

Issue: Group II Written Notice (unsatisfactory performance, failure to follow instructions, failure to work OT as required); Hearing Date: 07/19/19; Decision Issued: 07/31/19; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 11362; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 11362

Hearing Date: July 19, 2019  
Decision Issued: July 31, 2019

**PROCEDURAL HISTORY**

On January 17, 2019, the Grievant was issued a Group II Written Notice for:

On 9/25/18 you were advised to report to [Facility 2]. You stated and wrote a report that indicated you were “not going because of family personal reasons”, Working at [Facility 2] was considered as a draft. Your failure to follow supervisors instructions weakened the security of [Facility 2]. This action is deemed as unsatisfactory work performance. <sup>1</sup>

On February 25, 2019, the Grievant timely filed a grievance challenging the Agency’s actions. <sup>2</sup> On May 24, 2019, the grievance was assigned to a Hearing Officer. A hearing was held in this matter on July 19, 2019, at the Agency’s location.

**APPEARANCES**

Legal Advocate for Agency  
Grievant  
Witnesses

**ISSUES**

Did the Grievant fail to follow supervisor’s instructions or applicable written policy?

**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. <sup>3</sup> Implicit in the Hearing Officer’s statutory authority is the ability to independently determine whether the

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<sup>1</sup> Agency Exhibit 1, Tab 1, Page 1

<sup>2</sup> Agency Exhibit 1, Tab 2, Page 1

<sup>3</sup> See Va. Code § 2.2-3004(B)

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 witnesses, I make the following findings of fact:

The Agency provided me with a notebook containing nine tabs. With the exception of Tab 5, Page 1, where the Grievant objected to a name on the document at that page, the Agency notebook was accepted in its entirety, as Agency Exhibit 1, without objection. The dispute over the name was not relevant to my Finding.

The Grievant provided me with no documentary evidence. The Grievant relied upon the documentary evidence contained in Agency Exhibit 1.

The Agency presented two witnesses in this matter. The first witness was the Grievant's supervisor ("AB") and was responsible for filling the draft need of another location of the Agency ("Location 1"). AB testified that because of a shortage of staff, Location 1 was in a critical position and was in need of staff. There was uncontradicted evidence that employees of this Agency acknowledged that they may be drafted to work at another location, such as

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

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

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

Location 1, when that location is suffering a critical staffing issue. AB testified that after approximately four other employees, who were junior in seniority to the Grievant, refused their draft call, that he told the Grievant that he was next to be drafted. AB further testified that the Grievant stated that because of his family situation, he would not be able to honor the draft. AB testified that he told the Grievant to go home and consider his position and they would discuss the matter the following day. On the following day, the Grievant continued to take the position that because of his family situation he was not able to honor the draft. AB testified that he first notified the Grievant of his draft status on Tuesday, September 25, 2018, and indicated that he would need to report to Location 1, on Monday, October 1, 2018. When given an opportunity to question this witness, the Grievant indicated that he agreed fully with AB's testimony with the possible exception that the Grievant understood that he would have to report the very next day, September 26, 2018.

The Agency's second and final witness ("CD") was the Superintendent of the Grievant's home location. She testified that Location 1 was in a critical staffing shortage which was impacting life, health and safety of the Agency's clients. She further indicated that there had been less senior employees than the Grievant who had refused to be drafted. She testified that all of them received the same Group II Written Notice as the Grievant.

On October 25, 2018, CD provided the Grievant with a letter that was a Notification of Due Process. That letter quite succinctly set forth all of the relevant facts that were presented to me at the hearing. The Grievant, because of less senior employees refusing the draft before his, was moved up on the draft schedule to an earlier date. The Grievant was told that he would need to report, he was given time to consider his refusal to report, and he continued to refuse the draft report order. This refusal clearly represented a failure to follow supervisor's instructions.

The Grievant testified on his own behalf and offered no contradictory testimony to the two Agency witnesses other than he thought he needed to report with only a 24 hour notice. None of the evidence presented supported this claim by the Grievant. It is instructive that the did not tell anyone at the time that he was ordered to report, pursuant to the draft, or at least could not recall telling anyone that he had a 10-year old at home and was the sole parent responsible for that child. The Grievant further testified that he did not remember or recall asking for more time to make arrangements for his child.

Other than the receipt of the Group II Written Notice and it becoming a part of his record, the Grievant did not receive any further punishment.

### **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.

Based on my findings, I find no reason to address the issue of mitigation in this matter.

### **DECISION**

For reasons stated herein, I find that the Agency has borne its burden of proof, and that the issuance of the Group II Written Notice was proper.

### **APPEAL RIGHTS**

You may request an administrative review by EEDR within **15 calendar days from the date the decision was issued. Your request must be in writing and must be received by EEDR within 15 calendar days of the date the decision was issued.**

Please address your request to:

Office of Equal Employment and Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. 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.<sup>[1]</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.

explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

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William S. Davidson  
Hearing Officer