Issue: Step 4 Formal Performance Improvement Counseling Form with Termination; Hearing Date: 05/11/12; Decision Issued: 05/14/12; Agency: UVA Medical Center; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9811; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9811

Hearing Date: May 11, 2012
Decision Issued: May 14, 2012

PROCEDURAL HISTORY

Grievant, a supplies specialist with the University of Virginia Medical Center ("Agency") was removed from employment pursuant to Step 4 formal performance counseling form issued January 25, 2012. Agency Exh. 2. The discipline was issued under the authority of the Agency's Human Resources Policy No. 701, Employee Standards of Performance. Grievant timely filed a grievance to challenge the Agency's action. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On April 24, 2012, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. At the pre-hearing conference, the hearing was scheduled at the first date available between the parties and the hearing officer, May 11, 2012, at which time the grievance hearing was held at the Agency's offices.

Both sides submitted exhibits that were, without objection from either side, admitted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits, numbered respectively. The hearing officer has carefully considered all evidence presented.

Other disciplinary counseling and notices are part of the grievance record, as the Agency relied on the progressive disciplinary process.

APPEARANCES

Grievant
Advocate for Grievant
Advocate for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the termination memorandum?
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 under applicable 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?

The Grievant requests rescission of the termination and job reinstatement.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

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).

Code § 2.2-3000 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.

The Agency's Medical Center Human Resources Policy No. 701, Employee Standards of Performance ("SOP"), defines the progressive discipline that must be followed before a termination may occur. Agency Exh. 7. 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.

The SOP defines work expectations and provides guidance for dealing with performance deficiencies. The SOP, Section C, states as its objective:

> The Medical Center expects employees to meet standards of performance that enable all to work together to achieve the mission of the Medical Center.
>
> 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…

It states further, at Section D, in part, "The following are examples of some performance issues that are appropriate for the progressive performance improvement counseling process:

- Failure to meet performance expectations
- Adversely affecting another's ability to do work
- Misuse of work time
- Failure to report to work as scheduled
- Unauthorized absence from assigned work area
- Failure to meet attendance standard
- Failure to follow supervisor's instructions
- Failure to follow applicable policy

The SOP provides guidance to management officials for handling workplace behavior and for taking corrective action. The policy lists the four-step process as follows: (1) informal counseling; (2) formal written performance counseling; (3) performance warning; and, (4) termination.

More specifically, the SOP provides for a series of steps when Agency staff believes an employee's work performance is inadequate:

> The Medical Center may use a process of performance improvement counseling to address unacceptable performance when appropriate, except in cases of serious misconduct where suspension or termination is warranted. The purpose of the performance improvement counseling process is to correct the problem, prevent recurrence, and prepare the employee for satisfactory service in the future.
> ***

Performance improvement counseling steps include informal coaching, formal (written) performance improvement counseling, suspension and/or performance warning, and ultimately termination.
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A. Informal Counseling – Step 1

If performance issues continue after appropriate coaching and training, the supervisor will bring the performance deficiency issues to the attention of the employee in an informal coaching session. This session should take place as soon as possible after the deficiency is noted, and in most cases should be conducted in private.
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B. Formal (Written) Performance Improvement Counseling – Step 2

If the performance issue persists subsequent to the informal counseling, formal performance improvement counseling shall be initiated. The severity of the performance issue may warrant formal counseling without prior informal counseling.
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[T]he employee shall receive a Performance Improvement Counseling Form documenting the expectations for performance improvement, the time frame for the improvement, and consequences if the employee fails to achieve and maintain the required performance level.

C. Performance Warning – Step 3

A performance warning is issued to specify a period of time (not to exceed 90 days) during which the employee is expected to improve or correct performance issues and meet *all* performance expectations for his/her job.

A performance warning will typically be applied progressively after at least one formal performance improvement counseling. Suspension will generally accompany the performance warning except in the case of attendance infractions.

Prior to taking any formal disciplinary step, the supervisor must meet with the employee to conduct a predetermination meeting. This meeting is held to review the facts and give the employee an opportunity to respond to the issues or explain any mitigating circumstances. Documentation of the predetermination meeting shall be maintained by the supervisor.

After reviewing the information provided by the employee, the supervisor will determine if a performance warning is warranted.

The performance warning must be documented on a Performance Improvement Counseling Form and include (1) clear and specific documentation of the performance issue(s), expected behavior and/or performance goals to be met, and (2) the time frame for achieving expectations. The performance warning is a significant step in the process of progressive performance improvement counseling. The performance warning shall document that unsatisfactory progress, or failure to meet all performance expectations at any time during the performance warning period shall normally result in termination.

D. Termination or Demotion – Step 4

> If an employee does not successfully meet the expectations following progressive performance improvement counseling, employment may be terminated or the employee may be demoted.

The Americans with Disabilities Act ("ADA") prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability. 42 U.S.C. § 12112. Under the ADA, the term "disability" means, "with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). To be "substantially limited" in a major life activity, the grievant must be significantly restricted in performing the activity. *Toyota Motor Mfg., Ky., Inc., v. Williams*, 534 U.S. 184, 196-97 (2002). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2 (i). Refusing to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" is a prohibited form of discrimination under the ADA. 42 U.S.C. § 12112(b)(5)(A). However, the employer will not be required to offer the accommodation if it would "impose an undue hardship on the operation of the business" of the employer. *Id.*

Va. Code § 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 § 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 determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), 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."

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions. The operable facts are not materially in dispute and are summarized effectively in the Agency's termination form. Agency Exh. 2. In sum, on January 17, 2012, the Grievant was instructed to deliver and

stock supplies at the Cardiac Catheterization Lab. The Grievant left the supplies at the lab without stocking the supplies in the appropriate areas. The Grievant's supervisor had previously instructed him specifically not to leave supplies at a unit without properly stocking them. Knowing or inquiring about the proper storage and placement of supplies is peculiarly within the Grievant's job duties. The supervisor testified that, for most all supplies, the marked bins or shelves indicate the proper placement. The Grievant testified that this supply area was new to him and he did not know exactly where the supplies were to be stocked, and that he sought help from others who were unable or unwilling to assist him. The supervisor testified that he was always willing to assist the Grievant, that he received no communication from the Grievant regarding any problem with this stocking assignment, and that this was a repeated instance of unsatisfactory stocking performance by the Grievant. The supervisor testified that the lab manager was available to assist the Grievant with any questions about stocking. The Grievant was, in essence, not fulfilling a basic and core responsibility on January 17, 2012.

The Grievant was subject to progressive discipline, having received informal and, ultimately, a Formal Performance Counseling – Step 3, on September 6, 2011, for not unloading carts and delivering a medical supply order. Further, the Grievant received a "Below Expectations" rating on his annual performance appraisal on December 5, 2011.

The Agency employed Grievant as a supplies specialist. The Grievant had over 6 years service with the Agency. Other than the progressive performance issues, the Grievant was considered a good and loyal employee. However, based on the evidence presented, the Agency met its burden of proving the misconduct and the accompanying level of progressive discipline.

After the Agency elected Step 4 termination, the Grievant asserted that he had a disability and that, presumably, the disability caused his performance issues that could have been alleviated through reasonable accommodation. Thus, the Grievant argues that he has been subjected to a form of discrimination through the alleged failure of the agency to provide a reasonable accommodation for his disability under the ADA. The Grievant asserts that he has adult attention deficit hyperactivity disorder ("ADHD"). (The only medical evidence of disability is a 2001 "data sheet" from a school psychologist, indicating ADHD. Grievant Exh. J.)

While the Grievant seemed to assert that the Agency knew or should have known of his alleged disability, he ultimately conceded that he never put the Agency on notice of a specific disability or request for accommodation.

Generally, it is the obligation of an individual with a disability to request a reasonable accommodation. Although the ADA does not require employees to ask for an accommodation at a specific time, the timing of a request for reasonable accommodation is important because an employer does not have to rescind discipline (including a termination) or an evaluation warranted by poor performance. *See Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999) (request for reasonable accommodation is too late when it is made after an employee has committed a violation warranting termination); *Contreras v. Barnhart*, EEOC Appeal No. 01A10514 (February 22, 2002) (decision rejects employee's claim that employer should have known that a reasonable accommodation was not working and provided another one, rather than disciplining employee for poor performance, where employee failed to request a new

accommodation and two of her doctors had indicated that the employer should continue providing the existing accommodation); *cf. Fenney v. Dakota Minn. & E.R.R. Co.*, 327 F.3d 707, 717 (8th Cir. 2003) (employee took demotion to avoid risk of discharge for chronic tardiness after repeated requests for reasonable accommodation related to work schedule were summarily denied).

The employer may refuse the request for reasonable accommodation and proceed with the termination because an employer is not required to excuse performance problems that occurred prior to the accommodation request. Once an employer makes an employee aware of performance problems, the employee must request any accommodations needed to rectify them. This employee waited too long to request reasonable accommodation.

When an employee does not give notice of the need for accommodation until after a performance problem has occurred, reasonable accommodation does not require that the employer:

tolerate or excuse the poor performance;

withhold disciplinary action (including termination) warranted by the poor performance;

raise a performance rating; or

give an evaluation that does not reflect the employee's actual performance.[30]

See EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act*, at II (2.3) and IV (4.4), (1992), *available at www.adainformation.org/Employment.aspx*.

Thus, without any specific evidence that the inadequate performance at issue was the result of a covered disability, the failure of the Grievant to bring this to the employer's attention prior to discipline and prior to termination renders the disability issue out of reach. The Agency has met its burden of proof, and, under the applicable law, the ADA cannot apply to reverse discipline.

Mitigation

The Agency considered the issue of mitigation in reaching its decision to terminate the employment of the Grievant. The Agency commended the Grievant's attendance and reliability, other than the incidents of progressive discipline in the record. Further, the Grievant conceded that he did not raise disability issues during the various incidents of progressive discipline, and raised the issue for the grievance hearing. Because the law does not favor employees who raise disability issues post-discipline, such conduct is more of an aggravating factor than mitigating.

While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness. The agency has proved (i) the employee engaged in the behavior described in the termination memorandum, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent

evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

Termination is the normal disciplinary action for Step 4 in the disciplinary process unless mitigation weighs in favor of a reduction of discipline. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." Va. Code § 2.2-3005(C)(6). 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.

The agency expressed consideration of mitigating circumstances, but there are actually aggravating factors, notably the Grievant's failure to raise the applicability of an alleged disability post-discipline. Under the *Rules for Conducting Grievance Hearings*, an employee's length of service and satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. In this case, the Agency's action of imposing discipline of termination is within the limits of reasonableness. While the hearing officer finds that this Grievant has a good record overall of being a sincere contributor to the agency and is genuinely regretful for his omissions, in light of the applicable standards, the Hearing Officer finds no evidence that warrants any mitigation to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, the Agency's Step 4 discipline and termination is upheld.

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, VA 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 the 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer