

Issues: Group II Written Notice (unsatisfactory performance and failure to follow instructions), and Termination (due to accumulation); Hearing Date: 08/05/16; Decision Issued: 08/10/16; Agency: VDH; AHO: William S. Davidson, Esq.; Case No. 10817; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 10817

Hearing Date: August 5, 2016  
Decision Issued: August 10, 2016

**PROCEDURAL HISTORY**

On March 24, 2016, the Grievant was issued a Group II Written Notice, which stated in part as follows:

Since November 3, 2015 [Grievant] has received 10 customer complaints in regards to his work performance this performance cycle. On February 9, 2016 [Grievant] was issued a Due Process Memorandum providing him the opportunity to respond to the complaints. Previous counseling memorandums have been issued for the level of customer service provided by [Grievant] during past performance cycles. A Group II Written Notice was issued to [Grievant] on May 1, 2013<sup>1</sup> that is still active until May 1, 2016. A Group I Written Notice was issued to [Grievant] on June 12, 2015<sup>2</sup> that is still active until 2017.<sup>3</sup>

Pursuant to the Written Notice before me and the prior active Written Notices, the Grievant was terminated on March 24, 2016.<sup>4</sup> On April 22, 2016, the Grievant timely filed a grievance to challenge the Agency's actions.<sup>5</sup> On May 9, 2016, this appeal was assigned to me. Due to calendar conflicts with Agency witnesses, I moved the hearing which was originally calendared for June 8, 2016, to August 5, 2016. Accordingly, on August 5, 2016, a hearing was held at this office.

**APPEARANCES**

Attorney for Agency  
Agency Representative  
Witnesses  
Grievant did not appear

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<sup>1</sup> Agency Exhibit 1, Tab 1, Page 13  
<sup>2</sup> Agency Exhibit 1, Tab 1, Page 10  
<sup>3</sup> Agency Exhibit 1, Tab 1, Page 1  
<sup>4</sup> Agency Exhibit 1, Tab 1, Page 1  
<sup>5</sup> Agency Exhibit 1, Tab 2, Page 1

## **ISSUES**

Did the Grievant perform his assigned duties in a way that was unsatisfactory to work performance expectations and did he fail to follow 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>6</sup> 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.<sup>7</sup> However, proof must go beyond conjecture.<sup>8</sup> In other words, there must be more than a possibility or a mere speculation.<sup>9</sup>

### **FINDINGS OF FACT**

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<sup>6</sup> See Va. Code § 2.2-3004(B)

<sup>7</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>8</sup> *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>9</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

The Grievant participated in the prehearing telephone conference to establish the time parameters for this hearing. The Grievant was told during that call and by subsequent email notification the date for filing any documentary evidence. The Grievant filed no documentary evidence. The Grievant was also told the date for advising me of any witnesses he wished for me to compel on his behalf for this hearing. The Grievant provided me with no witness request(s). Finally, the Grievant did not attend the hearing. Accordingly, the only evidence before me was the testimony of Agency witnesses and the documentary evidence contained in Agency Exhibit 1, which consisted of two notebooks. The documentary evidence was introduced without objection and I am bound to accept this evidence as introduced.

Pursuant to the Written Notice before me, the Grievant had both an active Group II and an active Group I Written Notice when the Group II Written Notice, which is before me, was issued. I heard testimony as to the Grievant's rudeness in dealing with Agency customers and his inability to change his performance based on prior notices and prior counseling. I find the documentary evidence presented before me and the testimony of Agency witnesses to be sufficient for the Agency to carry its burden of proof in this matter.

### **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's testimony was that it considered mitigation in this matter and I find no reason to mitigate the Written Notice before me.

### **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 II Written Notice to the Grievant, with termination, was proper.

### **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 14<sup>th</sup> Street, 12<sup>th</sup> 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 14<sup>th</sup> Street, 12<sup>th</sup> 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.<sup>10</sup> 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>11</sup>

[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]

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William S. Davidson  
Hearing Officer

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<sup>10</sup>An 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).

<sup>11</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.