

Issues: Formal Performance Improvement Counseling Form (excessive absences/tardiness) and Termination; Hearing Date: 06/10/08; Decision Issued: 06/16/08; Agency: UVA Health System; AHO: John V. Robinson, Esq.; Case No. 8861; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: DHRM Admin Review Request received 07/01/08; DHRM Admin Review issued 07/31/08; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8861

Hearing Officer Appointment: May 12, 2008

Hearing Date: June 10, 2008

Decision Issued: June 16, 2008

PROCEDURAL HISTORY AND ISSUES

In her Grievance Form A concerning this proceeding (the "Form A"), the grievant requested a hearing to challenge the termination of her employment by the University of Virginia Health System (the "University", the "Department" or the "Agency") and is seeking the relief requested in her Grievance Form A, including her former position as a Radiology Technologist re-instated in the Operating Room ("OR") or at another facility.

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the termination was warranted and appropriate under the circumstances.

The agency was represented by a member from the University's General Counsel Office and the grievant was represented by her attorney. The hearing officer issued a Scheduling Order entered on May 20, 2008, which is incorporated herein by this reference.

At the hearing held on June 10, 2008, pursuant to the Scheduling Order, both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits into evidence at the hearing, namely Agency Exhibits 1 through 9.¹

¹ References to the agency's exhibits will be designated AE followed by the exhibit number.

APPEARANCES

Representative for Agency
Two Additional Witnesses for Agency
Grievant

FINDINGS OF FACT

1. The grievant was a Diagnostic Radiologic Technologist (“RT”), previously employed by the Agency. AE 1.
2. The grievant has been employed by the University since about November 2003 (AE 9) during different shifts and in various departments, including the Operating Room.
3. Despite being a good technologist, from early on in her employment, the Grievant has failed to get to work on time. AE 6, 7 and 8.
4. The Grievant was informally counseled about her tardiness by the University Medical Center Manager for Diagnostic Technology (the “Chief Tech”) on January 3, 2007 and was also frequently and repeatedly cautioned about the need for her to improve attendance and reliability, as reflected in numerous job performance evaluations. AE 6, 7 and 8.
5. Periodically, the Grievant would improve her attendance but then would regress to her tardiness until Management, acting within its lawful prerogative, decided that the issue of Grievant’s attendance needed to be formally addressed.
6. On May 3, 2007, the Chief Tech provided the Grievant with a Formal Performance Improvement Counseling Form dated May 3, 2007, which both the Grievant and the Chief Tech signed on May 3, 2007. The Form specified numerous tardy incidents from December 1, 2006 to May 1, 2007, resulting in a delay of patient care and/or shortage in staffing levels.
7. The clear, unequivocal policy concerning tardiness in the Department of Radiology at the University Medical Center provides, in part, as follows:

Tardy

Employees who report to work and are not at the work area and ready to work at the start of the scheduled shift will be considered tardy. There is no “grace period” of time.

8. The tardiness policy is essential to effective patient care, especially in the OR where surgeries must occur on time for sound health practices.
9. The Radiology Lead Tech for the OR (the “Lead Tech”) reported to the Chief Tech that the Grievant was not seen in the OR, where she was assigned, until about 7:50 a.m. when she should have reported at 7:30 a.m. on December 4, 2007. AE 4.
10. The Grievant failed to clock in and report ready to work in the OR until 7:50 a.m. on December 4, 2007.
11. Accordingly, the Chief Tech issued to the Grievant a Formal Performance Improvement Counseling Form. Pursuant to this Form, the Grievant was clearly informed that she was subject to a performance warning from December 24, 2007 through March 23, 2008 and that “(All performance expectations for the job must be met during this Performance Warning Period. Failure to meet performance expectations will result in termination.)” AE 4.
12. On December 21, 2007, the Chief Tech met with and advised the Grievant that “Employee must demonstrate that she is arriving to work on time by physically clocking into the time and attendance system with a lead technologist present. Missing clock in will be reported directly to manager and must have witness to verify employee was at work on time.” AE 4.
13. Despite the performance warning as of December 24, 2007, the Grievant continued to commit multiple tardies disrupting patient care. AE 3. For example, on March 1, 2008, the Grievant reported “ready to work” 2 hours and 20 minutes late and on March 2, 2008, the Grievant reported ready to work 42 minutes late. AE 3.
14. Accordingly, the Chief Tech met with the Grievant and validly terminated her employment with the University pursuant to written notice effective March 3, 2008. AE 3.
15. Management properly followed the necessary steps specified in University Medical Center Human Resources Policy No. 701 and Policy No. 704 (namely Informal Counseling, Formal Written Performance Improvement Counseling, Performance Warning and Termination) to effectively end the Grievant’s employment as of March 3, 2008.
16. The testimony of the witnesses called by the Agency, including the Chief Tech, was both credible and consistent on the material issues before the hearing officer of whether the Grievant was tardy and whether the University correctly followed the necessary procedures to terminate the Grievant’s employment. The demeanor

of such Agency witnesses at the hearing was candid and forthright. By contrast, the Grievant was inconsistent in her testimony and evasive during cross-examination.

17. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
18. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
19. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant.

APPLICABLE LAW AND OPINION

The General Assembly enacted the *Virginia Personnel Act, Va. Code § 2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 of the Commonwealth of Virginia's *Department of*

Personnel and Training Manual Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.

Consistent with the Standards of Conduct and University policy set forth in AE 2, the Grievant's continued tardies disrupting patient care and healthcare operations at the Medical Center could clearly constitute grounds for termination.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the termination of the grievant's employment was warranted and appropriate under the circumstances.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

As the agency argued in this proceeding, the policy requires dismissal. The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The continuing multiple violations and the gravity of the violations despite numerous dispensations to the Grievant in the context of a healthcare facility preclude a lesser sanction. The hearing officer agrees.

The Department, exercising its professional judgment through the appropriate personnel, and applying the Commonwealth's policy of progressive discipline, decided that termination of the Grievant's employment was warranted and appropriate under the circumstances. Such a decision was entirely appropriate and justified. The hearing officer is not persuaded in the least by the Grievant's argument that because the Chief Tech could not remember certain filing or housekeeping matters of a technical, *de minimis* nature early in the process that somehow the

whole termination is tainted. This is particularly the case where the Grievant was given numerous opportunities to rectify her tardiness and repeated warnings.

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in removing the grievant from his employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

- 1. A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
- 2. A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.
- 3. A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must

occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

ENTER:

John V. Robinson, Hearing Officer

cc: The persons on the Attached Distribution List (by U.S. Mail, e-mail transmission and/or facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

Z:\Hearing Officer\UVA Health System (Lane)\Final Decision 6-16-08.doc

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
University of Virginia

July 31, 2008

The grievant, through her representative, has requested an administrative review of the hearing officer's decision in Case No. 8861. The grievant was issued a Formal Performance Improvement Counseling Form of disciplinary action for excessive tardiness and removed on March 3, 2008. She filed a grievance to have the disciplinary action reversed. In his decision, the hearing officer upheld the disciplinary action and the termination. The grievant is appealing the decision on the basis that the hearing officer's decision is inconsistent with University of Virginia Health System Policy No. 701. The agency head of the Department of Human Resource Management has asked that I respond to this request for an administrative review. For reasons stated below, this Agency will not disturb the hearing decision.

FACTS

The University of Virginia Health System employed the grievant as a Radiologic Technologist at the hospital until she was terminated. The grievant's duties and responsibilities included the following:

Operates required equipment necessary to produce diagnostic images using established guidelines and diagnostic imaging procedures. Identifies, prepares and positions patient for procedure by using established diagnostic imaging protocols to achieve the highest quality images.

Ensures proper safety standards are met.

Instructs students and residents and performs preceptor duties as needed.

