

Issues: Written Notice (Formal Performance Improvement Counseling Form) with suspension and demotion (disruptive behavior); Hearing Date: 06/05/07; Decision Issued: 07/19/07; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 8605; Outcome: Partial Relief: Written Notice and Suspension upheld (No Relief), Demotion rescinded (Full Relief).



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8605**

Hearing Date: June 5, 2007  
Decision Issued: July 19, 2007

**PROCEDURAL HISTORY**

On March 1, 2007, Grievant was issued a Formal Performance Improvement Counseling Form of disciplinary action with suspension, demotion, and performance warning for disruptive behavior. On March 5, 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 he requested a hearing. On April 24, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 5, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Representative  
Witnesses

**ISSUES**

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 Health System employed Grievant as a Lead Transporter until his demotion to Transporter<sup>1</sup> in March 2007.

On June 1, 2006, Grievant received an informal counseling regarding disruptive behavior. On August 1, 2006, Grievant received a formal Performance Improvement Counseling Form for disruptive conversations. This formal counseling advised Grievant:

Avoid situations and conversations about topics where arguments are likely to occur. Keep conversations friendly and professional, using no profanity or other language that can cause staff to be uncomfortable.<sup>2</sup>

Grievant was promoted to Lead Transporter in September 2006. As a Lead Transporter, Grievant was not a supervisor, but he would take the lead role in making sure his shift was set up properly with enough staff and he would handle customer complaints.

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<sup>1</sup> A few days after the disciplinary action, the Agency changed Grievant's demotion to a Transporter Specialist instead of a Transporter. This lessened the severity of the demotion.

<sup>2</sup> Agency Exhibit 3.

On February 26, 2007, Grievant asked a coworker, Mr. P, if he wanted to join Grievant for drinks after work. Mr. P. had been a good friend of Grievant. Grievant asked Mr. P approximately 10 times during their eight hour shift if Mr. P would join him.<sup>3</sup> Mr. P became annoyed with Grievant's continued requests and said, [Grievant's first name] leave me alone about this sh-t, you gettin on my nerves; to shut the f—k up!" As Grievant was walking to his locker, Grievant called Mr. P's name again in a joking manner. Mr. P yelled "[Grievant's first name] when I say shut the f—k up I mean shut the f—k up."

Grievant spoke with the Transportation Supervisor regarding his interaction with Mr. P. The Transportation Supervisor served as a mentor for Grievant as part of a leadership program in which Grievant was participating. The Transportation Supervisor told Grievant to stay away from Mr. P.

On February 28, 2007, Grievant encountered<sup>4</sup> Mr. P while they were working. Grievant wanted to address the conflict between them. Grievant asked Mr. P what Mr. P was trying to do about the situation. Mr. P asked Grievant "what the f—k" Grievant meant by that. Grievant said that all he was trying to say was Mr. P's name but instead Mr. P "blew up." Mr. P responded, "you keep picking on me and you knew I was f—king mad." Grievant replied, "I didn't know you were mad!" Grievant also said, "if it's going to be a problem, let's handle it outside of work."<sup>5</sup> Mr. P continued cursing and walked into the break room. Mr. P hit the door to the break room and hit one of the cabinets and then took his shirt off.<sup>6</sup> The Patient Service Supervisor was in the break room. Grievant entered the break room through the door. The Patient Service Supervisor told Grievant to leave the room. Grievant left the room.

## 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

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<sup>3</sup> Grievant testified he just wanted "someone to hang out with".

<sup>4</sup> Portions of the conversation between Grievant and Mr. P occurred when they were alone in an elevator. The conversation became so heated that another employee called the Agency's security team to respond.

<sup>5</sup> Mr. P likely constructed Grievant's comments as an invitation to fight outside.

<sup>6</sup> Mr. P was also disciplined.

process is to correct the problem, prevent recurrence, and prepare the employee for satisfactory service in the future.

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

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#### **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.

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#### **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.

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[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.

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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.

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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.

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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 August 1, 2006, Grievant was instructed as part of a formal Performance Improvement Counseling to, "[a]void situations and conversations about topics where arguments are likely to occur." Grievant disregarded this instruction on February 28, 2007 when he confronted Mr. P. regarding their prior conflict. Grievant also disregarded the advice of his mentor, the Transportation Supervisor, to stay away from Mr. P. Grievant knew or should have known that Mr. P. had a quick temper and might not react as Grievant wished. The Agency has presented sufficient evidence to support its issuance to Grievant of a formal Performance Improvement Counseling form.

Under the Agency's Standards of Performance:

A performance warning will typically be applied progressively after at least one formal performance improvement counseling. Suspension will generally accompany the performance warning except in the case of attendance and fractions.

Grievant received a Formal Performance Improvement Counseling form on August 1, 2006. The Agency has presented sufficient evidence to support its suspension of Grievant and the issuance of a performance warning as part of the March 1, 2007 Formal Performance Improvement Counseling form.

### Demotion

Grievant was demoted pursuant to the March 1, 2007 Formal Performance Improvement Counseling Form which stated, "[s]ince this behavior is unacceptable for someone in a leadership or mentorship role, [Grievant] is also being demoted to Transporter." The Formal Performance Improvement Counseling Form was issued pursuant to Medical Center Human Resources Policy No. 701, *Employee Standards of Performance*. Nothing in policy 701 authorizes the Agency to demote employees. In addition, Grievant has not received notice that he could be demoted as a form of discipline. Accordingly, Grievant's demotion must be reversed. Grievant must be reinstated to his former position of Lead Transporter.

Under Medical Center Human Resources Policy No. 116, *Promotions and Transfers*, an employee who has been promoted has a six-month period of time in which the employee must demonstrate competency in the new job. The six-month period is called the Competency Assessment Period. Policy 116 provides:

If at any time during the Competency Assessment Period the supervisor determines that the employee does not meet the skills, knowledge or performance expectations for the position, the employee may be transferred, demoted or terminated. An OCAE<sup>7</sup> form documenting the unsatisfactory assessment must be reviewed with Human Resources prior to a final determination.

Policy 116 is not a disciplinary policy. It does not provide a process to demote employees as a form of discipline. The Agency has attempted to use the Formal Performance Improvement Counseling form in the place of an OCAE form. Nothing in Agency policy authorizes this. To the extent the Agency has the authority to demote an employee that authority is independent of the disciplinary process as expressed by the Agency's *Standards of Performance*.

### 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...."<sup>8</sup> 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 against him should be reduced because the reason he spoke with Mr. P was to attempt to lessen the conflict between them. Grievant wanted to reduce tension in the workplace, not exacerbate it. Grievant recognizes now that he made a mistake when he said "let's handle it outside of work". Grievant knew or should have known that Mr. P was quick-tempered and irrational. By choosing to question Mr. P, Grievant assumed the risk of adverse response from Mr. P. Grievant should have heeded the advice of his mentor and stayed away from Mr. P. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## **DECISION**

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<sup>7</sup> Orientation Competency Assessment and Evaluation form.

<sup>8</sup> Va. Code § 2.2-3005.

For the reasons stated herein, the Agency's issuance to the Grievant of a Formal Performance Improvement Counseling form with suspension is **upheld**. The Agency's demotion of Grievant is **reversed**. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay**<sup>9</sup> equaling the amount Grievant otherwise would have received had he not been demoted during the period of demotion.

## **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 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.

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<sup>9</sup> The Agency must also provide Grievant with any benefits or seniority that otherwise would have accrued had he not been demoted.



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>10</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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>10</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.