

Issues: Formal Performance Improvement Counseling Form (failure to follow instructions while under Performance Warning) and Termination; Hearing Date: 10/23/08; Decision Issued: 10/24/08; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 8954; Outcome: No Relief – Agency Upheld in Full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8954**

Hearing Date: October 23, 2008  
Decision Issued: October 24, 2008

**PROCEDURAL HISTORY**

On July 10, 2008, Grievant was issued a Formal Performance Improvement Counseling Form with removal for failure to follow a supervisor's instructions while under a Performance Warning.

On July 29, 2008, 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 September 17, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 23, 2008, 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 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 Health Unit Coordinator. Grievant reported to the Administrative Assistant who reported to the Manager. Grievant performed several essential duties for the Agency. One of these duties included answering "call bells". When a patient needed assistance, the patient could notify Grievant through the Agency's call system. Grievant was responsible for sitting at a desk, answering patient call bells, and notifying the appropriate medical staff of the patients' need for assistance.

Grievant had prior active disciplinary action culminating in a 90 day Performance Warning and a two work day suspension on April 14, 2008.

The Agency required its employees, including Grievant, to have a PPD to test for tuberculosis. As part of this process, Grievant had to have the PPD read on a timely basis. The Agency had several medical staff at its Facility who were capable of reading the PPD.

On July 10, 2008, Grievant wanted to leave the floor where she worked and have someone read the PPD. In the morning that day, Grievant walked to the Administrative Assistant and the Manager and requested to leave the floor to have the PPD read. The Administrative Assistant told Grievant that they were shorthanded that day and Grievant should not leave the floor. The Manager instructed Grievant not to leave the sixth floor and that she would have someone come to Grievant and read the PPD by examining Grievant's arm.

At lunchtime, the Administrative Assistant walked to Grievant's desk but Grievant was not there. The Charge Aide told the Administrative Assistant that Grievant left for

lunch. Grievant had left the sixth floor, taken the elevator down to the second floor, found an employee who could read her PPD, and had that employee read the PPD. Then Grievant took the elevator down to the first floor, walked to the cafeteria and had lunch.

Grievant's lunch period was to last 30 minutes. The Administrative Assistant remained at Grievant's desk to cover for Grievant. Forty minutes later, Grievant returned to the floor. The Administrative Assistant asked Grievant why she had taken an extended lunch. Grievant said because she had gotten her PPD read. The Administrative Assistant and Grievant then met with the Manager. Grievant was again asked why she had taken an extended lunch break. Grievant said because she had gotten her PPD read and because the lines were long in the cafeteria. The Agency decided to take disciplinary action against Grievant for failure to follow a supervisor's instructions.

### **CONCLUSIONS OF POLICY**

The 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. One of those steps includes receiving a 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 his/her job.

On April 14, 2008, Grievant received a Performance Warning for the period April 15, 2008 through July 15, 2008. That document advised Grievant:

All performance expectations for the job must be met during this Performance Warning period. Failure to meet performance expectations will result in termination.

One of Grievant's performance expectations was to comply with her supervisor's instructions. On July 10, 2008, Grievant was instructed by two supervisors not to leave the floor to have her PPD read. The instruction was lawful, ethical, and in accordance with the Agency's business needs to keep staff available for patient care. Grievant disregarded that instruction thereby justifying the issuance of disciplinary action. Since Grievant had received a Performance Warning, her failure to follow a supervisor's instruction provides a sufficient basis for the Agency to remove her from employment.

Grievant argued that she should be free to do what she wishes during her lunch break. Although Grievant's assertion may be true in general, it is not true with respect to tasks constituting the Agency's business. When Grievant left the sixth floor of the building, she did so with the intent of performing a job related task of having her PPD read. The Agency did not lose control of the job related task merely because Grievant

declared she was going on her lunch break.<sup>1</sup> Grievant was obligated to comply with the Manager's and Administrative Assistant's instruction not to leave the floor for the purpose of having her PPD read. These supervisors intended to have someone else come to the floor to read Grievant's PPD.

Grievant argued that she was late because her knee "popped" as she was returning to the sixth floor from lunch. When Grievant was asked by the Manager and the Administrative Assistant why she was late from lunch, Grievant gave two reasons: (1) she had her PPD read and (2) the lines were long in the cafeteria. She did not mention that her knee had popped. If Grievant had been late because her knee had popped, surely she would have mentioned it when specifically asked why she was late. Nevertheless, why Grievant was late in returning from her lunch break has no bearing on the fact that she failed to follow a supervisor's instruction. Even if Grievant was late because her knee popped, the Agency has presented sufficient evidence to show that Grievant did not meet her performance expectations.

*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>2</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. 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:

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<sup>1</sup> Indeed, it is not clear that Grievant's lunch break actually began until after she had finished having her PPD read because having her PPD read was part of her job duties.

<sup>2</sup> *Va. Code § 2.2-3005.*

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.

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>3</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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>3</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.