

Issue: Formal Performance Counseling Form (violating attendance policy); Hearing
Date: 12/04/03; Decision Issued: 12/05/03; Agency: UVA Health System; AHO:
Carl Wilson Schmidt, Esq.; Case No. 437



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 437

Hearing Date: December 4, 2003
Decision Issued: December 5, 2003

PROCEDURAL HISTORY

On August 28, 2003, Grievant received a Formal Performance Improvement Counseling Form and suspension representing disciplinary action¹ for violating the University's attendance policy. On September 5, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On November 10, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 4, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Witnesses

¹ Employees working for the University of Virginia Medical Center are exempt from the *Virginia Personnel Act*. However, they remain "subject to the provisions of the State Grievance Procedure (§ 2.2-3000 et seq.)." *Va. Code* § 2.2-2905.

ISSUE

Whether Grievant should receive a Formal Performance Improvement Counseling Form for violating the University's attendance policy.

BURDEN OF PROOF

The burden of proof is on the University to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The University of Virginia Medical Center employs Grievant as a Health Unit Coordinator. Several of Grievant's duties include answering the telephone, filing documents, and assisting staff and member of the public. She transferred to this position on April 14, 2003 from another position within the University. No evidence of prior disciplinary action against Grievant was presented at the hearing.

On March 31, 2003, the University issued Grievant a memorandum to summarize discussions regarding the University's attendance standards. Grievant had accrued 4.5 occurrences and she was informally coached.² On June 16, 2003, Grievant received a Formal Performance Improvement Counseling Form indicating she had 5.5 occurrences from April 14, 2003 until June 16, 2003.³ Grievant was scheduled to work on August 22, 2003, but she did not work that day. Because of Grievant's absence, she received on August 28, 2003 a Formal Performance Improvement Counseling Form with a two workday suspension. Grievant filed a grievance challenging that action.

Grievant met with the Administrator as part of her grievance. She informed him that she believed the University was inconsistently applying the attendance policy. The Administrator took Grievant's assertion seriously and began his own investigation. He reviewed "check in and check out" records, spoke with security and other staff, and looked at various employee roles. He concluded that although Grievant's immediate supervisors had consistently applied the attendance policy, other supervisors had not consistently applied the policy. He reorganized portions of his organization by placing

² Agency Exhibit 3.

³ Agency Exhibit 5.

all of the Health Unit Coordinators under one supervisor. He held a meeting with supervisors to review the attendance policy and its application. He established a procedure for quarterly reviews to assure that the attendance policy was being correctly and consistently applied to staff. Regarding Grievant, the Administrator chose to mitigate the disciplinary action against her by reducing the Step 3 Formal Performance Improvement Counseling Form to a Step 2 form without suspension.

CONCLUSIONS OF POLICY

Employee attendance is governed by University of Virginia Medical Center Human Resource Policy 704 which provides a “no fault” attendance policy applicable to all staff. Policy 704 states:

Absences will not be viewed as “excusable” or “inexcusable” as it is difficult, if not impossible, for the supervisor to make that judgment. It is understood that legitimate and unavoidable employee absences will occur. This policy is designed to provide clear guidelines for employees to follow in planning their time off, and to address situations where the frequency of absence exceeds the standard for the Medical Center. Frequent unscheduled absences may limit opportunities for promotion, pay increase, and ultimately, could result in termination of employment.

“Occurrences” are used to measure absenteeism under Policy 704 and to establish the level of disciplinary action. An occurrence is defined as:

An unscheduled absence or no show that is not due to the death of an immediate family member, an approved worker’s compensation injury, or illness, a certified Family Medical Leave absence, or an approved inclement weather absence. Unscheduled absences of more than 30 minutes, but less than half of the employee’s scheduled shift are partial occurrences and will only count as a half of an occurrence.

An employee will receive informal coaching to explore the cause of absenteeism and develop plans to avoid further unscheduled absences, if he or she reaches the fifth occurrence in the first half of the calendar year, the fifth occurrence in the second half of the calendar year or the seventh occurrence during the entire calendar year. The University refers to informal counseling as Step One. An additional occurrence within 60 days following informal coaching will result in formal performance improvement counseling which the University refers to as Step Two. “After receiving a formal performance improvement counseling, the employee is subject to progressive disciplinary action up to and including termination for all occurrences prior to the end of the calendar year or within 90 days following the most recent disciplinary action for

attendance, whichever is later.” Step Three involves a suspension and/or performance warning.⁴ Step Four is termination from employment.

Grievant’s attendance was contrary to the University’s expectations thereby justifying issuance of a Step Three formal Improvement Counseling Form with suspension. In response to Grievant’s request that he review whether the policy was being consistently applied, the Administrator conducted a thorough and objective analysis of the policy’s implementation. He concluded that although Grievant had been treated correctly under the policy, others within the organization has not been treated in accordance with the policy. Based on that conclusion, the Administrator mitigated Grievant’s disciplinary action from a Step 3 with suspension to a Step 2 and removed the suspension. The Administrator’s mitigation was reasonable and appropriate. The Hearing Officer finds there is no basis to further mitigate the disciplinary action.

Grievant contends the disciplinary action against her should be further mitigated because the University continues to fail to apply its attendance policy uniformly. She cites as an example Ms. LT, who has failed to appear to work as scheduled, yet Ms. LT has not been given a performance counseling with suspension. If indeed Ms. LT has a sufficient number of occurrences within the appropriate time period and has not received a Step 3 action against her, Grievant would be correct that the University has not consistently applied its no fault attendance policy. The evidence presented at the hearing, however, is insufficient for the Hearing Officer to conclude that Grievant’s assertion about the disciplinary action taken against Ms. LT is correct. Ms. LT was not called to testify at the hearing. No evidence was presented suggesting Ms. LT’s supervisor knew Ms. LT had a sufficient number of occurrences to warrant a Step Three action yet decided to do nothing against Ms. LT. In short, the evidence is insufficient for the Hearing Officer to conclude that the University intended to apply the policy to Grievant but not to Ms. LT.

Grievant contends the Formal Performance Improvement Counseling Form incorrectly alleges that she failed to properly file and was loud and disrespectful to others. The University has presented sufficient credible evidence to support the conclusion that Grievant was informally coached regarding these concerns and then she repeated the behavior sufficient to warrant a Step Two counseling. In essence, the University added these concerns to the form addressing Grievant’s attendance rather than issuing a separate form. The University has not acted contrary to its Standards of Conduct by doing so.

Grievant contends she was retaliated against by the University. No credible evidence was presented suggesting the University retaliated against Grievant. Grievant did not provide any examples of statements or actions taken by University managers

⁴ A performance warning is “issued to specify a period of time (not to exceed 90 days) during which the employee is expected to improve or correct performance issues and meet *all* performance expectations for their role, or face termination.” See University of Virginia Medical Center Policy 701.

against her for an improper purpose.⁵ Her concern that the University may retaliate against her for filing a grievance is not a sufficient basis to establish any retaliation has actually occurred.

DECISION

For the reasons stated herein, the University's issuance to the Grievant of a Step Two Formal Performance Improvement Counseling Form is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. 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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
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 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing

⁵ Grievant admits the University has correctly calculated the number of occurrences she has accrued.

officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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.⁶

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.