

Issues: Formal Performance Improvement Counseling Memorandum (workplace harassment), Suspension, and Performance Warning; Hearing Date: 08/02/07; Decision Issued: 08/07/07; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 8652; Outcome: Partial Relief (Counseling Memo upheld, Suspension rescinded, Performance Warning rescinded).



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8652

Hearing Date: August 2, 2007
Decision Issued: August 7, 2007

PROCEDURAL HISTORY

On May 10, 2007, Grievant was issued a Formal Performance Improvement Counseling Form with a five workday suspension and performance warning for sexual harassment complaints from coworkers. On June 6, 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 July 13, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 2, 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 UVA Health System employs Grievant as a Registered Nurse Clinician 3. A summary of his job is as follows:

An experienced and highly skilled clinician. Utilizes an interdisciplinary approach to patient care service delivery across the continuum of care. Exhibits leadership characteristics consistently and autonomously. Is learning to negotiate the health care system to maximize the delivery of quality care and minimize cost of patient care services.¹

Grievant is extroverted and gregarious. He enjoys poking fun at and joking with his coworkers.

Employees working in Grievant's Department often encounter difficult patients. Some of the patients may have psychological problems causing them to behave in unexpected ways. On occasion, an employee might be injured by a patient. Department employees sometimes experience stress in dealing with difficult patients. In order to nurture and support one another in times of stress, employees would ask for and receive hugs from other employees in the workplace. On occasion, employees may share a "group hug". One witness said the psychiatry unit was small and

¹ Agency Exhibit 5.

extremely cohesive. She said it was very much like an extended family. Department managers knew of and tolerated physical contact among staff. For example, Grievant had hugged his Manager.

Grievant worked with the Recreational Therapist two or three times per week. They were and continue to be friends. In January 2005, Grievant, the Recreational Therapist, and several other employees were sitting around a table talking. Grievant said that the Recreational Therapist was a beautiful woman. Grievant reached under the table and touched the calf part of her leg. The Recreational Therapist told Grievant to get his hand off her leg otherwise "I will own you". She left the room and reported the matter to Agency Managers. Grievant's Supervisor later spoke with Grievant regarding the Recreational Therapist's complaint. The Supervisor told Grievant that the Recreational Therapist was bothered by his behavior. Grievant said he would stop. From that day forward, Grievant did not inappropriately touch the Recreational Therapist.

From the spring of 2005 until the spring of 2007, Grievant made comments to the Recreational Therapist such as, "I am cold; I need a hug. Can we cuddle? Your husband won't mind." Grievant also said to her, "Your husband is a lucky man; why couldn't we have met before the wedding?"²

In February 2006, the Recreational Therapist referred to an individual whose last name was "Hamm". The Recreational Therapist asked another employee, "What room was Hamm in?" Grievant overheard the question. He looked at the Recreational Therapist's bottom and said in a joking manner, "I know where the ham is."

Grievant worked with the Health Unit Coordinator approximately two or three times per week. In May 2007, Grievant walked up behind the Health Unit Coordinator and poked her in her ribs. He tickled her under her arms. She slapped his hands and told Grievant to keep his hands off of her otherwise she would put him on the floor. Grievant responded, "What position would you like for me to be in?" The Health Unit Coordinator interpreted Grievant's question to be asking what sexual position she wanted him to be in.

During a three or four month period in 2007, Grievant would run his finger up the back of the Health Unit Coordinator's neck. She would tell him to stop, but Grievant would continue.

Grievant and the Health Unit Coordinator were friends. On occasion, they would poke at one another, say "stop" and then smile.

² There have been times when the Recreational Therapist hugged Grievant. For example, she hugged Grievant when he attended her wedding. She hugged Grievant when he returned from a funeral. The Recreational Therapist considered and continues to consider Grievant one of her friends.

On one particular day, Grievant was talking at the front desk to several female employees. He said he was "large and in charge". Grievant then flexed his muscles. One female employee interpreted his comment to be of a sexual nature. Another female employee interpreted Grievant's comment to mean he was having a good day.

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

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 infractions.

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 his/her job.

The University of Virginia Policy on Discriminatory Harassment prohibits an employee from engaging in discriminatory harassment. Discriminatory harassment is defined to include:

Conduct of any type (oral, written, graphic or physical) directed against a person because of his or her age, color, disability, sex (including pregnancy), national or ethnic origin, political affiliation, race, religion, sexual orientation, veteran status, or participation in a University, state, or federal discrimination investigation AND which also unreasonably interferes with the person's work or academic performance or participation in University activities, or creates a working or learning environment that a reasonable person would find threatening or intimidating.³

If an employee is determined to have engaged in discriminatory harassment, the Agency may impose "disciplinary action up to and including termination of employment or dismissal"

Grievant engaged in discriminatory harassment. Grievant repeatedly asked female employees for hugs at times when they did not wish to be hugged. Grievant inappropriately touched the Health Unit Coordinator. For example, Grievant repeatedly ran his fingers up and down her neck against her wishes. Grievant's actions against his

³ Agency Exhibit 6.

female coworkers was based on their gender and created a working environment that a reasonable person would find intimidating. The Agency has presented sufficient evidence to support the issuance of disciplinary action to Grievant. The question that remains is what level of disciplinary action is appropriate under the facts of this case.

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.

The disciplinary action taken against Grievant should be mitigated to eliminate his suspension and performance warning. Absent extraordinary circumstances⁵, it is inappropriate for employees to be frequently hugging or touching one another. Employees working in the department often had to treat difficult patients. The culture among the employees working in the department was such that if an employee was having a difficult day, he or she might ask other employees for a hug. When the employees in the department as a whole were having difficulty or having success they might have a "group hug". There are several reasons why this behavior is inappropriate.⁶ One of those reasons is illustrated by this case. Agency managers tolerated employees asking one another for hugs. Grievant frequently asked coworkers for hugs. He often received hugs. Part of the hostile work environment created by Grievant included his behavior of asking for hugs at times when those female employees did not wish to be hugged. Grievant did not have an accurate perception of the number of times he could ask for hugs from coworkers. The standard acquiesced to by Agency managers was that an employee could ask for a hug when he or she felt the

⁴ *Va. Code § 2.2-3005.*

⁵ One witness offered an example of an extraordinary circumstance where hugging might be appropriate. When she informed coworkers that her grandchild had been diagnosed with cancer, she received sympathy and hugs from some of her coworkers.

⁶ Another example might be of a female employee who does not wish to be hugged or touched. If department managers tolerate a culture of hugging among staff, that employee may be reluctant to complain about behavior that she believes is inappropriate but is tolerated and practiced by department managers.

need for a hug. Since Grievant only asked for hugs when he felt he needed a hug, he was complying with the practice he observed in the office. In short, the degree to which Grievant created a hostile work environment was influenced, in part, by the department's tolerance for inappropriate behavior (hugging) among employees. The suspension and performance warning given to Grievant should be reversed.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Formal Performance Improvement Counseling Form with suspension and performance warning is reduced to a Formal Performance Improvement Counseling Form of disciplinary action. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

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

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.⁷

[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

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