

Issues: Formal Performance Improvement Counseling (failure to complete training) and Termination; Hearing Date: 11/30/09; Decision Issued: 12/02/09; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 9225; Outcome: Full Relief.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9225**

Hearing Date: November 30, 2009  
Decision Issued: December 2, 2009

**PROCEDURAL HISTORY**

On August 5, 2009, Grievant was issued a Formal Improvement Counseling Form with removal for failure to timely complete computer based training.

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 November 9, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 30, 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 as a RN Administrative Coordinator. She began working for the Agency in May 2007. She had prior active disciplinary action. On May 11, 2009, Grievant received a Formal Performance Counseling Form establishing a Performance Warning period from May 11, 2009 through August 9, 2009. The Formal Performance Counseling Form notified Grievant that:

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

Grievant was expected to complete computer based training by July 31, 2009 as required by Medical Center Human Resources Policy No. 210.

Grievant was reminded many times to complete the computer based learning. Completing this training could take as few as fifteen minutes. On July 1, 2009 and July 14, 2009, Grievant received emails reminding her of her obligation to complete the training. On July 25, 2009, a Human Resource employee sent the Administrator an email listing those employees who had not completed the training. Grievant's name was included on that list. The Human Resource employee also wrote:

Mandatory retraining is to be completed by July 31<sup>st</sup>. Policy 2.10 states, "Employees who are noncompliant as of August 1<sup>st</sup>, or 31 days upon return to work from an approved leave of absence will be suspended

without pay until the modules are successfully completed. Employees who do not successfully complete the modules by the end of the fifth day of suspension will be terminated.

On Monday July 27, 2009, the Administrator sent Grievant an email indicating Grievant should complete the training by Friday July 31, 2009. The Administrator attached a copy of the Human Resource employee's email to the email sent to Grievant.

Grievant was absent from work on July 30, 2009 and July 31, 2009. She applied for Family Medical Leave on July 30, 2009. She sought intermittent leave. Grievant's supervisor approved the leave request on July 30, 2009.

Grievant did not complete the training by July 31, 2009. She was removed from employment because the Agency believed she had not completed all of the performance expectations of her job.

### **CONCLUSIONS OF POLICY**

Medical Center Human Resources Policy 701 provides that an employee who has been placed on a Performance Warning may be removed from employment for failure to meet any of his or her performance expectations.

One of Grievant's performance expectations was to complete the computer based learning seminar. Grievant did not complete the training. When Grievant was asked why she did not complete the training despite the numerous reminders, she responded that she had forgotten to do so.

The Agency contends Grievant was obligated to complete the training by July 31, 2009 and because Grievant failed to do so, she did not meet all of her performance expectations thereby justifying removal. Grievant contends that the due date for completing the training had not yet passed. The question becomes on what date was Grievant obligated to complete the training.

The Agency relied on Policy 210 to establish the date of July 31<sup>st</sup>. Section D of this policy states, in part:

All employees are assigned organization-wide mandatory training modules to complete on an annual basis. All assigned modules must be completed by July 31<sup>st</sup>. Employees on an approved leave of absence have 30 calendar days from their return to work date to complete the organizational-wide training modules. Employees who are noncompliant as of August 1<sup>st</sup>, or 31 days upon return to work from an approved leave of absence, will be suspended without pay or until the modules are successfully completed. Employees who do not successfully complete the

modules by the end of the fifth day of suspension will be terminated. (See Medical Center Human Resources Policy #701).

If Policy 210 is the source of the July 31<sup>st</sup> deadline as the Agency contends, it defines when that deadline is extended. Policy 210 states that an employee who is on an approved leave of absence has 30 calendar days from her return to work to complete the training. The Administrator testified that someone on FMLA leave would be on an approved leave of absence. Grievant was on approved FMLA leave on July 30 and July 31, 2009. Thus, Grievant was on an approved leave of absence under Policy 210. Because Grievant was on an approved leave of absence, her due date to complete the training was several weeks after Grievant was removed from employment effective August 5, 2009. The Agency removed Grievant from employment on August 5, 2009, but she had not yet failed to comply with Policy 210. Accordingly, there was no basis to take disciplinary action against Grievant. The Agency's disciplinary action against Grievant must be reversed.

### DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Formal Performance Counseling Form with removal is **rescinded**. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

### 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>1</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>1</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.