

Issue: Step 4 Formal Performance Improvement Counseling Form with Termination (failure to follow supervisor's instructions); Hearing Date: 09/27/18; Decision Issued: 10/01/18; Agency UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 11251; Outcome: No Relief – Agency Upheld; **Administrative Review Ruling Request received 10/15/18; EDR Ruling No. 2019-4801 issued 11/09/18; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11251

Hearing Date: September 27, 2018
Decision Issued: October 1, 2018

PROCEDURAL HISTORY

On June 25, 2018, Grievant was issued a Step 4 Formal Performance Improvement Counseling Form of disciplinary action with removal for failure to follow a supervisor's instructions.

On July 16, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 1, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On September 27, 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 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 employed Grievant as a Transporter. He began working for the Agency in October 2016. Grievant had prior active disciplinary action. He received a Step 2 Formal Counseling on October 17, 2017. Grievant received a Step 3 Performance Warning with a 24 hour suspension on December 21, 2017. He received a Step 3 Performance Warning with a 24 hour suspension on April 27, 2018.

Grievant and other employees in his Unit were expected to "clock in" and "clock out" at either of two Kronos terminals located in the Basement of the Building. They were prohibited from using Kronos terminals located on other floors. Agency managers wanted employees to clock in and clock out in the Basement so that employees could receive their daily assignments.

On May 29, 2018, the Supervisor met with Grievant and instructed Grievant to clock in and clock out using either of the Kronos terminals located in the Basement. Grievant understood the Supervisor's instruction.

On May 30, 2018, Grievant clocked in at 8:37 a.m. using a Kronos terminal located on the Second Floor of the Building. On May 30, 2018, Grievant clocked out at 5:10 p.m. using a Kronos terminal located on the First Floor Lobby. On June 1, 2018, Grievant clocked in at 8:31 a.m. using a Kronos terminal located on the Second Floor of the Building.

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.

A Performance Warning remains a permanent part of an employee's personnel file. The Performance Warning shall document that unsatisfactory progress, or failure to meet all performance and conduct expectations, at any time during the Performance Warning period shall normally result in termination.

Grievant received a Step 3, Formal Performance Improvement Counseling Form with Performance Warning beginning April 27, 2018 through July 26, 2018. He was advised, "All performance expectations for the job must be met during the Performance Warning Period ... Failure to meet all performance expectations during this time frame shall normally result in termination." The Supervisor instructed Grievant to clock in and clock out using the Kronos terminals located in the Basement of the Building. On May 30, 2018 and June 1, 2018, Grievant used terminals located on floors other than the Basement. His actions were contrary to the Supervisor's instructions showing he did not meet all of the performance expectations of his position during the Performance Warning Period. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Step 4 Formal Performance Improvement Counseling with removal.

Grievant asserted that he was being singled out and that he was being watched throughout the day. Grievant did not provide sufficient evidence to support his assertion. Grievant's assertion does not present a sufficient basis to reverse the disciplinary action.

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"¹ 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

¹ Va. Code § 2.2-3005.

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. 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 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]

^[1] 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

Carl Wilson Schmidt, Esq.
Hearing Officer