

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 07/25/14; Decision Issued: 07/26/14; Agency: DRPT; AHO: William S. Davidson, Esq.; Case No. 10109; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 08/09/13; EDR Ruling No. 2014-3681 issued 09/13/13; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 09/27/13; DHRM Ruling issued 10/03/13; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10109

Hearing Date: July 25, 2013
Decision Issued: June 26, 2013

PROCEDURAL HISTORY

A Group I Written Notice was issued to the Grievant on March 1, 2013, for:

During the time period, [Grievant] was either late to work, left the work site early or did not report to work at all and failed to submit leave slips for a total of 2.5 hours sick leave and 24 hours annual leave.¹

Pursuant to the Group I Written Notice, the Grievant received no discipline other than the entry of the Written Notice in his file.² On March 29, 2013, the Grievant timely filed a grievance to challenge the Agency's actions.³ On June 17, 2013, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On July 25, 2013, a hearing was held at the Agency's location.

APPEARANCES

Agency Advocate
Agency Party
Grievant
Witnesses

ISSUE

Did the Grievant fail to submit leave slips for sick leave and for annual leave?

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

¹ Agency Exhibit 1, Tab 2, Page 1

² Agency Exhibit 1, Tab 2, Page 1

³ Agency Exhibit 1, Tab 1, Page 1

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

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Agency provided the Hearing Officer with a notebook containing ten (10) tabs. That notebook was accepted in its entirety, without objection, as Agency Exhibit 1. During the course of the hearing, Page 12 was added to Tab 7, without objection.

The Grievant provided the Hearing Officer with a notebook containing eleven (11) tabs. That notebook was accepted in its entirety, without objection, as Grievant Exhibit 1.

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)

In October of 2012, the Agency commenced an internal control process to audit the internal leave reporting of its employees. At first, a random set of five (5) employees were audited to see if they were properly documenting sick leave, annual leave, and any other types of leave such as leaving the workplace early or arriving at the workplace late. Pursuant to this sample set of employees, a decision was made by the Agency to do a review of the entire workforce of this Agency which consists of approximately forty-one (41) people. Essentially, the audit was to determine if the Agency had, within its possession, accurately completed Leave Activity Reporting forms to justify an employee's various types of leaves. A sample of this form is found at Agency Exhibit 1, Tab 7, Page 12.

The original Agency-wide audit was for a period of forty-five (45) days. It was determined that all employees who, during that forty-five (45) day window, had more than one (1) day in question because of questionable or no documentation, would have an additional ninety (90) days audited. The Agency then decided that anyone who had more than ten (10) days in question after the additional ninety (90) days of audit (or a total of 135 days), would then be subject to a full one-year audit. The Grievant fell within the latter category and was audited for an entire year.

Subject to this one-year audit, on February 19, 2013, the Grievant was hand-delivered a Due Process letter, indicating seven (7) days, which represented 26.5 hours, of questionable documentation.⁸

On February 21, 2013, the Grievant filed a written response to his Due Process letter.⁹ In that letter, the Grievant stated in part as follows:

...I realize the importance of tracking leave time. For the instances I unknowingly failed to submit leave slips, or did not verify their entry into the system, I am both embarrassed and sorry. I am disappointed in myself for not tracking my time more carefully.¹⁰

Accordingly, there is no dispute that the Grievant did not file with the Agency the appropriate Leave Activity Reporting form(s). The Grievant offered no Policy that allowed him to not file such documentation. However, the Grievant's immediate supervisor testified on behalf of the Agency. His testimony indicated that the Grievant placed on the Grievant's electronic calendar all of the various leaves that he would be taking or requesting and that such requests simultaneously appeared on the Supervisor's electronic calendar. The Supervisor then informed the Grievant that he could take such leave. Accordingly, the Grievant's Supervisor was always aware when the Grievant would or would not be at work. The failure in this matter, was for the Grievant to follow up and complete the appropriate written form and submit that form to the appropriate entities that kept the various employees' leave times for this Agency.

⁸ Agency Exhibit 1, Tab 5, Pages 1 and 2

⁹ Agency Exhibit 1, Tab 6, Pages 1 and 2

¹⁰ Agency Exhibit 1, Tab 6, Page 1

The Grievant, quite correctly, points out that Policy 1.60, Standards of Conduct, states that:

...It is the intent of this policy that agencies follow a course of progressive discipline...¹¹

The Grievant argued that counseling should have been the first choice in this matter rather than a Written Notice. However, Policy 1.60(B)(1)

...Counseling is *typically* the first level of corrective action but is not a required precursor to the issuance of Written Notices...¹²

Through the testimony of Agency witnesses and the record, it is clear that the Agency deemed that there were multiple individual offenses of failing to file the proper leave notices. The Agency took the position that it mitigated multiple individual Group I Written Notices to a single Group I Written Notice. Indeed, as the Agency set forth in the Written Notice, they could have issued multiple Group I Written Notices, which would then have resulted in a possible suspension with loss of pay.¹³

While the Hearing Officer may have deemed counseling the more appropriate first step in this matter, the Hearing Officer will not interpose himself into management's role to make that determination. It is clear that the Grievant did not file the appropriate Leave Activity Reporting forms. It is clear that the Agency took the quality and caliber of his work into consideration in mitigating the totality of this offense to a single Group I Written Notice. It is equally clear that the Grievant in no way intended nor did he defraud this Agency in any way. Indeed, his immediate Supervisor was aware of all times when this Grievant was not going to be at work.

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..."¹⁴ 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

¹¹ Agency Exhibit 1, Tab 10, Page 1

¹² Agency Exhibit 1, Tab 10, Page 6

¹³ Agency Exhibit 1, Tab 2, Page 1

¹⁴ Va. Code § 2.2-3005

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.

The Agency clearly considered mitigation in this matter.¹⁵

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof in this matter and that the issuance of the Group I Written Notice to the Grievant 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 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.

¹⁵ Agency Exhibit 1, Tab 2, Page 1

You may request a judicial review if you believe the decision is contradictory to law.¹⁶ 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.¹⁷

[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

¹⁶An 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).

¹⁷Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.