

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 12055

Hearing Date: February 16, 2024
Decision Issued: February 17, 2024

PROCEDURAL HISTORY

On November 21, 2023, Grievant was issued a Group III Written Notice and was terminated on November 21, 2023.¹ On December 5, 2023, Grievant filed a grievance challenging the Agency's actions.² The grievance was assigned to this Hearing Officer on January 2, 2024. A hearing was held on February 16, 2024.

APPEARANCES

Agency Advocate
Agency Representative
Witnesses

ISSUES

Did Grievant fail to follow Agency policy, was her behavior disruptive, did she violate DOC OP 145.3, 135.1 and 110.1?

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.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

¹ Agency Exhibit 1, p.1

² Agency Exhibit 1, p.54

³ See Va. Code § 2.2-3004(B)

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 that 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

At 7:08 PM, February 15, Grievant wrote to the Hearing Officer and requested a general continuance in this matter *"due to recent events with my home flooding. And receiving 200 pages of my fact file just yesterday."* Based on the following, that request was denied.

On January 8, a prehearing conference was held with me, the Grievant, and the Advocate for the Agency (AA). Subsequently, on January 8, I sent a Scheduling letter. The date for filing documentary evidence was January 26. On that date, the Agency filed its documentary evidence electronically with me and the Grievant.

On January 27, at 8:22 AM, I wrote AA, copying Grievant, and stated that the Agency's documentation had not been numerically numbered as I had requested. This email contained a link to the Agency's evidence. At 10:15 AM, the Grievant acknowledged my e-mail to AA. Grievant did not state that she had received nothing from the Agency or that she could not read the link in the email that I sent.

On February 12, Grievant emailed me 3 pictures which appear to be rooms in a house with the following caption: *"kids room, hallway living room 1/29/2024 flood finally happened homeless."* Grievant did not request a continuance at this time.

At 3:15 PM, February 14, Grievant sent me an e-mail stating, *"I was under the impression we were to be exchanging evidence? I haven't received anything."* At 3:47 PM, I responded to Grievant stating that the Agency had *"sent evidence to both you and me on January 26."* I suggested *"she recheck her e-mail."* And I further stated: *"I look forward to seeing both of you at 9:00 AM Friday."* At 6:00 PM, AA reminded me that the hearing was scheduled for 10:00 AM, not 9:00 AM. At 8:58 PM, by email to both parties, I acknowledged my error and restated that the hearing would commence at 10:00 AM. At 8:59 PM, Grievant responded and thanked me for the correction. Grievant did not request a continuance at this time and said nothing further about not having the Agency's evidence.

At 8:13 PM, February 15, I responded to the Grievant's email asking for a continuance. I stated that the request was not timely and that the hearing would take place as scheduled. As an accommodation, I offered her the opportunity to attend the hearing telephonically and asked her to send me the correct phone number if she wished to avail herself of this offer. As of the commencement of the hearing, I

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)

had no further communication from Grievant. I inquired of AA and S to see if they had heard from Grievant. They both indicated they had not received any communication from Grievant.

All email communications with the Grievant were sent to the same address. The Grievant received my email that contained a link to the Agency's evidence. She acknowledged receipt of that email. The Agency used that same address when it sent evidence to Grievant. On February 14, Grievant did not make any request for a continuance. Based on her own email to me, it would appear that flood damage occurred on or before January 29. Grievant filed no documentary evidence, nor did she provide a list of witnesses. I find that the request for a continuance is without merit.

After reviewing the evidence and observing the demeanor of each witness, I make the following findings of fact: Agency submitted a notebook containing pages 1 through 205. It was accepted in its entirety as Agency Exhibit 1. In addition, during the hearing, the Agency offered as an additional exhibit a copy of a Group II Written Notice that was issued to the Grievant on October 6, 2022. It will be made a part of Exhibit 1 and be pages 206, 207 and 208. Four witnesses testified on behalf of the Agency: a Human Resources officer (HR), the Chief of Security (CS), a Watch Commander (WC) and the Superintendent (S).

Several Department of Corrections (DOC) policies are relevant to this matter.

