

Issue: Step 4 Formal Performance Improvement Counseling Form (threatening a co-worker); Hearing Date: 06/07/19; Decision Issued: 06/27/19; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 11339; Outcome: No Relief – Agency Upheld; **Administrative Review Ruling Request received 07/10/19; EDR Ruling No. 2020-4954 issued 07/30/19; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11339

Hearing Date:	June 7, 2019
Decision Issued:	June 27, 2019

PROCEDURAL HISTORY

On March 7, 2019, Grievant was issued a Step 4, Formal Performance Improvement Counseling Form with removal for threatening an employee with physical harm.

On March 8, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 25, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 7, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Formal 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 an LPN at one of its locations. She had been employed by the Agency for approximately seven years. On February 12, 2019, Grievant received a Step 1 Informal Counseling specifying her performance expectations to include "treat co-workers, patients, and their families with courtesy, respect, and consideration."¹

On February 22, 2019, Grievant went to the nursing station and observed Ms. T and Ms. B. Grievant asked aloud who drew the lab for a particular patient. Ms. T said she did it and then asked "Why?" Grievant said she asked because Ms. T did not finish the lab. Ms. T said, "What do you mean?" Grievant replied that the lab orders and labels were still lying on the counter.

Several minutes later, Ms. T went to Grievant's side of the nursing station and stood in the doorway. Ms. T told Grievant, "I know you didn't mean it, but you were rude to me and hurt my feelings." Grievant said aloud, "I'm tired of this bulls—it! Something needs to be done!" Grievant got up from her chair and tossed her phone on the counter.

Manager H and the Office Coordinator were in their shared office.

¹ Agency Exhibit 6.

Grievant went to the shared office. The office door was closed. Grievant knocked on the door and opened it. Grievant exclaimed, "Something has to be done about [Ms. T]. I'm going to slap the hell out of [Ms. T.] I'm tired of her s—t." Grievant's was angry. Her voice was stern. Grievant was "not in control."

Manager H told Grievant that Grievant's comment was inappropriate. Manager H said, "You seem angry, is there something else?" Grievant replied, "Yes, I'm angry about you writing me up two weeks ago."

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.

Gross Misconduct refers to acts or omissions having a severe or profound impact on patient care or business operations. Examples of Gross Misconduct include, but are not limited to, "Threatening a patient, employee, or visitor with physical harm."

On February 22, 2019, Grievant said, I'm going to slap the hell out of [Ms. T.] Slapping another person can cause physical harm. Ms. T was an employee. Grievant's words were a threat of physical harm to an employee thereby justifying the Agency's decision to issue a Step 4 Performance Improvement Counseling Form. Upon the issuance of a Step 4 Performance Improvement Counseling Form, the Agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued she said "something has to be done about [Ms. T] I would really like to slap her." The Agency has presented sufficient evidence to support its conclusion that Grievant said, "I am going to slap the hell out of [Ms. T]."²

Grievant argued that she did not actually intend to slap Ms. T and was actually just expressing her frustration with Ms. T's poor work performance. The Hearing Officer does not believe Grievant would have carried out her threat. Indeed, when she left the office, Grievant did not harm Ms. T. In order to meet its burden of proof, however, the Agency does not need to show that a threat was likely to be implemented or that the target of the threat was in actual danger. The Agency may form its disciplinary action

² Grievant argued that only one Agency witness testified she said "hell". Whether or not she said "hell" does not change the conclusion that she threatened an employee.

based upon the “face value” of the words and demeanor used by an employee to convey a threat.

Grievant argued the Agency could have issued a lesser level of disciplinary action. Although the Agency could have taken a lesser level of disciplinary action and still corrected Grievant’s behavior, the Agency chose to issue a Step 4 Formal Performance Improvement Counseling Form with removal. The Agency has presented sufficient evidence to support its disciplinary decision.

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”³ 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 disciplinary action was free of improper motive.

Grievant argued that the Agency inconsistently applied disciplinary action. Grievant presented evidence that Ms. B said she would kill her boyfriend but did not receive any disciplinary action even though her comments were heard by Agency managers. The evidence showed that Ms. B’s boyfriend was not an employee or patient of the Agency and was not present at the Facility when Ms. B made her threat. The Hearing Officer cannot conclude that the Agency inconsistently disciplined similarly situated employees. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant argued that the Agency retaliated against her because she complained about other employees. Grievant’s evidence was insufficient to support this conclusion. It appears the Agency took disciplinary action because Grievant threatened to harm another employee and not as a pretext for retaliation.

DECISION

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

³ Va. Code § 2.2-3005.

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 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.^[1]

[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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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