

Issue: Formal Performance Improvement Counseling with termination (sleeping while on duty); Hearing Date: 01/06/06; Decision Issued: 01/10/06; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 8229; Outcome: Agency upheld in full



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8229**

Hearing Date: January 6, 2006  
Decision Issued: January 10, 2006

**PROCEDURAL HISTORY**

On October 24, 2005, Grievant was issued a Formal Performance Improvement Counseling Form with removal for sleeping while on duty. On October 27, 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 he requested a hearing. On December 8, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 6, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Counsel  
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 University of Virginia Health System employed Grievant as a Patient Companion. As part of his 2004 performance evaluation, Grievant received an overall rating of "Meets Expectations."<sup>1</sup> He had been working for the Agency for approximately 19 years.

On April 19, 2005, Grievant received an informal counseling memorandum regarding his work performance.<sup>2</sup> On June 21, 2005, Grievant received a Formal Performance Improvement Counseling Form regarding his observation of a suicidal patient.<sup>3</sup> On September 15, 2005, Grievant received a Formal Performance Improvement Counseling Form with a 24 hour suspension for disobeying orders from a nursing supervisor. As part of this disciplinary action, Grievant received a performance warning from September 15, 2005 to December 15, 2005 requiring him to meet all

---

<sup>1</sup> Agency Exhibit 7.

<sup>2</sup> Agency Exhibit 6. The informal counseling memorandum states, "Further difficulty in this realm will initiate a formal counseling process."

<sup>3</sup> Agency Exhibit 5.

performance expectations for his job during the warning period otherwise he would be removed from employment.<sup>4</sup>

Dr. P was working as the on-call physician for the evening of October 8, 2005 to the morning of October 9, 2005. A patient at the Facility had displayed behavior showing a risk of suicide. Grievant was called to come to the Facility and watch the patient in a one-to-one relationship. Grievant arrived at the Facility at approximately 1 a.m. and began watching the patient. Dr. P approached Grievant and introduced herself as the on-call doctor. She asked Grievant to carefully watch the patient for signs of erratic behaviors or gestures that could cause self harm.

At approximately 4:45 a.m., a nurse observed Grievant sleeping. The nurse notified Dr. P and she went to the patient's room. Dr. P entered the room and observed Grievant's right side. He was seated in a chair. His chin was tucked down and he was motionless. While standing approximately three feet from Grievant, Dr. P observed Grievant's eyes shut and she believed he was sleeping. In order to verify her opinion, she stepped next to Grievant and waved her hand in a circular motion directly within Grievant's line of sight and within approximately a foot of his face. Grievant did not react to Dr. P's hand motion. Dr. P concluded Grievant was sleeping.

Dr. P tapped Grievant on the shoulder and he awoke. She instructed him not to fall asleep when he is supposed to be watching a patient.

### **CONCLUSIONS OF POLICY**

University of Virginia Medical Center Policy #701, *Employee Rights and Responsibilities*, provides for a series of steps

removal for employees engaging in serious misconduct; thus, Grievant's removal must be upheld.<sup>5</sup>

Grievant contends he was not sleeping. Dr. P's testimony was credible. No evidence was presented to suggest that the nurse who reported Grievant to Dr. P or Dr. P would have any motive to falsely report Grievant. Dr. P met Grievant for the first time on October 8, 2005. Based on the evidence presented, Grievant was sleeping during work hours.

Grievant argues the Agency took disciplinary action against him because of his race. No credible evidence was presented to support this argument. Approximately 60 percent of the employees working as Patient Companions were of Grievant's race. No evidence was presented suggesting the Agency disciplined employees of Grievant's race differently from employees of other races. No evidence was presented suggesting any Agency managers considered Grievant's race when determining whether to take disciplinary action or the appropriate level of disciplinary action. Grievant presented evidence that at least two patients used racial epithets against him. He said the Agency managers told him the patients' comments reflected their emotional limitations and, thus, did not remove him from watching those patients. The Agency cannot control the words expressed by patients suffering from mental illness. There is no connection between the words expressed by patients and the Agency's taking of disciplinary action against Grievant. Grievant has not presented any evidence to support his position that the Agency discriminated against him.

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...."<sup>6</sup> 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.

---

<sup>5</sup> The Agency has also established that Grievant did not meet all of the performance expectations of his job during his performance warning period arising from the disciplinary action he received on September 15, 2005. Accordingly, the Agency has established another basis to support Grievant's removal from employment.

<sup>6</sup> *Va. Code* § 2.2-3005.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Formal Performance Improvement Counseling Form with removal 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 14<sup>th</sup> St., 12<sup>th</sup> 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

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.<sup>7</sup>

[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

---

<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.