

Issues: Formal Performance Improvement Counseling and Termination; Hearing Date: 06/21/07; Decision Issued: 06/22/07; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 8628; Outcome: Agency Upheld In Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8628

Hearing Date: June 21, 2007
Decision Issued: June 22, 2007

PROCEDURAL HISTORY

On March 19, 2007, Grievant was issued a Formal Performance Improvement Counseling Form of disciplinary action with removal regarding her absence from work during part of her shift on March 15, 2007.

On March 22, 2007, 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 May 31, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 21, 2007, 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 Forum?
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 Health System employed Grievant as a Recreation Therapist. She was responsible for, "assessing, planning and administering recreational therapy treatment to Health System patients."¹ She was removed from employment effect of March 19, 2007.

On January 9, 2007, Grievant met with her Supervisor because the Supervisor had concerns about Grievant changing her schedule without approval. The Supervisor told Grievant that Grievant could not change her schedule without the Supervisor's prior approval.

On March 11, 2007, Grievant received a Formal Performance Improvement Counseling Form with an eight hour suspension and Performance Warning. The Performance Warning was for the period March 11, 2007 through June 11, 2007.²

¹ Agency Exhibit 7.

² Agency Exhibit 3.

On March 15, 2007, Grievant clocked in at 12:51 p.m. and began working her shift. At 3:30 p.m. Grievant told the Shift Manager that she had not eaten all day and was going to take a 15 minute break to eat. The Shift Manager said that was okay.

At 4:15 p.m., Grievant received a telephone call from her Babysitter. The Babysitter told Grievant that the Babysitter was having chest pains and needed to go to the medical provider immediately. The Babysitter told Grievant she would have to come get her child because the Babysitter could no longer care for the child. Grievant spoke with her coworkers to asked them if they could take care of her child in light of the Babysitter's emergency. None were able to help.

At 4:40 p.m. Grievant spoke with the Shift Manager about being away from the unit and then left the facility. Grievant did not clock out when she left.

At 5:30 p.m., Grievant returned to the facility. Grievant took a 20 minute break because she was upset about a telephone call she made to the Shift Manager while she was attending to her child. At 5:50 p.m. Grievant informed the Shift Manager that she was back on the unit and ready to complete her shift.

Grievant continued working until she clocked out at 9:47 p.m.

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.

Beginning March 11, 2007 Grievant was working subject to a Performance Warning. She was obligated to meet all of the performance expectations for her position otherwise she could be removed from employment.

On March 15, 2007, Grievant failed to meet all of the performance expectations of her position for several reasons. First, Grievant failed to obtain the permission of the Supervisor prior to leaving the facility. The Supervisor was working that night in a different part of the facility. Grievant did not attempt to locate or call the Supervisor. On

January 9, 2007, the Supervisor had instructed Grievant she could not change her shift schedule without the Supervisor's prior permission. Second, Grievant failed to clock out when she left the facility. As a result she was paid for several minutes that she did not work.³ Third, Grievant did not conduct any of the group sessions with patients on March 15, 2007 because she was absent from work. The Agency has presented sufficient evidence to support its issuance to Grievant of disciplinary action with removal.

Mitigation

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 *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because it was not her fault and it was not within her control for the Babysitter to require immediate medical attention. Grievant's argument fails. Grievant was not disciplined for having an emergency. Grievant was disciplined for how she handled the emergency. In light of the standard set forth in the *Rules*, 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**.⁵

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:

³ Grievant was supposed to work 8.5 hours as part of her shift. She was entitled to take one 15 minute paid break and a 30 minute unpaid lunch break.

⁴ *Va. Code § 2.2-3005.*

⁵ Because the disciplinary action is upheld, there is no basis to change Grievant's eligibility for rehire.

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

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.⁶

[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.

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Hearing Officer