

Issues: Formal Performance Improvement Counseling Form and Termination
(continued poor performance); Hearing Date: 10/19/09; Decision Issued: 10/23/09;
Agency: UVA Health System; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9190;
Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9190

Hearing Date: October 19, 2009
Decision Issued: October 23, 2009

PROCEDURAL HISTORY

On June 26, 2009, Grievant was issued a disciplinary termination for failing to comply with terms and performance expectations from an earlier performance warning issued May 18, 2009.

Grievant timely filed a grievance to challenge the Agency's action. The outcome of the administrative steps was not satisfactory to the Grievant and he requested a hearing. On September 16, 2009, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on September 18, 2009. The hearing was scheduled at the first date available between the parties and the hearing officer, Monday, October 19, 2009, on which date the grievance hearing was held, at the Agency's regional facility.

The Agency submitted documents for exhibits that were, without objection from the Grievant, admitted into the grievance record, and will be referred to as Agency's Exhibits. The Grievant also submitted documents that were admitted without objection. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant
Representative/Advocate for Agency
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 (e.g., properly characterized)?
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?

The Grievant requests rescission of the termination, reinstatement, back pay and all benefits.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

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).

Code § 2.2-3000 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.

The Agency's Medical Center Human Resources Policy No. 701, Employee Standards of Performance, defines the progressive discipline that must be followed before a termination may occur. Agency Exh. 5.

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The University of Virginia Health System employed Grievant at its Facility as a patient transporter. He had prior active disciplinary activity. Prior to the employment termination, Grievant received on May 18, 2009, a Formal Performance Improvement Counseling Form placing him on Performance Warning from May 18, 2009, through August 16, 2009. Agency Exh. 3. 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."

Since October 22, 2008, the Agency established the standard for checking the Transport Tracking system. Instead of the prior policy 8-10 minutes, the policy changed, requiring transporters to check the system every 3-5 minutes. The Grievant acknowledged this policy change when he signed the policy on November 6, 2008. Agency Exh. 2.

Policy No. 701 defines work expectations and provides guidance for dealing with performance deficiencies. 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 work 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

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. The policy lists the four-step process as follows: (1) informal counseling; (2) formal written performance counseling; (3) performance warning; and, (4) termination.

More specifically, Policy No. 701 provides for a series of steps when University staff believes an employee's work performance is inadequate:

The Medical Center may use a process of performance improvement counseling to address unacceptable performance when appropriate, except in cases of serious misconduct where suspension or termination is warranted. The purpose of the performance improvement counseling process is to correct the problem, prevent recurrence, and prepare the employee for satisfactory service in the future.

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

A. Informal Counseling – Step 1

If performance issues continue after appropriate coaching and training, the supervisor will bring the performance deficiency issues to the attention of the employee in an informal coaching session. This session should take place as soon as possible after the deficiency is noted, and in most cases should be conducted in private.

B. Formal (Written) Performance Improvement Counseling – Step 2

If the performance issue persists subsequent to the informal counseling, formal performance improvement counseling shall be initiated. The severity of the performance issue may warrant formal counseling without prior informal counseling.

[T]he employee shall receive a Performance Improvement Counseling Form documenting the expectations for performance improvement, the time frame for the improvement, and consequences if the employee fails to achieve and maintain the required performance level.

C. Performance Warning – Step 3

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 performance warning shall document that unsatisfactory progress, or failure to meet all performance expectations at any time during the performance warning period shall normally result in termination.

D. Termination – Step 4

If an employee does not successfully meet the expectations following progressive performance improvement counseling, employment may be terminated.

The Agency issued a Job Performance Informal Coaching memorandum to the Grievant on December 3, 2008. Next, the Agency issued a Formal Performance Improvement Counseling Form on January 12, 2009. Beginning May 18, 2009 Grievant was working subject to a Performance Warning. He was obligated to meet all of the performance expectations for his position otherwise he could be removed from employment. The Grievant was specifically instructed to check the Transport Tracking system every 3-5 minutes and was specifically warned that future gaps in checking the system would result in termination. Prior to the Performance Warning, the Grievant was counseled on this issue as early as July 2008.

On June 23, 2009, Grievant was observed sitting idle and not checking the Transport Tracking system, and a check of the records showed that he continued to exceed the prescribed 3-5 minute standard without recording any delay codes as required. Agency Exh. 6. The Agency witnesses testified that this type of documentation was only produced and reviewed when specific problems are noticed and addressed.

Through its grievance hearing witnesses and documentation, the Agency has presented sufficient evidence to support its issuance to Grievant of disciplinary action.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating

circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action.”

Failure to meet performance expectations, misuse of work time, failure to follow supervisor’s instructions, and failure to follow applicable policy are all examples stated in the policy that are appropriate for the progressive performance improvement counseling process. In order to prove a failure to meet performance expectations, etc., the Agency must establish that the Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet. The Agency has shown a recurring pattern of deficiencies by the Grievant in his compliance with the policy to check, when idle, the transport tracking system every 3-5 minutes.

Grievant contends the disciplinary action of termination was unfair and unwarranted. The Agency has presented sufficient evidence to support the issuance of the progressive discipline resulting in termination. Grievant was aware of his performance issues and failed to make satisfactory progress toward improvement, culminating in management observed him on June 23, 2009, being idle without checking the system for an extended period. The logs presented demonstrate repeated violations of the 3-5 minute standard. While the Grievant proffered justified explanations for possible delays, he did not explain away his failures to note in the system when delays occurred preventing his compliance with the policy. While the Grievant presented a sincere belief that the discipline was not justified, the Agency established a valid policy foundation for the discipline. The Agency’s action falls well within its discretionary management function and obligation to promote a well-managed workforce.

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....” Va. Code § 2.2-3005. 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 the standard is not achievable. Grievant had two witnesses, also patient transporters, testify that the standard was difficult to meet. The transporter witnesses testified that phone availability was always a problem as was having to wait for elevators when they had equipment such as wheelchairs or stretchers. Phones were not available in the elevator lobbies, and the transporters testified that they commonly exceeded the 3-5 minute standard out of necessity. While not testifying directly, the Grievant established his points that the standard was difficult to meet with the obstacles presented within the workplace. He pointed out statistics that indicated he was becoming more productive over time. Grievant’s Exh. C.

The Agency's witnesses, however, testified that the Transport Tracking system allowed the transporters to enter delay codes into the system to record unavoidable delays in checking the system. The Agency's witnesses also testified that the transporters should inform their supervisors when problems occur that prevent the transporters to check the system every 3-5 minutes.

The hearing officer finds that the Agency's witnesses credibly established that the Grievant routinely exceeded the prescribed standard of checking the transport system when idle every 3-5 minutes for pending transport jobs. This is a critical function within the health system, and the very nature of the transporters' job prevents constant and/or direct supervision. The transporters are working independently, and the only way for them to work productively and be accountable within the system is to follow the prescribed protocols. In this case, while the Grievant demonstrated a sincere willingness to comply and fondness for his job, he did not present evidence sufficient to rebut the discipline or to mitigate it to less than termination. In sum, the Agency has wide latitude and discretion in disciplinary matters and it has not exceeded the bounds of reasonableness in applying its progressive discipline.

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 claimant engaged in the described conduct which the Agency appropriately characterized as misconduct. The Agency's discipline was consistent with law and policy, and no mitigating circumstances exist to reduce the disciplinary action. Accordingly, the Agency's progressive discipline resulting in termination is upheld.

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, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 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 the 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer