

Issues: Formal Performance Improvement Counseling (unsatisfactory performance) and Termination (due to accumulation); Hearing Date: 10/20/09; Decision Issued: 11/21/09; Agency: UVA Health System; AHO: John V. Robinson, Esq.; Case No. 9202; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9202

Hearing Officer Appointment: September 28, 2009

Hearing Date: October 20, 2009

Decision Issued: November 21, 2009

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge termination of his employment effective July 14, 2009, pursuant to a written notice, dated July 14, 2009 by Management of University of Virginia Health System (the “Department” or “Agency”), as described in the Grievance Form A dated August 11, 2009.

The parties duly participated in a first pre-hearing conference call scheduled by the hearing officer on October 5, 2009 at shortly after 4:00 p.m. The Grievant, the Agency’s advocate and the hearing officer participated in the call. The Grievant is seeking the relief requested in his Grievance Form A, namely, reinstatement and confirmed during the call that he is also seeking back-pay and restoration of all benefits.

Following the first pre-hearing conference, the hearing officer issued a Scheduling Order entered on October 6, 2009 (the “Scheduling Order”), which is incorporated herein by this reference.

At the hearing, the Agency was represented by its advocate and the Grievant represented himself. 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 of the parties into evidence at the hearing, namely Agency exhibits 1-3 and Grievant’s exhibits 1-8¹.

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

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

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

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant was a driver for the Agency, previously employed by the Agency for approximately 3 years before the termination of his employment by the Agency.
2. On June 9, 2009, the Grievant was working as a driver, driving a shuttle for patients and visitors to the Agency's hospital (the "Facility") in which he was formerly employed. AE 1.
3. On June 9, 2009, the Grievant was rude and unhelpful to a patient's visiting family member who was riding the shuttle. When this visitor asked the Grievant about the appropriate shuttle to take, the Grievant responded rudely and the Grievant did not provide the required assistance/customer service. AE 1.
4. The Grievant's Job Description provides in part as follows:

2. *Job Function: Maintains schedule while still providing necessary assistance to patients and visitors.*

Performance Expectations:

...

e) *Patients and visitors are given necessary assistance, providing step stool, wheelchairs or other assistance as appropriate. . .*

2. *Function: Serves, manages and supports internal and external customers.*

Performance Expectations:

- a) *Privacy is maintained at all times for patient and employee information.*
- b) *Actions are initiated to meet or exceed customer/co-workers expectations in delivering service by implementing the I Make a Difference philosophy (Ownership begins with me. Greet customers by making eye contact and smiling. Provide positive, professional and prompt responses, e.g. helping visitors find their way. Close every interaction with – Is there anything else I can do for you?)*
- c) *Appropriate resources throughout the Organization are used consistently to meet customer needs.*
- d) *Relationships with staff in other work areas are fostered to meet internal and external customer needs.*
- e) *Positive working relationships with peers, management and customers are maintained at all times.*
- f) *Organizational Mission and Values or Respect, Integrity, Stewardship and Excellence are evident in behaviors.*

GE 8.

5. On June 11, 2009, Management of the Agency issued to the Grievant a Formal Performance Improvement Counseling Form (“PIC”) with a one-day suspension:

Counseled about rudeness to passengers and others on 2/13/08, 9/30/08, and again on 3/13/09. Given a PIC on 5/13/09 for rudeness to a passenger. Received another complaint from a passenger looking for the Hospitality Shuttle.

AE 2.

6. Management also notified the Grievant of his associated Performance Warning Period (“PWP”) from June 11, 2009 through September 9, 2009:

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

AE 2.

7. The Grievant did not file any grievance proceeding concerning this discipline
8. As stated above, the Grievant had previously received a PIC on May 13, 2009:

History of complaints of rudeness from riders on the shuttle. Counseled for this on 2/13/08, 9/30/08 and 3/13/09. Current complaint from professional employee at UH – she asked if this was the Fontaine Shuttle when she boarded at the West Complex. The response she reported (“can’t you see the sign out there – it’s big and green”) was embarrassing to her. She also witnessed him nearly hitting a pedestrian in the crosswalk at the intersection of JPA and Emmett, as well as honking at a confused driver who was in his way at the intersection of JPA and Fontaine.

Specific changes in performance or behavior required and the time frame in which this must occur:

Further complaints may result in the next step of disciplinary action. All complaints will be investigated, and [Grievant’s] accounts will always be considered, but continued extraordinary numbers of complaints from his riders is not reassuring and scrutiny will be high for him until we are reassured that his communications and his behaviors are both professional and friendly. Driving behaviors appear to be bordering on aggressive driving. Drivers in medical center vehicles are representing the medical center and must be careful to avoid being perceived as a rude or aggressive driver. Defensive driving to avoid accidents is required, and more patience is advised. Pedestrians in crosswalks have the right of way and all possible care must be taken to avoid hitting a pedestrian.

Failure of employee to correct performance may result in further disciplinary action up to and including termination of employment.

9. The Grievant did not file any grievance proceeding concerning this PIC.

10. On Friday, July 3, 2009, J (the visiting mother of a Facility child patient) complained about the Grievant, who at the time was driving the HHouse Shuttle between HHouse and the RM House. Firstly, J complained that the Grievant yelled unnecessarily at the mother, J, to watch and get control of her four year old child when the child was on the curb and in no danger of running into the path of the Grievant's shuttle. The Grievant was not in a good mood.
11. Secondly, the Grievant had not put the shuttle in park and as the child was stepping up on to the van, the Grievant bent over to pick up a box and as the Grievant did this, the van started rolling forward.
12. J grabbed her child and began hollering at the Grievant that he almost ran over her child. The Grievant was very apologetic and altered his shuttle route and schedule, doing a U-turn to take J and her daughter to the RM House before going to the HHouse, where he should have gone first.
13. Management thoroughly, independently and impartially investigated the complaints of J and through corroborating accounts of neutral witnesses determined that J's complaints were justified and true.
14. Accordingly, Management issued a PIC Written Notice terminating the Grievant's employment, effective July 14, 2009. The Written Notice is incorporated herein by this reference.
15. The investigation conducted by the Agency was thorough and impartial. The conclusions reached by the Agency were reasonable.
16. The testimony of the Agency witnesses was credible and consistent. The demeanor of such witnesses was open, frank and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

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 operative Agency Standards of Conduct (the “SOC”) are contained in Agency Human Resources Policy No. 0701 (effective January 1, 2009). The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC 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.

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.*

Pursuant to Policy No. 0701 and consistent with the SOC, the Grievant’s conduct could clearly constitute a terminable offense, as asserted by the Agency. AE 3.

As previously stated, the Agency’s burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency’s advocate that the Grievant’s disciplinary infractions justified the termination by Management. Accordingly, the Grievant’s behavior constituted misconduct and the Agency’s discipline is consistent with law and consistent with policy, being properly characterized as a terminable offense.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant, including his three years of service to the Department. However, the Department also had to account for the prior PICs and the PWP described above and the formal and informal performance counselings.

Accordingly, because the Department assessed mitigating factors, the Rules only allow this hearing officer to mitigate the discipline further if this hearing officer upon consideration of the evidence finds that the Department's discipline exceeded the limits of reasonableness.

While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered many factors including those specifically referenced above and all of those listed below in his analysis:

1. the Grievant's service to the Agency of 3 years;
2. the Grievant's cultural and communication differences; and
3. the Grievant received an overall rating of "Meets Expectations" in his two previous Performance Appraisals (GE 7 & 8).

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was very serious. Clearly, the mitigation decision by the Agency was within the permissible zone of reasonableness.

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, and the SOC, 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 Agency'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.*

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the PIC Written Notice and in terminating the Grievant's 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 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, Main Street Centre, 600 East Main Street, Suite 301, 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: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).