Policy 110.1 (IV)(C)(5), **Hours of Work and Leaves of Absence**, states: *Leaving the worksite during work hours without permission or notification will be considered unauthorized absence or absence without leave and will result in loss of pay and treated as a violation of Operating Procedure 135.1, Standards of Conduct.*⁸

Policy 135.1 (I)(G)(9), **Standards of Conduct** states in part as follows: *create and maintain a healing environment within the DOC by treating coworkers... with respect, courtesy, dignity, and professionalism....*⁹

Policy 135.1 (XIV)(B)(14,15,16), states: *Group III offenses include: (14) Leaving the security post without permission during working hours; (15) Gross negligence on the job that results (or could have resulted) in the escape, death, or serious injury of an inmate/probationer/parolee or the death or serious injury of a state employee; (16) Refusal to obey instructions that could result in a weakening of security.*¹⁰

Policy 145.3 (IV)(A) ...**Workplace Civility** states in part: *It is the responsibility of all employees... to maintain a non-hostile, bias free work environment, and to ensure that employment practices are free from workplace harassment of any kind... bullying... or other inappropriate behavior.*¹¹

On August 16, Grievant filed a complaint regarding her treatment at the Agency. HR was assigned to investigate these matters and filed her report on October 3.¹² While the investigation was taking place, HR notified Grievant to maintain civility with another employee should they meet at work. On September 20, the results were presented to Grievant at a meeting also attended by CS and S. Grievant acknowledged that she greeted this employee, after being reminded about civility, with "Good

⁸ Agency Exhibit 1, p.133

⁹ Agency Exhibit 1, p.151

¹⁰ Agency Exhibit 1, p.161

¹¹ Agency Exhibit 1, p.174

¹² Agency Exhibit 1, pp.5-6

morning dickhead.”¹³ This employee characterized the greeting as “Hello dickhead”¹⁴ and stated that this greeting took place on August 23.

Grievant was on duty September 20, 2023.¹⁵ Her shift was approximately 6:00 PM to 6:00 AM. CS testified that because Grievant was upset with the results of the investigation, he told her to take a 15-minute break to compose herself, before returning to work. Grievant did not return to work from this break. CS stated that Grievant was not given permission to leave. CS also testified that Grievant left her shift without permission on September 24.

WC testified regarding the September 24 absence without permission. Again, the shift was from 6:00 PM to 6:00 AM.¹⁶ At approximately 9:00 PM, Grievant told WC that she needed to meet a maintenance person at her home. WC asked if Grievant was going to return to work and Grievant answered if her mother could give her some money for gas. WC told Grievant that she could not approve her leaving. Grievant left work and did not return for the remainder of the shift.

Both CS and S testified that there normally were only 2 corrections officers present on the shifts that Grievant left without permission. Losing 1 obviously means the Agency is now short 50% of those who are charged with the security and safety of all of those who are incarcerated.

Prior to the issuance of the Written Notice before me, Grievant was issued a Due Process Notification on November 2. She could respond verbally or in writing at a meeting that would take place at 5:40 PM, November 5.¹⁷ S testified that she granted Grievant several extensions of time regarding the Grievant’s response to the Due Process Notification.¹⁸ S testified that Grievant never provided a response.

Grievant has an active Group II Written Notice for failure to follow supervisor’s instructions, leaving the worksite during work hours without permission and violating OP 145.3 lack of civility.¹⁹ In this matter, I find the Grievant left the worksite without permission 2 separate times. By so doing, she put co-workers and those they are in charge of in danger of harm and she failed to follow instructions and/or policy. I find her greeting to a co-worker was not professional. I also note that these actions seem to be a repeat of those that lead to the active Group II Written Notice.

MITIGATION

Va. Code § 2.2-3005(C)(6), authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings (“Rules”), provide that a Hearing Officer is not a super personnel officer. Therefore, in providing any remedy, the Hearing Officer should give the appropriate level of deference to actions by the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency’s discipline was consistent with law and policy, then the Agency’s discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

¹³ Agency Exhibit 1, p.6

¹⁴ Agency Exhibit 1, p.7

¹⁵ Agency Exhibit 1, p.12

¹⁶ Agency Exhibit 1, p.14

¹⁷ Agency Exhibit 1, pp.9-10

¹⁸ Agency Exhibit 1, p.33

¹⁹ Agency Exhibit 1, pp.1,206

Hearing Officers are authorized to make findings of fact as to the material issues of the Case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

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 Grievant has been employed by the Agency, and (5) whether or not Grievant has been a valued employee during the time of his/her employment at the Agency. I find there is no reason for mitigation in this matter.

DECISION

For the reasons stated herein, I find that the Agency has borne its burden of proof in this matter and the issuance of the Group III Written Notice with termination was proper.

APPEAL RIGHTS

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

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or send by e-mail to 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 that 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 where the grievance arose within **30 days** of the date when the decision becomes final.^[1]

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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

William S. Davidson, Hearing Officer

Date: February 17, 2024