Issue: Notice of termination (not meeting productivity standard); Hearing Date: 11/13/02; Decision Date: 11/14/02; Agency: UVA Health System; AHO: David J. Latham, Esq.; Case No.: 5561

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5561

Hearing Date: November 13, 2002
Decision Issued: November 14, 2002

APPEARANCES

Grievant
One witness for Grievant
Vice President of Human Resources
Manager of Employee Relations
Two witnesses for Agency

ISSUES

Did the grievant's actions warrant disciplinary action under the Standards of Performance policy? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Notice of termination of employment.[1] Following a denial of relief at the third resolution step, the agency head qualified the grievance for a hearing.[2]

The University of Virginia Health System (Hereinafter referred to as agency) has employed the grievant as an office services assistant for nine years. His most recent performance evaluation rated his overall performance as commendable.[3]

In 2000, a new administrator was employed by the agency to bring order to the hospital medical records system. By 2001, the administrator had decided that productivity standards had to be established for the various positions in the medical records department. The agency first contacted other similar hospitals to ascertain benchmark levels for measuring productivity of various positions. Beginning in July 2001, the agency tracked the productivity of employees for four months in order to validate the benchmark figures obtained from other similar facilities. By November 2001, the agency had settled on productivity figures that were generally lower than other similar hospitals. All employees were notified in conjunction with their annual performance evaluations that they would be expected to achieve specific productivity levels by the end of March 2002.[4]

Grievant and three other employees, who had previously been in the sorting section, were assigned to perform filing in July 2001 because of a 30-day backlog of records. The records they were given to file had already been sorted in terminal digit order. Grievant's job was to simply drop each record in the appropriate patient chart or folder. The patient charts are maintained on shelves in a storage area. Although the agency had initially established a productivity level of filing 1.0 to 1.5 inches of records per hour, the level was reduced to .85 to 1.0 inches per hour in April 2002.[5] Seven employees have been working in the "drop filing" area since December 2001.

The supervisor has maintained productivity statistics on all employees since that date.[6] The data reflect that grievant and one other employee have consistently failed to achieve the minimum filing productivity level from December 2001 through August 2002. The other employee was a temporary wage employee whose employment was terminated in June 2002. Grievant's average productivity of .61 inches per hour is only 72 percent of the minimum expected

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[1] Exhibit 8. Notice of Termination, issued September 3, 2002.
[2] Exhibit 13. Grievance Form A, filed September 13, 2002.
[3] Exhibit 12. Grievant's performance evaluation, November 26, 2001. NOTE: The four possible ratings (from highest to lowest) are: Outstanding, Peak Performer, Commendable, and Needs Improvement.
[4] Exhibit 1. Grievant's Performance Planning form for 2001-2002.
[5] Exhibit 3. Record and File Management staff meeting notes, April 18, 2002.
[6] Exhibit 11. File Management Production Report, December 2001 - August 2002.

productivity level, and only 64 percent of the average productivity achieved by the other five people in the filing section.

To establish procedures on Standards of Performance for its employees, the agency promulgated Policy #701.[7] The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section 4 of the Policy Guidelines provides a four-step, progressive performance improvement process, including informal counseling, formal counseling, suspension and/or performance warning, and termination of employment.

At the end of April 2002, grievant's supervisor informally counseled him verbally and in writing about his failure to achieve the minimum productivity goals.[8] Grievant did not offer any reasons to account for his substandard performance. In early June 2002, the supervisor's manager gave grievant a formal counseling form noting that his productivity was not acceptable, and that he must meet the performance expectation or face more serious discipline.[9] During this meeting, grievant noted that lighting in the filing area was inadequate due to burned-out and weakened bulbs. The manager immediately arranged to replace every light bulb in the filing area. Grievant also pointed out that the section of files to which he was assigned was very tight; the manager moved grievant to a section that had more room in which to work.

By early July 2002 grievant was still not achieving the filing productivity standard. The manager gave grievant a second formal performance counseling form, suspended him from work for one day and warned grievant that failure to meet the standard would result in his termination.[10] Grievant was also admonished for logging fewer hours of filing time than he was actually using to complete his filing tasks. This resulted in an incorrect, higher productivity figure than grievant actually achieved. By September 2002, grievant's production had still not improved and the manager terminated his employment.[11]

Grievant never advised his supervisor, manager or anyone in human resources that he felt his ability to work was impaired by either a physical or mental disability. Grievant received a kidney transplant several years ago but had not told his supervisor or manager that any aftereffects of this surgery affected his ability to perform his job. His supervisor observed that grievant was able to achieve the productivity standard if he applied himself, but conversing with coworkers caused his productivity to drop significantly.

