

Issues: Formal Performance Improvement Counseling for excessive tardiness, and Termination (unsatisfactory performance during Performance Warning Period);  
Hearing Date: 03/25/11; Decision Issued: 03/28/11; Agency: UVA Health System;  
AHO: Carl Wilson Schmidt, Esq.; Case No. 9542; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9542**

Hearing Date: March 25, 2011  
Decision Issued: March 28, 2011

**PROCEDURAL HISTORY**

On November 3, 2010, Grievant was issued a Formal Performance Improvement Counseling Form with removal for being tardy during a Performance Warning for attendance.

On December 3, 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 March 7, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 25, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
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?

### **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 an Access Scheduling Specialist. She was responsible for many duties including answering telephone calls and scheduling patient visits. Grievant had been employed by the Agency for approximately 30 years.

On October 11, 2010, Grievant received a Formal Performance Counseling Form placing Grievant under Performance Warning from September 15, 2010 through December 15, 2010. The form stated:

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

On November 2, 2010, Grievant's shift was scheduled to begin at 8 a.m. She overslept. She called the Supervisor at approximately 8 a.m. and said that she would arrive to work before 9 a.m. Grievant arrived at the Facility at approximately 8:45 a.m. Because she was more than one half hour late, she was deemed to have an unscheduled absence/tardy thereby resulting in an occurrence under the Agency's leave policy. Grievant's occurrence on November 2, 2010 was her 10<sup>th</sup> active occurrence. Agency managers concluded that Grievant had not met all of the performance expectations of her position during the performance warning period. Grievant was removed from employment.

## CONCLUSIONS OF POLICY

Medical Center Human Resources Policy Number 701 sets forth the Agency's Employee Standards of Performance. Employee performance issues are addressed through a process of progressive performance improvement counseling. This process consists of four steps: (1) informal counseling, (2) formal performance improvement counseling, (3) performance warning and/or suspension, and (4) termination. Failure to meet all performance expectations at anytime during the Performance Warning period normally results in removal under the Agency's Policy 701.

Medical Center Human Resources Policy Number 704 governs Attendance. The Medical Center must be adequately staffed in order to meet patient care needs. Policy Number 704 is designed to provide clear guidelines for employees to follow in planning their time off and also to assist supervisors in addressing situations in which the frequency of employee absence exceeds the standard for the Medical Center. An addendum to Policy Number 704 provides:

Employees who report to work and or clock in 7 minutes after the start of the scheduled shift will be considered tardy. A tardy of greater than 30 minutes past the scheduled shift will result in an occurrence for that day. Supervisors had the discretion to review situations with extenuating circumstances.

Unscheduled absence occurrences and tardies are counted in 12 month calendar year period. All occurrences and tardies from the previous calendar year shall expire at the conclusion of the calendar year if the employee has not been formally counseled (formal counseling or performance warning). If an employee completes 90 days without incurring any additional unscheduled absence or tardy, the last disciplinary action must be repeated. Disciplinary action steps will not be repeated more than once except in unusual circumstances as determined by the area Administrator.

Attendance occurrences will be considered excessive and subject to disciplinary action when they reach the following levels:

Unscheduled Absence Occurrence	Tardy	Progressive Counseling Step
6 <sup>th</sup>	6 <sup>th</sup>	Informal Counseling
7 <sup>th</sup>	7 <sup>th</sup>	Formal Performance Improvement

		Counseling
8 <sup>th</sup>	8 <sup>th</sup>	Performance Warning
9 <sup>th</sup>	9 <sup>th</sup>	Termination of Employment

The Agency did not remove Grievant from employment after she accumulated the ninth occurrence. Grievant received a Formal Performance Improvement Counseling with a Performance Warning on October 10, 2010. On November 2, 2010, Grievant was tardy to work by more than one half hour. This represented an occurrence under the Agency's policy. Because Grievant had accumulated a 10<sup>th</sup> occurrence, and that occurrence occurred during a Performance Warning period, the Agency has presented sufficient evidence to support the disciplinary action with Grievant's removal.

Grievant argued that and Agency manager "was after me to fire me". No credible evidence was presented to support this allegation. Under the Agency's attendance policy, Grievant was in control of whether an occurrence would accrue.

Grievant argued that she suffered from several medical concerns that affected her attendance. She argued that the Agency should have provided her with a reasonable accommodation. On November 2, 2010, Grievant was not late to work because of a medical condition. She overslept. To the extent Grievant's medical condition may have affected prior occurrences, the merits of those occurrences would not be before the Hearing Officer. Grievant could have filed a grievance to challenge the application of the Agency's policy each time she received an occurrence. Whether the Agency provided Grievant with an accommodation would have had no influence on whether Grievant overslept. Grievant overslept because she left her alarm clock with a family member in another location.

*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>1</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

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<sup>1</sup> Va. Code § 2.2-3005.

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 Performance 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 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>2</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>2</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.