

Issue: Group III Written Notice with Termination (violation of drug/alcohol policy);
Hearing Date: 07/03/14; Decision Issued: 07/03/14; Agency: DOC; AHO: William
S. Davidson, Esq.; Case No. 10382; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10382

Hearing Date: July 3, 2014
Decision Issued: July 3, 2014

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on May 5, 2014, for:

Failure to submit to a strip search under circumstances of reasonable suspicion.¹

Pursuant to this Written Notice, the Grievant was terminated on May 5, 2014.² The Grievant timely filed a grievance to challenge the Agency's actions on May 9, 2014.³ On June 4, 2014, this appeal was assigned to a Hearing Officer. A hearing was held at the Agency's location on July 3, 2014.

APPEARANCES

Advocate for Agency
Party Representative for Agency
Witness
**Grievant did not appear

ISSUE

Did the Grievant fail to submit to a strip search under the circumstances of reasonable suspicion?

¹ Agency Exhibit 1, Tab 1, Pages 1-2

² Agency Exhibit 1, Tab 1, Page 1

³ Agency Exhibit 1, Tab 2, 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

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 ten tabs and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant provided me with no documentary evidence.

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)

On May 5, 2014, prior to commencement of the Grievant's shift, muster was held. During muster a drug canine alerted on the Grievant.⁸ The Grievant was separated from the remaining persons present at the muster and the Warden took the Grievant to the Warden's office. At the Warden's office, the Warden informed the Grievant that there was probable cause, based on the canine alert, to perform a strip search. Paperwork was prepared for a body cavity search and the Grievant refused to submit for the search. The Grievant, subsequently, admitted at his Due Process Disciplinary Hearing that he should have allowed such a search.⁹

Operating Procedure Policy 445.1, at Section V(A)(1) and (2), states in part as follows:

All facility employees are subject to search as a condition of employment, which shall be explained to each employee during initial orientation.

Facilities shall provide employees with a written statement of its policies and procedures governing searches of employees. Facility Unit Heads may require a written statement from each employee indicating awareness and understanding of this condition.

Employee refusal to submit to a search is considered a Group III offense under Operating Procedure 135.1, Standards of Conduct, and justification for barring the individual from the facility.¹⁰

On November 26, 2012, the Grievant acknowledged receipt of an Orientation Manual for this Agency.¹¹ That Manual states in part as follows:

...All employees entering the prison compound are subject to search of their person and their belongings. Refusal to submit to search may be grounds for disciplinary action.¹²

Accordingly, I find that the canine alerting on the Grievant created a reasonable suspicion regarding drugs and the Grievant's refusal to consent to either a strip search or a cavity search violated Agency Policy.

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

⁸ Agency Exhibit 1, Tab 1, Page 2

⁹ Grievant Exhibit 1, Tab 5, Page 1

¹⁰ Agency Exhibit 1, Tab 6, Page 4

¹¹ Agency Exhibit 1, Tab 8, Pages 1-4

¹² Agency Exhibit 1, Tab 8, Page 2

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 the issuance of a Group III Written Notice with termination 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.

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.