

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 09/17/14;
Decision Issued: 09/22/14; Agency: DBHDS; AHO: William S. Davidson, Esq.;
Case No. 10438; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10438

Hearing Date: September 17, 2014
Decision Issued: September 22, 2014

PROCEDURAL HISTORY

The Grievant was issued a Group I Written Notice on March 17, 2014, for:

Disruptive behavior from remarks made about harming employers.

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Pursuant to this Written Notice, there was no action taken by the Agency other than placing the Written Notice in the employee's personnel file. The Grievant timely filed a grievance to challenge the Agency's actions on April 8, 2014. ² On August 11, 2014, this appeal was assigned to a Hearing Officer. A hearing was held at the Agency's location on September 17, 2014.

APPEARANCES

Advocate for Agency
Grievant
Grievant's wife (assisted the Grievant with taking notes during the hearing)
Witnesses

ISSUE

Was the Grievant's behavior disruptive?

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 B, Page 19

² Agency Exhibit 1, Tab B, Page 1

reserved the exclusive right to manage the affairs and operations of state government.³ 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.⁴ However, proof must go beyond conjecture.⁵ In other words, there must be more than a possibility or a mere speculation.⁶

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 tabs A-H. There was an objection to Tab D, Sections 1-4, based on the fact that the people in these documents were not present at the hearing. There was also an objection to Tab H. I sustained these objections. Except as noted, the Agency's notebook was accepted as Agency Exhibit 1.

The Grievant provided me with a notebook containing 4 sections. That notebook was accepted in its entirety as Grievant Exhibit 1, without objection.

The Agency presented testimony through Sergeant A, the author of a Confidential Western State Hospital Security Report.⁷ This investigation did not take place until February 27,

³ See Va. Code § 2.2-3004(B)

⁴ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁵ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁶ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

2014, some 21 days after the incident with which the Grievant was charged.⁸ This witness testified as to the interviews that he had with those who were involved with the incident. In his written report and as he summarized before me, this witness stated as follows:

AB stated that on the morning of Thursday, February 06, 2014, she asked [Grievant] if he had documented some information on a patient that was pertinent to the patient's treatment plan. [Grievant] advised AB that he was busy. AB advised that when he had time he could do it as she was on the milieu taking care of her patient care duties. AB advised when she was finished with her duties, she approached [Grievant] alone in the medication room and in a calm voice, told him, "If you have an issue with me, then just let me know." She then stated that [Grievant] swung open the medication room door and yelled, "You don't know what I have to do in here!" After this, AB stated to him that she was done talking about it, but he continued to yell, and said they needed to talk. At this point, according to AB, CD who was also in the team center, spoke up and said, "Just give her some space." Upon hearing this, [Grievant] said, "Fine, I tried to talk to her." Nothing more was said between the two that day. AB stated that when she returned to work the next day, EF, the ward clerk, advised her that [Grievant] had allegedly made a statement, after AB had left the unit the previous day, saying that he needed to leave work before he got his gun and shot somebody.⁹

The Grievant did not object to Sergeant A's summation, either in his report or as he testified before me, regarding what was clearly hearsay.

Sergeant A testified that, pursuant to these interviews, the workplace had been disrupted for a time, on February 6, 2014.

The Agency had another witness who testified as to phone calls and conversations she had with other employees significantly after the February 6, 2014 incident. I ruled that, what was before me was what took place on February 6, 2014, and I gave exceedingly little credence to hearsay conversations regarding events that took place after that date.

The Grievant did not offer oral testimony before me at the hearing. However, the Grievant's documentary evidence supports the Agency's evidence regarding the concept that the Grievant was very upset at work on February 6, 2014, and certainly made some statements that, in hindsight, he would have preferred to not make.¹⁰

Hospital Instruction Number 3272, defines Disruptive Behavior as:

...a pattern of behavior that impedes the sharing of information or the collaboration required to implement or maintain the clinical, support or

⁷ Agency Exhibit 1, Tab D, Pages 1-5

⁸ Agency Exhibit 1, Tab D, Page 2

⁹ Agency Exhibit 1, Tab D, Page 2

¹⁰ Grievant Exhibit 1, Tab 1, Page 4

administrative processes required for the safe and effective treatment of individuals and operational integrity of the hospital... ¹¹

Based on the testimony of Sergeant A, and the Grievant's documentary evidence, I find that the Grievant did, on February 6, 2014, exhibit disruptive behavior.

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.

The Agency, "due to the indirect nature of his remarks, his supervisor denying his request to leave twice before he said something he would regret, and his length of service and work history, ¹² mitigated the original Group III Written Notice ¹³ to a Group I Written Notice.

DECISION

For reasons stated herein, I find that the Agency has borne its burden of proof in this matter and that the issuance of the Group I Written Notice 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:

¹¹ Agency Exhibit 1, Tab C, Page 1

¹² Agency Exhibit 1, Tab B, Page 19

¹³ Agency Exhibit 1, Tab B, Page 18

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.