated on January 28, 2014.² The Grievant timely filed a grievance to challenge the Agency's actions.³ On April 22, 2014, the this appeal was assigned to a Hearing Officer. On May 22, 2014, a hearing was held at the Agency's location.

APPEARANCES

Counsel for Agency
Party Representative for Agency
Witness

ISSUE

Did the Grievant fail to adequately complete the Performance Improvement Plan ("PIP") dated October 23, 2013?

¹ Agency Exhibit 1, Tab 25, Page 1

² Agency Exhibit 1, Tab 25, Page 1

³ Agency Exhibit 1, Tab 1, Page 1

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. 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 the witness, I make the following findings of fact:

The Agency provided me with a notebook containing 29 tabs and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant did not file any documentary evidence with me, nor did the Grievant attend the hearing in this matter.

On or about October 23, 2013, the Grievant was issued her Employee Work Profile Performance Evaluation (“EWP”).⁸ Pursuant to this EWP, the Grievant was rated “Below Contributor.”⁹

Subsequently, the Grievant entered into a Performance Management Improvement Needed/Substandard Performance Notification Plan (“PIP”).¹⁰ The PIP set forth the specific areas in which the Grievant needed to improve her performance.

I heard testimony from the Grievant’s supervisor. His testimony corroborated his letter to the Grievant of January 28, 2014, wherein he notified the Grievant that she had not improved her performance since her “Below Contributor” EWP of October, 2013. He testified that the same issues that led to the “Below Contributor” finding on the EWP continued during and after the 90-day PIP.

Department of Human Resource Management (“DHRM”) Policy 1.40-Performance Planning and Evaluation is relevant where an employee receives a “Below Contributor” rating. This Policy states in part that:

An employee who receives a rating of “Below Contributor” must be re-evaluated and have a performance re-evaluation plan developed...¹¹

This Policy further states in part that:

...If Performance Does Not Improve: If the employee receives a re-evaluation rating of “Below Contributor,” the supervisor shall demote, reassign, or terminate the employee by the end of the three (3)-month re-evaluation period...¹²

⁸ Agency Exhibit 1, Tab 24, Pages 2-6

⁹ Agency Exhibit 1, Tab 24, Page 5

¹⁰ Agency Exhibit 1, Tab 24, Page 1

¹¹ Agency Exhibit 1, Tab 3, Page 10

¹² Agency Exhibit 1, Tab 3, Page 11

...Terminate: If the agency determines that there are no alternatives to demote, reassign, or reduce the employee of duties, termination based on the unsatisfactory re-evaluation is the proper action. The employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3)-month re-evaluation period.¹³

Pursuant to the documentary evidence and oral evidence introduced by the Agency before me, I find that the Agency has properly complied with the requirements of Policy 1.40. The Agency found that the Grievant did not improve in her performance and there was not a viable transfer or demotion available to her and, accordingly, she was terminated in compliance with Policy 1.40.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the Agency disciplinary action.” 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

I find that the Agency has borne its burden of proof in this matter and that termination was appropriate. The Grievant did not meet the expectations of her PIP, in that her work performance remained inadequate and unsatisfactory.

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:

¹³ Agency Exhibit 1, Tab 3, Page 11

Director of the Department of Human Resource Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

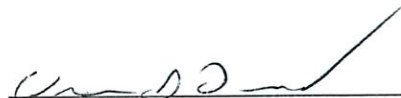
2. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. You may fax your request to 804-786-1606, 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.