

Issues: Formal Performance Improvement Counseling Form (inappropriate comments, misuse of agency's computer system) and Termination; Hearing Date: 08/03/10; Decision Issued: 08/09/10; Agency: UVA Health System; AHO: William Davidson, Esq.; Case No. 9373; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 08/23/10; Outcome pending; **Administrative Review**: DHRM Ruling Request received 08/23/10; Outcome pending.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9373

Hearing Date: August 3, 2010
Decision Issued: August 9, 2010

PROCEDURAL HISTORY

The Grievant was issued a Formal Performance Improvement Counseling Form on April 22, 2010 for:

[Grievant] sent multiple inappropriate messages to a female nurse in the department on days when they worked together. This has been occurring off and on over the last 6 months but over the last 10 days has escalated from comments such as “you’re sweet” and “you’re cute” to “I am attracted to you and don’t know what to do about it” and “In heaven we shall hang out.” This is when the female nurse became frightened and notified management. [Grievant’s] wife then contacted the female nurse, stating that [Grievant] told her they were having an affair with times and places they met together outside work, none of which is true. The female nurse is feeling threatened and unsafe at work. In June of 2008, [Grievant] was again counseled for making inappropriate comments regarding sexual orientation.¹

Pursuant to the Formal Performance Improvement Counseling Form, the Grievant was terminated on April 22, 2010.² On May 10, 2010, the Grievant timely filed a grievance to challenge the Agency’s actions.³ On July 6, 2010, the Department of Employment Dispute Resolution (“EDR”) assigned this Appeal to a Hearing Officer. On August 3, 2010, a hearing was held at the Agency’s location.

APPEARANCES

Agency Representative
Grievant
Witnesses

¹ Agency Exhibit 1, Tab 2, Page 1

² Agency Exhibit 1, Tab 2, Page 1

³ Agency Exhibit 1, Tab 1, Page 2

ISSUE

1. Did the Grievant use the Agency's paging system in a manner that violated Agency rules and regulations regarding the use of such paging system?
2. Did the Grievant harass a fellow employee of the Agency?

AUTHORITY OF HEARING OFFICER

Code Section 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 Section 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 termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) 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. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.⁴ However, proof must go beyond conjecture.⁵ In other words, there must be more than a possibility or a mere speculation.⁶

FINDINGS OF FACT

⁴ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁵ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁶ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

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

The Agency provided the Hearing Officer with a notebook containing five (5) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing nine (9) tabbed sections (labeled A-I) and that notebook was accepted in its entirety as Grievant Exhibit 1.

In this matter, the Grievant worked as a nurse in the Emergency Department for the Agency. The Agency used an Intranet system known as Medihost. This system was used by the employees of the Agency to communicate with each other regarding official Agency business. Examples of print-outs of the logs produced by this system are found in Agency Exhibit 1.⁷ Medical Center Policy number 0202 deals with Intranet access and usage. That policy states that acceptable uses for the Intranet include communicating by electronic mail for purposes relevant to the mission of the Medical Center.⁸ Unacceptable uses of the Intranet include engaging in illegal or unethical activities as defined by this policy.⁹

A fellow employee of the Grievant testified that over a period of time, she received text messages on the Intranet system from the Grievant. Her testimony was that she was certain that the Grievant was the sender of these messages as they were identical in verbiage to what he had previously said to her orally. Examples of those messages were, “You are sweet (sent on April 7, 2010); I think I am attracted to you, and I don’t know how to handle it (sent on April 8, 2010); Smile you are cute (sent on April 15, 2010); OK, in Heaven we shall hang out (sent on April 15, 2010)”¹⁰

In his testimony, the Grievant vigorously denied that he sent any of these messages.

The Medihost system did not provide the name of the sender of these messages. That system provides the sender with the ability to delete his or her name. On April 20, 2010, the Interim Director of the Emergency Department and a Human Resources Consultant met with the Grievant to discuss these issues. They both testified that the Grievant readily admitted that he had sent inappropriate text messages over the Intranet system and that he was able to quote them nearly verbatim without the need to look at the printed copies of the message log. Both of these witnesses were adamant that the Grievant admitted sending the messages.

The recipient of the messages testified that she only received them when she and the Grievant worked the same shift. When she went to a night shift, the messages stopped. The recipient testified that she was extremely fearful by the time she received the fourth message regarding, “hanging out in Heaven.” On that same day, the recipient of the text messages testified that the Grievant’s wife called her at work. Further, she testified that his wife indicated

⁷ Agency Exhibit 1, Tab 1, Pages 11-13

⁸ Agency Exhibit 1, Tab 3, Page 1, Policy 0202(D)(1)(a)

⁹ Agency Exhibit 1, Tab 3, Page 2, Policy 0202(D)(2)(c)

¹⁰ Agency Exhibit 1, Tab 1, Page 11-13

that the Grievant had told her that she (the recipient of the text messages) and the Grievant were having an affair and that she (the Grievant's wife) wished to come in and discuss this matter. Because of her fear, she moved out of her house for a period of time, changed the location of her employment parking space and had escorts to and from the parking lot to the Hospital.

In the Grievant's testimony, he admitted that his wife called this employee but he denied that there was a statement regarding an affair.

While there is a conflict as to whether the Grievant was the author of the text messages, the Hearing Officer finds that the Agency has borne its burden of proof and that it was more likely than not that it was the Grievant who sent the text messages and accordingly violated the Agency's rules governing the use of the MediHost system. Having found that the Grievant sent these messages, and that the recipient of these messages was frightened and concerned by them, the Hearing Officer finds that the recipient was harassed.

A more important issue before the Hearing Officer is whether or not the Grievant harassed a fellow employee with these messages and, if so, did that rise to the level that it justified termination. The Agency introduced into evidence Medical Center Human Resource Policy 701 which deals with Employee Standards of Performance.¹¹ This Policy provides in part that:

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.¹²

Policy 701 also sets forth examples of unacceptable performance/behavior that could be addressed through the Progressive Performance Improvement Counseling process. One (1) of those examples is set forth as follows:

Adversely affecting another's ability to do work.¹³

This system consists of four (4) steps and they are as follows:

1. Informal Counseling
2. Formal Performance Improvement Counseling
3. Performance warning And/or Suspension
4. Termination¹⁴

An example of an issue that would qualify for Informal Counseling as set forth in Policy 701 is, "actions that are discourteous to patients, guests or other staff members."¹⁵ An example of an action that would immediately qualify for a Performance Warning And/or Suspension is,

¹¹ Agency Exhibit 1, Tab 3, Pages 1-8

¹² Agency Exhibit 1, Tab 3, Page 1 of 8

¹³ Agency Exhibit 1, Tab 3, Page 2 of 8

¹⁴ Agency Exhibit 1, Tab 3, Page 3 of 8

¹⁵ Agency Exhibit 1, Tab 3, Page 3 of 8

“Unacceptable or unauthorized use of the Internet, electronic mail, or Medical Center computer network/system.”¹⁶

Policy 701 further sets forth that, depending upon the employee’s overall work record, serious misconduct issues may result in termination without prior Progressive Performance Improvement Counseling. An example of such a serious misconduct issue would be the, “mistreatment, including verbal and physical abuse or harassment of a patient, visitor or fellow employee...”¹⁷ It is clear that the recipient of these messages did not wish to receive them.

While it is clear that the Agency, regarding the harassment and improper use of the MediHost system issues, could have adopted a lower-level of Progressive Performance Improvement Counseling, the Hearing Officer finds that the Agency has reached its minimal burden of proof to show that the Grievant’s fellow employee was in fact mistreated by him because of her receipt of these unwanted text messages which caused her significant fear and, accordingly, impacted her ability to perform her job as an employee of the Agency.

MITIGATION

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...”¹⁸ 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency. The Hearing Officer has considered all of the delineated items in mitigation as set forth in this paragraph as well as any and all other possible sources of mitigation which were raised by the Grievant at the hearing and the Hearing Officer finds that no further mitigation is required in this matter.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof regarding this matter.

¹⁶ Agency Exhibit 1, Tab 3, Page 5 of 8

¹⁷ Agency Exhibit 1, Tab 3, Page 5 of 8

¹⁸ Va. Code § 2.2-3005

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 Street, 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 Street, Suite 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 your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹⁹ 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.²⁰

[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]

¹⁹An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

²⁰Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

William S. Davidson
Hearing Officer