Performs daily quality assurance checks.

Assists in maintaining supply inventory.

Participates in on-going service and process improvement efforts.

Communicates appropriately using good interpersonal skills.

Serves, manages and supports internal and external customers.

Participates in performance improvement activities.

The evidence supports that except for prompt arrival to work, her performance was satisfactory. On December 21, 2007, the grievant's supervisor issued to her a Performance Warning and told her that if her promptness in attendance did not improve during the performance period of December 24, 2007 - March 8, 2008, her employment would be terminated. During that period of time she arrived late to work

at least 9 more times. On March 3, 2008, her supervisor met with her and terminated her employment by written notice... This disciplinary action was the culmination of more than 4 years of counseling for late arrival to work.

According to the evidence, the grievant's supervisor first gave her informal counseling regarding her late arrival within a few months after she was employed in November 2003. After informal counseling she was issued a Formal Performance Improvement Counseling Form in May 2007. On her November 2007 performance evaluation, it was noted that her arrival to work on time was problematic and must be improved upon. Finally, she was issued a Performance Warning in December 2007 and terminated in March 2008. The grievant filed a grievance, and when she did not receive the relief she sought, she asked that the grievance be heard by a hearing officer.

In the instant case, two UVA Medical Health System* policies define work expectations and provide guidance for dealing with performance deficiencies. The first, the Medical Center Human Resources Policy No. 701, Section C, states as its objective,

“The Medical Center expects employees to adhere to standards of performance that are established to enable all to work together to achieve the mission of the Medical Center. Performance issues are addressed through a process of progressive performance improvement counseling as outlined in this policy. The progressive performance improvement counseling process provides positive guidance, appropriate correction, and helps ensure fair and equitable treatment of all employees...” It states further, in part, “The following are examples of some performance issues that are appropriate for the progressive performance improvement counseling process:

- Failure to meet performance expectations
- Adversely affecting another's ability to do work
- Misuse of time
- Failure to report to work as scheduled
- Unauthorized absence from assigned work area
- Failure to meet attendance standard
- Failure to follow supervisor's instructions
- Failure to follow applicable policy”

In addition, Policy No. 704 is designed to provide clear guidelines for employees to follow in planning their time off and also to assist supervisors in addressing situations in which the frequency of employee absence exceeds the standard for the Medical Center. In that respect, the Medical Center established expectations for attendance and arrival of employees.

DISCUSSION

* The hearing officer cited DHRM Policy as being applicable to this case. To the contrary, when the disciplinary action was issued to the grievant in 2008, she was no longer covered by the Virginia Personnel Act and was not subject to the provisions of DHRM Policy 1.60 as related to disciplinary action. Rather, the applicable disciplinary policies were the University of Virginia Medical Health System Policy Nos. 701 and 704.

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

The University of Virginia Medical Health System Policy No. 701, Employee Standards of Conduct, provides guidance to management officials for handling workplace behavior and for taking corrective action. Specifically, the policy lists the four-step process as follows: (1) informal counseling; (2) formal written performance counseling; (3) performance warning; and, (3) termination.

In her appeal, the grievant stated that the hearing officer's decision is inconsistent with agency policy, specifically UVA Medical Center Human Resource Policy No. 701. More specifically, the grievant points out that Policy 701, Section D. 3, "Performance Improvement Counseling" provides for a four-step counseling process prior to termination of an employee. In summary, the grievant asserts that the hearing officer erred in his determination because officials of UVA Medical Center did not provide a four-step counseling process

To the contrary, the evidence clearly supports that the UVA Medical Center went through the four-step process before the employee was terminated. Thus, it is the opinion of this Agency that the University of Virginia officials properly applied the provisions of the Employee Standards of Conduct Policy 701 and 704 and the hearing officer properly interpreted that policy. Therefore, this Agency will not interfere with the application of the decision.

Ernest G. Spratley
Assistant Director
Office of Equal Employment Services