

Issue: Step 4 Formal Performance Improvement Counseling Form (workplace violence); Hearing Date: 12/14/18; Decision Issued: 12/17/18; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 11279; 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: 11279

Hearing Date: December 14, 2018
Decision Issued: December 17, 2018

PROCEDURAL HISTORY

On September 20, 2018, Grievant was issued a Step 4 Formal Performance Improvement Counseling with removal for physical abuse of another employee.

On September 21, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 15, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On December 14, 2018, a hearing was held at the Agency's office. Grievant was notified of the hearing date and time but did not appear.

APPEARANCES

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 Medical Center employed Grievant as a Health Unit Coordinator. She began working in that position on July 21, 2017. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked at a large desk in the Unit. The desk was a "community desk" because it was shared by many staff. Several papers were placed on the desk and available for various staff to enter information relating to patient assignments and other matters.

On September 5, 2018, Grievant was seated at the community desk. The Registered Nurse approached the desk and was located to Grievant's side. The Registered Nurse reached across Grievant's forearm to write the room number of a patient she had been assigned on an assignment sheet on the desk. Grievant grab the Registered Nurse's wrist tightly, squeezed her wrist, and pushed her wrist away. Grievant said "get your hand away from my desk and off my paper!"¹ The Registered Nurse's face turned red and she said to Grievant "you don't have to grab my wrist, you can say that nicely!" The Registered Nurse left the desk and remained upset for the rest of her shift. Grievant grabbed the Registered Nurse's wrist with sufficient force to leave a bruise. The Registered Nurse had not expected Grievant to grab her wrist and react as Grievant did.

¹ The paper was not Grievant's paper.

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 includes, "physical abuse of a patient, visitor, or fellow employee." On September 5, 2018, Grievant engaged in physical abuse of a fellow employee. Grievant's action was physical because she grabbed the Registered Nurse's wrist. Grievant's action was abuse because it was unwanted, offensive, disrespectful, and with sufficient force to cause bruising. Grievant's behavior was not consistent with behavior tolerated in the Agency's workplace.

Policy 701 provides:

If, in the Medical Center management's opinion, the employee's misconduct or deficient performance has a significant or severe impact on patient care or Medical Center operations, employment may be terminated without resorting to Steps 1 through 3.

The Agency is presented sufficient evidence to support its issuance to Grievant of a Step 4 Formal Performance Improvement Counseling Form with removal.

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"² 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

² Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Step 4 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]

[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].

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

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer