

Issue: Formal Performance Improvement Counseling (inappropriate use of email);
Hearing Date: 12/21/05; Decision Issued: 01/04/06; Agency: UVA Health System;
AHO: Carl Wilson Schmidt, Esq.; Case No. 8210; Outcome: Agency upheld in full;
Administrative Review: HO Reconsideration Request received 01/11/06;
Reconsideration Decision issued 01/19/06; Outcome: Agency upheld in full;
Administrative Review: EDR Ruling Request received 01/11/06; EDR Ruling No.
2006-1314 issued 03/27/06; Outcome: HO's decision affirmed; Administrative
Review: DHRM Ruling Request received 01/11/06; DHRM Ruling issued 03/20/06;
Outcome: HO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8210

Hearing Date: December 21, 2005
Decision Issued: January 4, 2006

PROCEDURAL HISTORY

On May 10, 2005, Grievant was issued a Formal Performance Improvement Counseling form for inappropriate use of email. On June 7, 2005, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On November 29, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 21, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUE

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 (e.g., properly characterized)?
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. 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 UVA Health System employs Grievant as a Certified Ophthalmic Medical Technician. She has been employed by the Agency for approximately 16 years.¹

For several years, Grievant worked as an operations manager with administrative duties such as scheduling employees. Because of budget considerations, the Agency changed Grievant's role. Her duties changed from primarily working in an office with an assigned computer and telephone to primarily providing patient care in the clinic. She did not desire the change and believed Agency managers should have done a better job of enabling her to transition to her new role. Grievant viewed the role change as a demotion. Grievant began expressing her concerns including sending emails to various employees within the Agency.

On November 5, 2004, Grievant began a series of emails with her Supervisor regarding her work duties and the Agency's operations. She sent copies of her emails to a faculty member, Dr. C. The Supervisor replied to Grievant's emails. In a reply sent at 4:22 p.m., the Supervisor tells Grievant, "I do not know why you copy [Dr. C] and [another doctor]. The chain of command is me first, then the medical directors, The volume of emails is overwhelming and bogs down the system. My expectation is that the faculty will not be burdened with emails that do not directly involve them." Grievant

¹ Grievant began working part-time for the Agency in April 2005.

responded with an email she sent at 4:35 p.m. She sent a copy of that email to Dr. C. At 5:08 p.m., the Supervisor sent another email to Grievant stating, in part, "I see you copied [Dr. C] and [another doctor] on this and that was inappropriate. My expectation is that you follow the proper chain of command ... and refrain from including, and copying people who are not directly involved in the issue (this applies to any emails, not just this one). The volume of emails is burdensome. Faculty do not need to be included."

On November 9, 2004, Grievant's Supervisor presented Grievant with memorandum regarding work expectations for Grievant. Grievant and the Supervisor discussed the memorandum. The memorandum stated, in part:

Since your transition to the new role of COMT, you have raised some questions about your job duties, and we would like to take this opportunity to address these as well as to clarify expectations so that you can continue to successfully apply your talents to your new role.

Your primary job function is patient care, and therefore in the clinic, not behind a desk or at a computer. We have eliminated all administrative activities that interfere with your current clinical obligations, with the exception of scheduling. The scheduling will continue as long as it does not interfere with patient care.

Since this transition, some behaviors have been observed in which professional communication was not being used. Examples of this include spending an inappropriate amount of time composing lengthy e-mails, copying inappropriate people on these communications, and sharing your frustrations about your new role with the faculty and staff. As you are a senior member of this staff, professional communication is expected at all times, not only with patients, but also with the staff and faculty in the clinic, through both verbal and e-mail communication.

Our expectations are:

E-mail: Be judicious in your use of e-mail. E-mail should be used for communications related to your direct job responsibilities, and then only when face-to-face communication is not possible or practical, and when writing e-mail is not done during your time dedicated to patient care. You have many suggestions about how to improve things in the clinic, but often the length of these e-mails does not reflect good judgment about time management. A good general rule of thumb is that if the e-mail needs to be more than 2 paragraphs or 6 sentences long, there may be a better way to communicate your message. Finally, e-mails not related to a specific patient care situation should not be copied to staff or faculty

other than your supervisor, your manager and the medical director(s).

On April 26, 2005 at 7:05 a.m., Grievant sent the Supervisor an email stating, in part:

I found out when I tried to check my messages yesterday that [telephone number] is now a non-working number at UVA.

It would have been appropriate for someone to give me at least a couple of days notice that this would no longer be my phone number. I don't have a problem with not having the number, it is just the lack of thought or respect about what affect it would have.

The email did not relate to specific patient care. Grievant sent a copy to Dr. C, a member of the medical faculty. Dr. C was not within Grievant's chain of command for administrative matters.

CONCLUSIONS OF POLICY

University of Virginia Medical Center Policy #701, *Employee Rights and Responsibilities*, provides for a series of steps when University staff believe an employee's work performance is inadequate:

The Medical Center may use a process of performance improvement counseling to address unacceptable performance when appropriate, except in cases of serious misconduct where suspension or termination is warranted. The purpose of the performance improvement counseling process is to correct the problem, prevent recurrence, and prepare the employee for satisfactory service in the future.

Performance improvement counseling steps include informal coaching, formal (written) performance improvement counseling, suspension and/or performance warning, and ultimately termination.

A. Informal Coaching

If performance issues develop once a staff member has completed his/her probationary period, the supervisor will bring these issues to the attention of the employee in an informal coaching session. This session should take place as soon as possible after the deficiency is noted, and in most cases should be conducted in private.

B. Formal (Written) Performance Improvement Counseling

If the performance issue persists subsequent to informal coaching, formal performance improvement counseling may be initiated. The severity of the performance issue may warrant formal counseling without prior informal coaching.

[T]he employee will receive a Performance Improvement Counseling Form documenting the expectations for performance improvement, the time frame for the improvement, and action to be taken if the employee fails to achieve and maintain the required performance level.

C. Suspension

A disciplinary suspension of up to five (5) working days would normally be applied progressively after at least one formal performance improvement counseling.

The suspension must be documented on a Performance Improvement Counseling Form indicating the date and time the suspension begins and ends.

D. Performance Warning

A performance warning is issued to specify a period of time (not to exceed 90 days) during which the employee is expected to improve or correct performance issues and meet all performance expectations for their role, or face termination.

The performance warning should be documented on a Performance Improvement Counseling Form stating how the employee fails to meet expectations, what must be done to meet expectations, and the time frame for achieving expectations. It will document that unsatisfactory progress, or failure to meet all performance expectations at any time during the performance warning period will normally result in termination.

Termination will be documented on a Performance Improvement Counseling Form for the personnel file and a copy of the documentation should be given to the employee.

“Failure to follow supervisor’s instructions” is an example of a performance issue that may be appropriate for progressive counseling. Grievant was instructed by her Supervisor not to send emails to faculty unless those emails related to a specific patient care situation. On April 26, 2005, Grievant sent a copy of an email to a faculty member. The email did not concern care for a specific patient. Grievant acted contrary to her Supervisor’s instructions. Grievant previously received an informal coaching on November 9, 2004. Thus, it was appropriate for the Agency to issue a Formal Performance Improvement Counseling.

Grievant argues she has been singled out and harassed by the Agency because she is the only employee with email restriction and those restrictions should not be permitted. Grievant's argument fails because the email system is an instrument owned by the Agency and in its control. The Agency has the right to determine which of its employees will use the email system and under what terms and conditions. The Agency singled out Grievant because she previously sent numerous lengthy emails outlining her complaints against the Agency and sending copies of those emails to medical faculty whose time the Agency believed would be better spent devoted to patient care and other faculty duties.

Policy 701 requires the Formal Performance Improvement Counseling to contain "the time frame for the improvement" The form given to Grievant does not contain any time frame. The purpose of this language is to establish a reasonable period of time for the employee to correct his or her behavior. The Agency's expectation was that Grievant discontinue sending emails for an indefinite period of time. The form, with the time omission, indicates Grievant should never send certain emails. This is the instruction that the Agency would have given had it discussed a time frame in the form. The Agency's failure to write on the form that Grievant is expected to refrain from sending certain emails indefinitely is harmless error.

Grievant argues the Agency has subjected her to a hostile work environment. She argues the Agency failed to properly handle her change in roles. She contends the Supervisor and Agency managers failed to properly and timely notify her co-workers of the role change. She believes some co-workers were left with false impressions that her role changed because of problems with her work performance. Grievant contends the Agency provided her with new duties but was slow to remove her former duties thereby causing extra work on her part. Grievant argued that the Supervisor treated employees differently and showed favoritism and gave different assignments to employees. During her meeting with the Supervisor in November 2004, she asked whether Dr. C was still paying a portion of her salary and whether he had been notified that she would not be permitted to copy him on emails. The Supervisor disregarded what she considered as a reasonable request. She offered as an example of mistreatment the Agency's removal of her telephone line without giving her any prior notice. Grievant presented testimony of former employees who resigned because of the difficulty of working for Agency supervisors. In short, Grievant has numerous concerns about how the Agency supervises her and other employees.

The Hearing Officer is not a super-personnel officer who can intervene to improve Agency management based on his perception of how well an Agency is managing its employees. In order to obtain relief, Grievant must show the Agency acted contrary to a policy. Grievant's assertion that she is subject to a hostile work environment is not supported by the evidence. It may be the case that Grievant's working conditions are less than desirable to her but in order for her to be working in a hostile work environment, she must show the Agency's behavior was contrary to policy such as resulting from discrimination against her because of her gender. If Grievant contends she is subject to workplace harassment, she must show the Agency's actions

arose as a result of race, color, national origin, age, sex, religion, disability, marital status or pregnancy. Grievant has not established in violation of Agency policy or any Agency behavior driven by these considerations.² Accordingly, her request for relief must be denied.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Formal Performance Improvement Counseling form is **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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

² Grievant argued that the Agency acted contrary to Policy 701 which "requires an environment that reflects our core values of respect and dignity." When the policy is read as a whole, however, it is intended to create a framework for taking disciplinary action against employees and not for setting management standards.

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. 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.³

[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

³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8210-R

Reconsideration Decision Issued: January 19, 2006

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant argues the Agency has admitted that the November 9, 2004 memorandum “was never clearly distinguished as Step #1 (Informal Coaching) in the Performance Improvement Counseling Steps.” The November 9, 2004 memorandum meets the requirements of Informal Coaching with the exception of stating a time period for making improvement. No time period was necessary because the Agency expected Grievant’s performance to improve for an indeterminate amount of time. Policy 701 does not require that the Agency inform Grievant that an informal counseling is part of the disciplinary process that may result in elevation to Step Two upon another occurrence. Regardless of whether Grievant or Grievant’s Supervisor knew the memorandum met the requirements of an Informal Coaching, the fact remains that it did meet the requirements of an Informal Coaching.

Grievant argues the Agency representative indicated she would be comfortable with the Formal Performance Improvement Counseling being treated as an Informal Coaching. The Hearing Officer does not have the discretion to reduce disciplinary action because of an Agency representative’s assertion that she would be satisfied with a less restrictive level of discipline. The Agency retains discretion to reduce the disciplinary action to an Informal Coaching. Since the Agency did not reduce the disciplinary action during the grievance step process, the disciplinary action presented to the Hearing Officer for review was a Formal Performance Improvement Counseling.

Grievant argues that Policy 701 supports her claim that the Hearing Officer can rule regarding the behavior towards her by Agency managers. She points out that Policy 701 states:

The primary purpose of this policy is to facilitate the well-being of all members of our community by defining and establishing certain norms of behavior for employees and management.

The Hearing Officer construes Policy 701 to set forth the Agency's standard of conduct and procedure for disciplining employees for several reasons. First, although the above cited language appears in the seven page policy, the remaining provisions articulate, in detail, what constitutes standards of performance and what procedure Agency managers must follow to correct employee behavior. Second, Policy 701 lacks definitions and measures of how to evaluate when Agency managers are poorly managing employees. The bulk of Grievant's criticisms of the Agency focus on her belief that she was being poorly supervised. There is no objective standard upon which a Hearing Officer can rely to determine when Agency managers are poorly supervising an employee. Third, Policy 701 does not set forth what remedies an employee can take or a Hearing Officer can impose if evidence is presented establishing an employee's claim that she is poorly supervised. To some extent, Policy 701 is similar to a newspaper article where the headline does not reflect the actual content of the news article.⁴

Grievant argues she sent the email on her "personal time." The time Grievant sent the email is irrelevant. By using the Agency's equipment she is obligated to follow the Agency's instructions regarding its use. She was instructed regarding to whom she could send emails.

Grievant argues she had given her direct phone number to two patients and thus her email is patient care related. When the email is considered as a whole, it clearly is not related to patient care. Grievant does not mention patients being unable to reach her. For example, she states, "I have children and this is the number that is listed with their schools for their teachers to reach me if necessary. Having time to notify the school would have been considerate."

Grievant argues that her email does not violate Policy #0193. Whether Grievant violated this policy is irrelevant because she was charged with violating a supervisor's instruction. The Agency established that she acted contrary to her supervisor's instructions.

Grievant argues female employees were "given a hard time about computer use including e-mail while male employees were not." This allegation was not supported by the evidence and there is no reason to believe it is true. Grievant was not discriminated

⁴ The language cited by Grievant represents the headline and the remaining pages of the policy represent the article.

against because of her gender; she had restrictions placed on her use of email because she abused her email privileges.

Grievant objects to the Hearing Officer excluding three of her witnesses. The Hearing Officer permitted Grievant to proffer the testimony of the witnesses and concluded their testimony was unnecessary. A Hearing Officer may exclude⁵ testimony that is irrelevant, immaterial, insubstantial, privileged, or repetitive.⁶ The proffered testimony was unnecessary because it was repetitive and would merely supplement Grievant's concern that the Agency is poorly managed.

Grievant contends the disciplinary action should be mitigated. *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 Employment Dispute Resolution...."⁷ Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Grievant simply restates the arguments and evidence presented at the hearing. For this reason, Grievant's request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

⁵ Grievance Procedure Manual § 5.7.

⁶ Rules for Conducting Grievance Hearings § IV(D).

⁷ *Va. Code § 2.2-3005*.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the University of Virginia
Health Systems
March 20, 2006

The grievant has requested an administrative review of the hearing officer's January 4, 2006, decision in Case No. 8120. She feels that the agency's Policy # 701, Employee Rights and Responsibilities, was not followed. She contends that the memorandum issued to her regarding her performance was never identified as Step One of the policy related to the performance improvement counseling provision. She contends that the memorandum entered into her file was written before a performance discussion was held and the memorandum had no timeframe for improvement. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this request.

FACTS

The University of Virginia Health Systems employs the grievant as a Certified Ophthalmic Medical Technician. The University has employed her for about 17 years, first as a fulltime employee and most recently as a part-time employee. She had worked for a number of years as a Technical Operations Manager, but due to budgetary constraints, her position was downgraded. Even though she did not suffer a salary loss, she disagreed with the change in job role, and expressed her disagreement by sending a series of emails to her supervisor and copied other individuals not in her chain of command. Her supervisor, through a series of emails, advised the grievant that it was inappropriate to copy individuals not in her chain of command. On November 9, 2004, her supervisor issued to the grievant a memorandum that explained the expectations of the grievant as a Certified Ophthalmic Medical Technician and gave guidance on the use of emails. Based on the grievant continued inclusion on emails of faculty members not in the chain of command, her supervisor issued to her a Formal Performance Counseling form for inappropriate use of email. The grievant challenged the issuance of the disciplinary action by filing a grievance. In his decision dated December 21, 2005, the hearing officer upheld the action of the agency. The grievant requested a reconsideration of the decision from the hearing officer but he did not modify his decision.

The relevant policy, the University of Virginia Medical Center Policy #701 states as its purpose, in part:

The Medical Center strives for an environment that reflects our values of respect and dignity. We value people as individuals and continually strive

to create an environment where their skills, abilities and sense of self can be enhanced. All employees of the Medical Center have the right to be treated in accordance with

these values and share the responsibility for securing and sustaining the general conditions conducive to creating this environment.

The primary purpose of this policy is to facilitate the well being of all members of our community by defining and establishing certain norms of behavior for employees and management.

The policy states, in part, in its policy statement:

Medical Center employees perform critical roles in the organization and have a right to receive non-discriminatory treatment, consideration respect and recognition for their contribution. Employees are encouraged to share their ideas, concerns, and dissatisfaction without fear of reprisal or discrimination. In return, the Medical Center expects employees to adhere to standards of performance that are established to enable all to work together to achieve the mission of the Medical Center.

Also, it states, "Performance issues may be addressed through a process of performance improvement counseling."

In its Policy Guidelines, the policy lists its standards of performance, examples of performance issues and serious misconduct, and the steps of performance improvement counseling. Concerning performance improvement counseling steps, the policy indicates that while there is a sequential process, supervisors may take into consideration the nature of the performance issue, the employee's intent, the consequences of the employee's actions, the employee's past performance record, and other mitigating circumstances in determining the appropriate step to take. Therefore, the supervisor has the freedom, based on the circumstances, to deviate from the sequence as listed in the policy.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. The Department's authority, however, is limited

to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the present case concerning Policy #701, the hearing officer stated, "Failure to follow supervisor's instructions is an example of a performance issue that may be appropriate for progressive counseling. Grievant was instructed by her Supervisor not to send emails to faculty unless those emails were related to a specific patient care situation. On April 26, 2005, Grievant sent a copy of an email to a faculty member. The email did not concern care for a specific patient. Grievant acted contrary to her Supervisor's instructions. Grievant previously received an informal coaching on November 9, 2004. Thus, it was appropriate for the Agency to issue a Formal Performance Improvement Counseling."

In conclusion, this Agency agrees that while UVAHC officials did not designate specifically that the November 9, 2004 memorandum was an informal counseling, the evidence supports that the agency had put the grievant on sufficient notice that her practice of copying faculty members on emails not in the chain of command was inappropriate. This continued practice was "Failure to follow supervisor's instructions", a violation of Policy #701 (Performance Issues). DHRM concurs with the interpretation of the policy by the hearing officer in this instance and has no basis to interfere with this decision.

Ernest G. Spratley, Manager