

Issues: Formal Performance Improvement Counseling Form (failure to follow instructions), and Termination (poor performance); Hearing Date: 03/26/09; Decision Issued: 04/16/09; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 9042; 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: 9042

Hearing Date: March 26, 2009
Decision Issued: April 16, 2009

PROCEDURAL HISTORY

On January 7, 2009, Grievant was issued a Formal Performance Counseling Form with removal for failure to follow a supervisor's instruction during his 90-day probationary period.

On January 9, 2009, 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. The Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 26, 2009, 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 at its Facility. He had prior active disciplinary activity. His most recent disciplinary action was issued on November 10, 2008. Grievant received a Formal Performance Improvement Counseling Form placing him on Performance Warning from November 10, 2008 through February 10, 2009. The Form advised him that, "All performance expectations for the job must be met during this Performance Warning Period. Failure to meet performance expectations will result in termination."

On December 31, 2008, Grievant's work shift was scheduled to end at 3:30 p.m. At approximately 3 p.m. that day, the Charge Nurse asked Grievant if he could stay after the end of his scheduled shift in order to take a patient from the Unit to the Hospital. It was necessary for the patient to return to the Hospital on time because the patient had an ambulance scheduled to pick him up at the Hospital and take him to the nursing home. Grievant informed the Charge Nurse that he would remain after 3:30 p.m. to transport the patient. At 3:30 p.m., Grievant put on his coat and backpack and left the Agency's Facility without notifying the Charge Nurse and without helping the patient.

CONCLUSIONS OF POLICY

Under the Agency's Standards of Conduct, when an employee is placed on Performance Warning, the employee is expected to meet all performance expectations

of his or her job. If an employee fails to meet all of his or her performance expectations during the Performance Warning period, the employee may be removed from employment.

Grievant was placed on Performance Warning on November 10, 2008. He received a notice that his failure to comply with all of the performance expectations of his job would result in removal. On December 31, 2008, Grievant was instructed by the Charge Nurse, a supervisor, to wait past his shift to transport a patient. Grievant understood the instruction. Instead of waiting after his shift, Grievant left at 3:30 p.m. He did not transport the patient as instructed. One of Grievant's performance expectations was to comply with instructions of his supervisor. The Agency has presented sufficient evidence to support the issuance of a Formal Performance Improvement Counseling Form with removal.¹

Grievant argues he left because his shift ended and he was authorized to leave. This argument fails because the Charge Nurse had the authority to extend Grievant's shift and instruct him to remain after the conclusion of his regular shift.

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...."² 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

¹ The Agency also alleged that during the Performance Warning period Grievant failed to "clock in" from his Unit but instead would clock in from other parts of the Hospital. The Agency has not presented sufficient detail regarding the date, time, and location of the instruction to Grievant requiring him to clock in from the Unit. The Agency also alleged that during the Performance Warning period Grievant did not "check in" with the Charge Nurse during his shift. The details of this allegation have not been established. Although these allegations were not supported by the evidence, there remains sufficient evidence to support the issuance of the disciplinary action in this case.

² *Va. Code § 2.2-3005.*

For the reasons stated herein, the Agency's issuance to the Grievant of a Formal 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:

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
600 East Main St. STE 301
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.³

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

[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