

Issue: Step 4 Formal Performance Improvement Counseling Form with Termination (sleeping during work hours); Hearing Date: 06/06/18; Decision Issued: 06/07/18; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 11207; Outcome: No Relief – Agency Upheld.



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11207**

Hearing Date: June 6, 2018  
Decision Issued: June 7, 2018

**PROCEDURAL HISTORY**

On March 14, 2018, Grievant was issued a Step 4, Formal Performance Improvement Counseling Form for sleeping during work hours.

On April 8, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 1, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On June 6, 2018, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Performance Improvement Counseling Form?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **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 raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 employed Grievant as a Case Manager. She received favorable performance evaluations from the Agency. Grievant had prior disciplinary action. On February 15, 2015, Grievant received a Step 3 Formal Performance Improvement Counseling Form with suspension for sleeping or giving the appearance of sleeping. On August 26, 2016, Grievant received a Step 2, Formal Performance Improvement Counseling Form for unprofessional conduct. On July 26, 2017, Grievant received a Step 3, Formal Performance Improvement Counseling Form with a 90 day Performance Warning for sleeping or giving the appearance of sleeping.

On February 28, 2018, Grievant attended a staff meeting. Approximately 20 employees were in the room seated in rows of tables. Two guest lecturers from another Unit stood at the front of the room and gave a presentation to staff. After the two guests finished speaking for approximately a half hour, another employee spoke for five or ten minutes.

Grievant was seated at a table in the middle of the room. During the staff meeting, Grievant dropped her head forward with her face pointed downward. Her eyes were closed and her body was still. Grievant was sleeping. She repeated this behavior several times during the staff meeting. One of those times lasted for approximately two minutes. When another employee entered the room, she woke up.

## CONCLUSIONS OF POLICY

Policy 701 sets forth the Agency's Standards of Performance for its employees. Progressive performance improvement counseling steps include an information counseling (Step One), formal written performance improvement counseling (Step Two), suspension and/or performance warning (Step Three) and ultimately termination (Step Four). Depending upon the employee's overall work record, serious misconduct issues that may result in termination without prior progressive performance improvement counseling.

Serious misconduct includes sleeping or giving the appearance of sleeping during working hours. On February 28, 2018, Grievant was sleeping during a staff meeting thereby justify the Agency's decision to issue disciplinary action for serious misconduct.

Policy 701 provides, "if another performance issue arises or the employee engages in misconduct within one (1) year from the date of the Performance Warning, immediate termination may result." Grievant received a Performance Warning on July 26, 2017. She engaged in serious misconduct on February 28, 2018 which is within the one year timeframe. The Agency has presented sufficient evidence to support the issuance of a Step 4, Formal Performance Improvement Counseling Form with removal.

Grievant argued that she was not asleep during the meeting. She asserted that she was holding a cell phone under the table and reading information to prepare for an upcoming exam. The Agency presented at least four people who stood within ten to fifteen feet of Grievant and observed Grievant with her head down appearing to be sleeping. Their testimony was credible. One employee leaned to his side to look to see if Grievant was looking at something under the table. She was not looking at her cell phone. Another employee could see the back of Grievant's cell phone as she held it in her lap with the screen towards the floor rather than upwards for Grievant to read.

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management ...."<sup>1</sup> 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, and (3) the

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<sup>1</sup> Va. Code § 2.2-3005.

disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Step 4, Formal Performance Improvement Counseling Form with removal is **upheld**.

## 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>

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer