

Issues: Formal Performance Improvement Counseling Form (failure to report to work or call in) and Termination; Hearing Date: 10/28/10; Decision Issued: 10/29/10; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 9443; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9443**

Hearing Date: October 28, 2010  
Decision Issued: October 29, 2010

**PROCEDURAL HISTORY**

On July 29, 2010, Grievant was issued a Formal Performance Counseling Form with removal for failing to report to work.

On August 25, 2010, 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 October 13, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 28 2000 and, a hearing was held at the Agency's 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 Patient Access Specialist prior to her removal effective July 29, 2010. Grievant had prior active disciplinary action consisting of a Formal Performance Counseling Form issued on July 12, 2010. As part of this discipline, Grievant was placed on a Performance Warning from July 12, 2010 through October 12, 2010. Grievant received notice that:

All performance expectations for the job must be met during this Performance Warning period. Failure to meet performance expectations will result in termination.<sup>1</sup>

On July 19, 2010, Grievant was scheduled to work at the Agency's workplace. She did not report to work at all that day. She did not contact the Supervisor. Because the Agency had not received any response from Grievant, the Agency sent Grievant a letter by certified mail. The letter stated:

This letter is to inform you that as of July 19<sup>th</sup>, you have not reported to work nor have you contacted your supervisor as to why you [have not] reported. If your supervisor, [Supervisor] does not hear from you by telephone or in person by Wednesday, July 28, you will be removed from your current position of Access Specialist in the [Department].<sup>2</sup>

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<sup>1</sup> Agency Exhibit 2.

<sup>2</sup> Agency Exhibit 4.

Grievant received the letter on July 23, 2010. Grievant did not contact the Supervisor by Wednesday, July 28, 2010.

### **CONCLUSIONS OF POLICY**

Under the Agency's standards of conduct, an employee who receives a Formal Performance Counseling Form with a Performance Warning must meet all of the performance expectations of his or her job during the performance warning period. An employee who fails to meet any of his or her performance expectations during the performance warning period may be removed from employment.

The Agency has an attendance policy requiring:

Employee shall inform their supervisor, or designee, of an absence in accordance with the department's Addendum.

When an employee notifies his/her supervisor, or designee, of an absence that is health-related or involves hospitalization or is expected to last for more than three days, the supervisor shall assess the situation for the applicability of Family Medical Leave or Medical Leave. If applicable, the supervisor shall instruct the employee to contact Employee Relations and obtain required FMLA paperwork to certify the leave of absence.

Employees are required to call in each day of the absence, or according to their department's Addendum, unless other arrangements have been made with the supervisor, or designee.<sup>3</sup>

One of Grievant's performance expectations on July 19, 2010 was to contact the Supervisor to inform the Supervisor that she would be absent from work. Because Grievant failed to contact the Supervisor on July 19, 2010, Grievant failed to meet all of the performance expectations for her job during the Performance Warning thereby justifying her removal from employment.

The Agency sent Grievant a letter advising her to contact the Supervisor by July 28, 2010, otherwise she would be removed from employment. Grievant did not contact the Supervisor by July 28, 2010.

Grievant argued that she attempted to call the Supervisor but was unsuccessful in reaching the Supervisor. No credible evidence was presented to support this assertion.

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<sup>3</sup> Agency Exhibit 3.

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. In light of this standard, 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 Improvement 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

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<sup>4</sup> Va. Code § 2.2-3005.

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.