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[7] Exhibit 9. Human Resources Policy # 701, *Employee Rights and Responsibilities*, revised June 13, 2001.
[8] Exhibit 5. Memorandum from supervisor to grievant, April 29, 2002.
[9] Exhibit 6. Formal Performance Counseling form, June 6, 2002.
[10] Exhibit 7. Formal Performance Counseling form, July 9, 2002.
[11] Exhibit 8. Termination of employment form, September 3, 2002.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2.3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[12]

The agency has demonstrated that it fairly established productivity standards applicable to all filing personnel, and that grievant consistently failed to achieve the minimum productivity standard after ten months. The agency further showed that grievant was given ample counseling and warnings pursuant to its Standards of Performance policy, and that the agency promptly responded when he expressed concerns about working conditions. Therefore, the agency has shown, by a preponderance of evidence, that it complied with policy and terminated grievant's employment only after grievant failed to perform the essential functions of his position.

Grievant alleges that he was discriminated against on the basis of physical and mental disability. In order to sustain such an allegation, the grievant must demonstrate that he is an "individual with a disability" as defined by the Americans with Disabilities Act (ADA). Although grievant had a kidney transplant some years ago, he had never subsequently indicated to his employer that this impaired his ability to perform his job. Since grievant has no record of impairment, he must show that he has a physical or mental impairment, and that

[12] § 5.8, EDR *Grievance Procedure Manual*, effective July 1, 2001.

the impairment substantially limits one or more of his major life activities. For an impairment to substantially limit, it must prevent the individual from performing the function, and significantly restrict the condition, manner and duration in which the individual can perform the activities.

In the instant case, although grievant had never previously notified his employer of any physical or mental problems, he has proffered a letter from his physician obtained more than a month after his dismissal. The physician states that grievant has had stable kidney function for several years since the transplant. Grievant has diabetes, hypertension, ischemic cardiac disease and flares of bipolar disorder. His diabetes and immunosuppression medications have contributed to a neuropathy that makes it difficult for grievant to grasp things with his hands.[13] Assuming that these conditions constitute physical and/or mental impairments, the issue is whether these impairments substantially limit grievant's work. The preponderance of evidence establishes that grievant is able to perform his work, and that when he applies himself diligently, he is able to meet the productivity standard. However, when grievant engages coworkers in conversation, his productivity decreases. Thus, while grievant's impairments may have some mild impact on his ability to work, they do not *prevent* him from performing the functions or *significantly* restrict the manner in which he performs the functions. For these reasons, it is concluded that grievant does not meet the ADA definition of an individual with a disability.

Grievant suggests that, because his supervisor knew about his kidney transplant, she should have made accommodations for him. It is correct that if a supervisor is aware of an obvious disability, accommodations should be offered. However, in this case, grievant had successful surgery and never thereafter indicated that he had any physical or mental problems. Thus, there was no obvious reason for the supervisor to suspect that grievant required accommodations. The ADA makes it unlawful for an employer to ask an employee questions about disability unless there is an obvious reason to do so. Employers are not obligated to provide reasonable accommodations unless the physical or mental limitations are *known*.

Grievant argues that he felt he had to conceal his disabilities because he was fearful of coworkers looking at him differently. However, he has not offered any reason to justify this concern. Moreover, grievant was given repeated warnings that his work was not satisfactory and that he might be discharged if he did not increase productivity. If grievant had told his supervisors or human resources about his problems, perhaps some accommodation might have been made. However, if no accommodation had been possible, grievant's dismissal would have been unavoidable. The courts have held that even where the reason for poor job performance was the disability, the reason for termination of employment was non-discriminatory because the job performance element is an

[13] Exhibit 14. Letter from physician, October 11, 2002.

essential function of the job.[14] The ADA provides that an individual with a disability must make a request for reasonable accommodation; grievant never made such a request prior to, or at the time of, his dismissal. Further, if an individual is unable to perform the essential functions of a job, he may not be qualified for the job.

Grievant had asked his supervisor to be transferred to another position but there was no specific job opening available. In any event, grievant's supervisor and manager have concluded that grievant's job is the least demanding position available in the medical records area. Grievant believes that sorting is easier than filing. However both positions require the handling of documents by hand and are therefore very similar.

In summary, grievant has not shown that he meets the ADA definition of an individual with a disability. However, even if grievant was able to meet the definition, he has not shown that he ever requested any accommodation. Most significantly, grievant has not demonstrated that he is able to perform the essential functions of his job. Therefore, the termination of grievant's employment was consistent with the agency's Standards of Performance policy.

DECISION

The disciplinary action of the agency is affirmed.

The termination of grievant's employment on September 3, 2002 is hereby 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.

[14] *See* Lindgren v. Harmon Glass Co., 2 A.D.Cases 644 (1992).

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.

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 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.[15]

[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]

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David J. Latham, Esq.
Hearing Officer

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