

Issue: Formal Performance Improvement Counseling Form with Termination (falsifying application); Hearing Date: 11/15/13; Decision Issued: 11/27/13; Agency: UVA Health System; AHO: John V. Robinson, Esq.; Case No. 9952; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9952

Hearing Officer Appointment: October 23, 2012

Hearing Date: November 15, 2012

Decision Issued: November 27, 2012

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge termination of her employment effective September 25, 2012, pursuant to a Formal Performance Counseling Form, dated September 25, 2012 by Management of University of Virginia Health System (the "Department" or "Agency"), as described in the Grievance Form A dated October 5, 2012. The Grievant is seeking the relief requested in her Grievance Form A.

The hearing officer scheduled a pre-hearing conference call at 3:00 p.m. on October 31, 2012. The Grievant, the Agency's advocate (the "Advocate") and the hearing officer participated in the call. Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered October 31, 2012 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the Grievant represented herself and the Advocate represented the Agency. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing¹.

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

¹ References to the grievant's exhibits will be designated GE followed by the page number. References to the agency's exhibits will be designated AE followed by the exhibit number.

APPEARANCES

Representative for Agency
Grievant

FINDINGS OF FACT

1. The Grievant was a registered nurse for the Agency, previously employed by the Agency for about 18 months before the termination of her employment by the Agency.
2. In February 2011, during her employment with a previous healthcare provider (the "Previous Employer"), a report of patient abuse by Grievant was made by a student nurse, including that the Grievant grabbed and shook Patient A's arms and yelled at Patient A, an 80 year old patient with dementia. AE 5.
3. On February 14, 2011, the Director of Nursing and Operations and the Director of Nursing for the Previous Employer interviewed the Grievant concerning the alleged abuse incident.
4. The Grievant admits that during the interview with the administrators from the Previous Employer, after being informed that the Grievant would be suspended from her employment pending further investigation, the Grievant resigned. GE 12; AE 5; Tape.
5. On February 15, 2011, the Previous Employer issued a letter to the Grievant terminating her employment effective February 14, 2011. AE 5.
6. In the Grievant's employment application to the Agency, the Grievant answered "No" to the question "Have you ever been disciplined, separated from employment, or left employment while under investigation for abuse, neglect or sexual exploitation of a patient, child, or incapacitated adult?"
7. The Grievant admits that the Previous Employer never intimated that the investigation into the alleged patient abuse would cease because of the Grievant's resignation.
8. The Grievant's supervisor (the "Supervisor") testified credibly and forcefully at the hearing that the Grievant under the circumstances in the context of an allegation of patient abuse, would understand that the investigation would continue.

9. The Grievant's response in the negative to the question in the Agency's employment application, "Have you ever . . . , separated from employment, or left employment while under investigation for abuse, . . . of a patient, or incapacitated adult?" constitutes a misrepresentation or material omission.
10. The testimony of the Agency witness was credible. The demeanor of such witness was open, frank and forthright.

ADDITIONAL FINDINGS, APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. Code § 2.2-3000(A) 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.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The operative Agency standards of conduct (the "SOC") are contained in Agency Human Resources Policy No. 701 (effective July 1, 2011). The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The SOC provides in part as follows:

....

C. POLICY:

The Medical Center expects employees to meet standards of performance that enable all to work together to achieve the mission of the Medical Center. The University of Virginia Medical Center maintains an environment that is free from implicit and explicit behavior which is used to adversely control, influence or affect the well-being of any members of its healthcare community. All individuals working in the Medical Center shall treat others with respect, courtesy, and dignity, and shall conduct themselves in a professional and cooperative manner.

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. . . .

D. PROCEDURE:

1. Standards of Performance

The following standards of performance are designed to protect the well being and rights of all employees and promote safe and efficient operation of the Medical Center.

A. Each employee shall adhere to Medical Center Policy No. 0283 - "Behavioral Code of Conduct", Medical Center Policy No. 0235 - "Compliance Code of Conduct", and University of Virginia Code of Ethics"
<http://www.virginia.edu/statementofpurpose/uethics.html>.

B. In addition, each employee shall:

- a. follow all other Medical Center and departmental policies and procedures.
- b. perform job duties as assigned by the supervisor, spending the work day

efficiently and effectively performing such duties while demonstrating an awareness of priorities. . . .

2. Performance Issues

The Medical Center uses a process of performance improvement counseling to address unacceptable performance/behaviors 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.

The following are examples of unacceptable performance/behavior that would be addressed through the progressive performance improvement counseling process:

- Failure to meet performance expectations
- Adversely affecting another's ability to do work . . .
- Failure to follow supervisor's instructions
- Failure to follow applicable policy

3. Performance Improvement Counseling

It is the responsibility of the supervisor to ensure that the employee receives appropriate training and understands how to meet performance expectations. When concerns about employee performance arise, the supervisor is responsible for assessing the situation, determining whether the employee understands how to meet performance expectations, providing coaching and monitoring changes in performance. If, after such supervisory attention/intervention, the performance issue is not corrected, the supervisor shall implement the progressive performance improvement counseling process. Progressive performance improvement counseling steps include informal counseling, formal (written) performance improvement counseling, suspension and/or performance warning, and ultimately termination or demotion. Although most cases will follow the sequence below, supervisors shall take into consideration the nature of the performance issue, the employee's intent, the consequences of the employee's actions, the employee's past performance

record, and other mitigating or aggravating circumstances in determining the appropriate step to take.

Step One	Step Two	Step Three	Step Four
Informal Counseling	Formal Performance Improvement Counseling	Performance Warning And/or Suspension	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.

Depending upon the employee's overall work record, serious misconduct issues that may result in termination *without* prior progressive performance improvement counseling include, but are not limited to:

....

The Formal Performance Counseling Form, Step 4 - Termination dated September 25, 2012 (the "Step 4"), issued by the Supervisor described the Grievant's disciplinary infractions as follows:

[Grievant] is being terminated for misrepresenting information on her application for employment which is a violation of Medical Center Human Resources Policy No. 104 Condition of Employment.

On [date] it was brought to Human Resources attention through a routine audit conducted to ensure current licensure that [Grievant's] License was flagged. The flag on [Grievant's] License resulted due to her being reported to The Board of Nursing for an investigation conducted by her previous employer [Name]. The Board of Nursing Order dated [date] states that on [date] coworkers reported that in their presence [Grievant] grabbed and shook the patient's arm and yelled at the patient. Co-workers also stated [Grievant]

made inappropriate comments regarding the patient while still in the patient's room as well as when exiting. The Order reveals that on [date] [Name of Previous Employer] issued a letter to [Grievant] terminating her employment effective [date].

A review of [Grievant's] employment application for [Agency] from [date] showed that [Grievant] responded "No" to the question "Have you ever been disciplined, separated from employment, or left employment while under investigation for abuse, neglect or sexual exploitation of a patient, child or incapacitated adult?"

Medical Center HR Policy 104 states that throughout the hiring process and employment, the Medical Center relies upon the accuracy of the information in the employment application, as well as the accuracy of other data presented. Any misrepresentations, falsifications, or material omissions in any of this information or data may result in exclusion of the individual from further consideration for employment or, if the person has been hired, termination of employment.

A predetermination meeting was held on [date]. [Grievant] admitted that she had received discipline from the board of nursing regarding an incident at [Name of Previous Employer]. [Grievant] stated she thought the incident was over and alleges that she resigned from [Name of Previous Employer]. [Grievant] further stated that no one at [Name of Previous Employer] had mentioned that an investigation was ongoing after she had left. She states that she did not intend to mislead or deceive anyone when she marked "No" to the question on her employment application. The Order shows that [Grievant] attended a meeting before the Board on [date].

AE 1.

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

Here, the Agency elected to terminate the Grievant's employment as permitted under policy. AE 6. Pursuant to Policy No. 104 and 701 and consistent with the SOC, the Grievant's conduct could clearly constitute a terminable offence, as asserted by the Agency. AE 6. The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated Policy No. 104 concerning the Grievant's misrepresentation on the employment application.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's Advocate that the Grievant's disciplinary infractions justified the discipline by Management concerning the Grievant's employment application. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Step 4 offense.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department apparently did not consider mitigating factors in disciplining the Grievant.

While the Grievant did not specifically raise mitigation in the hearing or in her Form A and while the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Form A and all of those listed below in his analysis:

1. the Grievant's strong service to the Agency as evidenced by her positive evaluations;
2. the Grievant's competency as a nurse;
3. the Grievant's dedication to nursing and her patients; and

4. the often difficult and stressful circumstances of the Grievant's work environment.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

The Grievant's misrepresentation on her employment application was material and serious. The hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

The hearing officer decides for the offense specified in the written notice concerning the Grievant's infraction (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the disciplinary action of the Agency concerning the infraction by the Grievant in her employment application grieved in this proceeding, is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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 two types of administrative review, depending upon the nature of the alleged defect of the decision:

- 1. 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 refer 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 or e-mailed.
- 2. A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR'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 Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

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 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 EDR before filing a notice of appeal.

ENTER: 11 / 27 / 2012

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Rules for Conducting Grievance Hearings*, § V(C)).