

Issue: Formal Performance Improvement Counseling form and termination (making unauthorized shuttle stops); Hearing Date: 08/21/06; Decision Issued: 08/22/06; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 8400; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8400

Hearing Date: August 21, 2006
Decision Issued: August 22, 2006

PROCEDURAL HISTORY

On May 16, 2006, Grievant was issued a Formal Performance Improvement Counseling Form with removal for making shuttle stops at unauthorized locations. On June 8, 2006, 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 July 25, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 21, 2006, 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?
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 Medical Center employed Grievant as a Driver until his removal effective May 16, 2006. Grievant was responsible for driving a bus carrying students, patients, and staff along four stops.

Grievant received a copy of the University's Interfacility Transportation Services Guidelines. This policy stated, in part:

Maintain your route. You should not go to locations not on your route, nor vary the stops. If passengers ask you to go to a location not on your stop, explain courteously that you are required to maintain your route.¹

In 2003, Grievant was counseled by his supervisor to refrain from making unauthorized stops.

On September 28, 2005, Grievant received a Formal Performance Improvement Counseling Form because "[s]everal complaints [were] received regarding the shuttle not being on schedule, causing patients/staff to be late for clinics; also received complaints of multiple stops at locations not on route" Grievant was advised on the

¹ Agency Exhibit 7.

form to “adhere faithfully to the schedule; only making unplanned stops if requested to do so by the lead driver, dispatcher, or supervisor.”²

On April 21, 2006, Grievant received a Formal Performance Improvement Counseling Form for, “[n]ot staying on route, and making stops at unauthorized locations.” He was advised he should be “[s]taying on assigned route, only stopping at authorized locations and only varying from route when directed to do so by dispatcher, lead driver, or supervisor.” Grievant was placed on a Performance Warning from April 20, 2006 through July 19, 2006. The Form also stated, “[a]ll performance expectations for the job must be met during this Performance Warning Period. Failure to meet performance expectations will result in termination.”³

On May 16, 2006, while driving home from work, the Administrator observed Grievant driving a shuttle bus. Approximately one half mile after the assigned shuttle stop, Grievant stopped his vehicle and let a woman exit the shuttle. She walked perpendicular to the shuttle towards a residential area. She did not walk back towards the prior shuttle stop or forward towards the next shuttle stop, one and a half miles away. She did not appear to be a patient with any medical condition requiring special treatment.

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

² Agency Exhibit 4.

³ Agency Exhibit 8.

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.

On April 21, 2006, Grievant was notified that he could be removed from employment if he failed to comply with his performance expectations. He had been repeatedly informed that one of his performance expectations was to avoid letting passengers off of the shuttle at locations other than one of the four assigned shuttle stops. On May 16, 2006, Grievant stopped his shuttle at a location other than one of

the four shuttle stops and permitted a woman to exit the shuttle. She went towards a residential area thereby suggesting the reason Grievant let her off at that time was for her personal convenience and not because of any medical necessity. Grievant acted contrary to his performance expectations. The Agency has presented sufficient evidence to support its issuance of a Formal Performance Improvement Counseling Form with removal.

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....”⁴ 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.

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

⁴ *Va. Code § 2.2-3005.*

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

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 all of your appeals to the other party and to the EDR Director. 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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.