

Issues: Group III Written Notice (theft) and Termination; Hearing Date: 05/28/09; Decision Issued: 05/29/09; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 9091; 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: 9091**

Hearing Date: May 28, 2009  
Decision Issued: May 29, 2009

**PROCEDURAL HISTORY**

On February 12, 2009, Grievant was issued a Formal Performance Counseling Form with removal for theft of medical center property.

On February 26, 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 she requested a hearing. On May 6, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 28, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Counsel  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Formal Performance 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 Clinical Care Coordinator until her removal effective February 12, 2009. The quality of Grievant's work was otherwise satisfactory to the Agency. Grievant has been licensed in Virginia as Registered Nurse for approximately 12 years. Grievant had prior active disciplinary action.

Grievant is a very caring person who responds quickly to help others in need. She does not let others suffer if she can avoid doing so.

Mr. B is Grievant's next door neighbor. Grievant considers him her best friend and a part of her family. Mr. B is a volunteer Emergency Medical Technician who assists others in the locality. Mr. B was not a patient of the Agency and he was not being treated for dehydration by a doctor at the Agency.

On Thursday, February 5, 2009, Mr. B was extremely ill. He had vomited repeatedly and had diarrhea. He was unable to keep fluids in his system and was dehydrated. At approximately 4:15 p.m., Mr. B contacted Grievant and they spoke about Mr. B's medical condition. Grievant concluded Mr. B needed to be rehydrated by receiving intravenous fluids (IV). Grievant had the skills necessary to begin an IV. Mr. B told Grievant he would not go to the Emergency Room because he did not want to wait several hours for assistance given his condition.

He did not want to pay for the ambulance to get him to the Emergency Room. He did not want to travel in an ambulance which would result in that ambulance crew being unable to help other citizens who may have more serious medical concerns than his. Grievant decided she would leave early and take IV fluids to Mr. B and give him an IV.

At 4:42 p.m. on February 5, 2009, Grievant sent the Supervisor an email stating:

I'm leaving now, My neighbor is sick & vomiting ...."<sup>1</sup>

Grievant took the supplies to her neighbor and performed the IV on him. Grievant's assistance helped Mr. B.

When Grievant returned to work on Monday, February 9, 2009, another employee told Grievant that Grievant should inform the Supervisor of what had happened before other employees informed the Supervisor. At 3:09 p.m., Grievant sent an email to the Supervisor as follows:

When my neighbor paged me at 16:15 last Thursday with 24 hours of N&V, I panicked and went into "code12" mode or "rescue" mode. I didn't even think about this until over the weekend.

I helped myself to four 250cc bags of fluid & 1 angiocath from PS clinic. I already had tubing on hand from fostering puppies that need LR. I guess that since we waste 250cc bags every Tues in [clinic], I didn't think that it would be a big deal, but I wanted to tell you.

Please let me know what I owe the clinic \$\$.

My neighbor had no transportation to ER. He already talked to his MD who told him he would need IV fluids if he couldn't keep anything down.<sup>2</sup>

### **CONCLUSIONS OF POLICY**

Under the Agency's Medical Center Human Resource Policy 701, the Agency may remove an employee upon the first occurrence for "[t]heft or unauthorized removal or use of property ...." Although not specifically defined under the policy, theft of property occurs when an employee intentionally

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<sup>1</sup> Grievant Exhibit 1.

<sup>2</sup> Grievant Exhibit 2.

removes property belonging to the Agency without permission.<sup>3</sup> In this case Grievant removed supplies belonging to the Agency without obtaining permission of the Agency. The Agency has presented sufficient evidence to support the issuance of a Formal Performance Counseling Form with removal.

Grievant argues that she spoke with at least two doctors as she was collecting the appropriate supplies to take with her yet none of the doctor's stopped her. This argument is irrelevant. None of the doctors told Grievant she could take the supplies. None of the doctor's had the authority to suggest Grievant could take supplies. Their silence could not be construed as granting the Grievant the authority to remove the supplies.

Grievant contends she did not engage in theft because she lacked sufficient intent to steal. If the Hearing Officer assumes for the sake argument that Grievant did not engage in theft, the outcome of this case remains the same. The "unauthorized removal" provides a sufficient basis to uphold the disciplinary action with removal.

*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>4</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 should be mitigated because she went into "rescue mode" and was merely trying to assist someone in need. Nothing in the *Rules* establishes Grievant's good intention would be a basis to mitigate the disciplinary action in this case. How the Agency wishes to use its property for the benefit of others is up to the Agency to decide. To the extent Grievant's motive may be a mitigating factor, however, an aggravating factor exists. Grievant sent the Supervisor an email indicating she was leaving early. Grievant could have included in that email a request for approval to remove the

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<sup>3</sup> To remove supplies with permission, Grievant would have had to obtain permission from the Supervisor.

<sup>4</sup> *Va. Code § 2.2-3005.*

supplies. There is no reason to believe Grievant could not have spoken with the Supervisor prior to removing the supplies to obtain permission to remove them. In light of the standard set forth in the *Rules*, 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 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 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  
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.<sup>5</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>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.