

Issue: Formal performance improvement counseling and 90-day probationary period; Hearing Date: 10/19/05; Decision Issued: 10/20/05; Agency: UVA Health System; AHO: David J. Latham, Esq.; Case No. 8182



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8182

Hearing Date: October 19, 2005
Decision Issued: October 20, 2005

PROCEDURAL ISSUE

Grievant requested as part of the relief she seeks that the agency provide a positive working environment, equal treatment, and less stress and harassment. However, since filing this grievance grievant has resigned from her position and has been hired in another department of the agency. Grievant avers that her new position does not have any of the concerns cited in her previous position. Therefore, grievant's requests for relief are now moot since she is no longer in the department where the alleged adverse conditions purportedly existed. Grievant also requested reinstatement of sick leave used in September 2005. A hearing officer does not have authority to reinstate sick leave.¹ Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

¹ § 5.9(b)4 & 8. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

Grievant
Four witnesses for Grievant
Employee Relations Manager
Three witnesses for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely grievance from a formal performance improvement counseling.² Grievant was also placed on a 90-day performance warning (probation) from February 8 through May 6, 2005. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³ The University of Virginia Health System (Hereinafter referred to as "agency") has employed grievant for 23 years; she is a cast technician. Grievant had previously received a Step Two formal performance improvement counseling for substandard work performance in November 2003.

Grievant's annual performance appraisal for the period ending in October 2003 stated that she needed improvement in self-management and teamwork, and in communication and interpersonal skills.⁴ Her 2004 appraisal found that grievant was below expectations in the same areas, as well as in decision making.⁵ Her overall evaluation for the year was also below expectations.

On July 30, 2004, grievant's supervisor informally coached her regarding observed problems in working with the new computer system, need for increased productivity, and interpersonal communication problems. In August 2004, the Medical Center Manager and grievant's supervisor met with grievant to further counsel her for performance problems including taking too long to apply casts and splints, problems in learning computer system, taking too many breaks after casting a patient, and not consistently performing other required tasks.⁶ In September 2004, the Manager again coached grievant after six patients returned for unscheduled visits during a two-week period because of casts grievant had

² Agency Exhibit 1. *Counseling Form*, issued February 8, 2005.

³ Agency Exhibit 1. Grievance Form A, filed March 23, 2005. [NOTE: Grievant filed her grievance more than 30 days after issuance of the Counseling Form. While the agency could have declined the grievance as untimely filed, it allowed the grievance to proceed into the resolution steps. By accepting the untimely grievance and proceeding through the resolution steps, the agency has effectively waived its right to decline the grievance as untimely.]

⁴ Agency Exhibit 6. 2003 Annual Performance Appraisal, December 30, 2003.

⁵ Agency Exhibit 6. 2004 Annual Performance Appraisal, December 1, 2004.

⁶ Agency Exhibit 2. Letter from Manager to grievant, August 16, 2004.

applied.⁷ The Manager subsequently conducted a thorough investigation of the six cases and found that grievant had improperly applied five of the six casts.⁸

In November 2004, the Manager gave grievant a Second Step formal performance improvement counseling for the substandard castings, low productivity (taking significantly longer to cast patients than the other cast technicians), lack of initiative, and for mumbling and grumbling which affected other staff adversely.⁹ After grievant had more casting problems in January 2005, the Manager issued a Step Three formal performance improvement counseling and placed grievant on a 90-day performance warning.¹⁰

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. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹¹

⁷ Agency Exhibit 3. Letter from Manager to grievant, September 22, 2004.

⁸ Agency Exhibit 5. Letter from Manager to grievant, November 29, 2004.

⁹ Agency Exhibit 5. Formal Performance Improvement Counseling, November 29, 2004.

¹⁰ Agency Exhibit 1. Formal Performance Improvement Counseling, February 8, 2005.

¹¹ § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. 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. The agency has promulgated its own Standards of Performance policy, which provides, in pertinent part, that failure to meet performance expectations, is a performance issue for which performance improvement counseling is appropriate.¹²

The agency has demonstrated, by a preponderance of evidence, that grievant's performance was not up to expectations during 2003 and 2004. Grievant was counseled formally in 2003, then counseled informally on multiple occasions in 2004, and then again formally in November 2004. The documentation in the record, as well as the testimony of witnesses is sufficient to conclude that the both the informal and formal counseling sessions were warranted. After additional problems continued to occur in early 2005, the agency issued another formal counseling and placed grievant on a 90-day performance warning.

Grievant alleged that the Manager was unfair but the evidence indicates otherwise. On two occasions, grievant had requested that other persons accompany her to meetings with the Manager. On September 22, 2004, at grievant's request, a coworker sat in on the meeting between grievant and the Manager.¹³ On November 15, 2004, the Director of Ambulatory Operations sat in on a meeting with grievant and the Manager; she concluded that the Manager was fair and had complete documentation to support her position. On a third occasion (August 13, 2004), a registered nurse (RN) who is grievant's immediate supervisor was in the meeting with grievant and the manager. The RN agreed with the Manager's assessment of grievant's performance.

Moreover, during the second resolution step of the grievance process, the Administrator of Ambulatory Operations (second-step respondent) conducted her own investigation into the matter. She spoke with two physicians in the clinic where grievant is assigned. The physicians reported that grievant took, on average, twice as long to cast a patient as the other two cast technicians, that grievant was often unavailable when she was supposed to be working, and that she spent too much time with patients. The Administrator also spoke with grievant's supervisor and other coworkers in order to assure that the Manager's assessment of grievant's performance had been fair and that the documentation

¹² Agency Exhibit 4. Policy # 701: *Employee Rights and Responsibilities*, revised July 1, 2003.

¹³ Grievant did not ask this person to be a witness during the hearing. In the absence of this witness, it must be presumed that she would not have testified unfavorably against the manager.

supported the assessment. After this thorough investigation, the Administrator concluded that the formal counseling and performance warning were warranted.

Grievant asked three employees who work in the same building to testify on her behalf. However, each of these three employees is supervised by other people and each has other responsibilities. Although each would occasionally work with grievant, they did not work with her on a daily or even regular basis. None of the three were responsible for evaluating grievant's performance and their limited observations of her work were incidental to seeing her occasionally during the course of their own work. Accordingly, their observations have been given relatively little evidentiary weight.

Grievant points out that all casting technicians have patients who return to the clinic for unscheduled visits due to cast problems. Those who testified agreed that a certain percentage of patients will have cast problems regardless of who has performed the casting. However, the preponderance of testimony and evidence establishes that grievant's percentage of such problems was significantly greater than that of the other two cast technicians. In addition, grievant's performance problems included issues other than cast problems, such as taking too long to apply casts, interpersonal communication problems, and the other issues mentioned above.

Grievant argues that she has always tried to do a good job. Those who testified agreed that grievant did indeed make the effort to perform her job well. Nonetheless, the observations of grievant's supervisor, her manager, and physicians in the clinic reflect that grievant's work was not up to expectations in the identified areas. It appears from the multiple informal counseling sessions that grievant's supervisor had given her ample opportunity to improve before formal discipline became necessary. Thus, there is no evidence to support grievant's allegation that she was being treated unfairly.

DECISION

The disciplinary action of the agency is affirmed.

The Performance Improvement Counseling and the 90-day Performance Warning issued on February 8, 2005 are hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 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 15-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.¹⁴ 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]

¹⁴ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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

David J. Latham, Esq.
Hearing Officer