

Issue: Formal Performance Improvement Counseling and Termination (continued failure to meet performance expectations); Hearing Date: 12/13/12; Decision Issued: 12/19/12; Agency: UVA Medical Center; AHO: William S. Davidson, Esq.; Case No. 9976; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9976

Hearing Date: December 13, 2012
Decision Issued: December 19, 2012

PROCEDURAL HISTORY

The Grievant was issued a University of Virginia Medical Center Formal Performance Counseling Form (“FPCF”) on October 10, 2012.¹ Pursuant to the FPCF, the Grievant was terminated by the Agency on October 10, 2012. The FPCF, in summary, states that the reasons for termination were as follows:

[Grievant] is being terminated for continued failure to meet performance expectation resulting in unreasonable delays in response of the Pegasus ground unit which is a violation of Medical Center Human Resources Policy No. 701 - Employee Standards of Performance.

On 10/1/12, [Grievant] and his unit received a emergent call for an internal response team transport request, [Grievant’s] supervisor observed [Grievant] walking in the opposite direction of the response location, then stopping by the cafeteria to fill his water bottle instead of responding immediately to the emergent call. [Grievant’s] primary responsibility is to be readily available for emergency and/or non-emergency transport requests both within the unit’s internal and external response areas. A delay in response not only negatively affects the department’s reliability and predictability to its customers, but it also directly impacts patient care.

A predetermination meeting was held on 10/1/12. [Grievant] acknowledged that he had a delayed response in an emergency situation. He also acknowledged that he understood his performance expectations as described in his performance appraisal dated 8/30/12.

[Grievant] received a Step 3 - Performance Warning with suspension on 1/12/12 for failure to meet performance expectations which resulted in unreasonable delays in response of Pegasus ground unit. [Grievant] received a Step 2 - Formal Counseling on 7/19/11 for unsatisfactory job performance related to unreasonable delays in response of the Pegasus ground unit. [Grievant] received informal counseling on 3/30/11 for unsatisfactory job performance related to unreasonable delays in response of the Pegasus ground unit.²

¹ Agency Exhibit 1, Tab 2, Page 1

² Agency Exhibit 1, Tab 2, Page 1

Pursuant to the FPCF, on October 24, 2012, the Grievant timely filed a grievance to challenge the Agency's actions.³ On November 13, 2012, the Department of Human Resource Management ("DHRM") assigned this Appeal to a Hearing Officer. On December 13, 2012, a hearing was held at the Agency's location.

APPEARANCES

Agency Advocate
Grievant
Witnesses

ISSUE

1. Did the Grievant fail to meet performance expectations resulting in unreasonable delays in response of the Pegasus ground unit in violation of Medical Center Human Resources Policy No. 701?

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.

³ Agency Exhibit 1, Tab 1, Page 1

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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

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) tabs and, with no objections raised, the Agency notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with no documentary evidence, and chose instead to rely on the Agency’s notebook for documentary evidence.

The Grievant in this matter was a member of a unit that was expected to provide emergency care for anyone who needed such care within the location of this Agency. The Hearing Officer heard testimony that, on October 1, 2012, the Grievant and this unit received an emergent call for an internal response team transport. The Hearing Officer heard testimony from the Grievant’s immediate supervisor that the supervisor witnessed the Grievant in a cafeteria location filling his water bottle when he should have been responding to the emergency call.

When the Grievant testified, he did not deny that he was filling his water bottle after he had received the emergency call. The Hearing Officer heard testimony in this matter that there is an expectation that all members of this unit will respond immediately to any emergency call.

This matter is governed by Medical Center Human Resources Policy No. 701. That Policy, at 701(D)(1)(ii) states in part as follows:

Perform job duties as assigned by the supervisor, spending the work day efficiently and effectively performing such duties while demonstrating an awareness of priorities. ⁷

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)

⁷ Agency Exhibit 1, Tab 5, Page 2

Prior to the incident that is before the Hearing Officer, the Grievant was issued a Step 3 FPCF on January 12, 2012.⁸ Pursuant to this FPCF, the Grievant received a one (1) day suspension. This document, which the Grievant acknowledged and signed on January 12, 2012, stated in bold print:

All performance expectations for the job must be met during this Performance Warning Period. Failure to meet performance expectations will result in termination.⁹

On July 9, 2011, the Grievant received a Step 2 FPCF. As in the aforesaid Step 3 FPCF, the Grievant was again being issued the Step 2 FPCF for issues which were causing unreasonable delays in his unit's response time. The Grievant acknowledged receipt of this warning on July 19, 2011.¹⁰ And again, this document contained bold faced language that stated:

All performance expectations for the job must be met during this Performance Warning Period. Failure to meet performance expectations will result in termination.¹¹

One of the Grievant's primary duties was to immediately respond when called. The testimony before this Hearing Officer is clear that the Grievant did not immediately respond when called on October 1, 2012. It is also clear that the Grievant has had prior issues regarding the immediacy of his response time.

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..."¹² 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.

⁸ Agency Exhibit 1, Tab 2, Page 3

⁹ Agency Exhibit 1, Tab 2, Page 4

¹⁰ Agency Exhibit 1, Tab 2, Page 6

¹¹ Agency Exhibit 1, Tab 2, Page 6

¹² Va. Code § 2.2-3005

The Agency considered the Grievant's seventeen (17) years of service in this matter. However, because of his prior progressive counseling and the potential impact on patient care, the Agency did not choose to mitigate this matter. The Hearing Officer finds no fault in that decision.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof in this matter and that termination of the Grievant was appropriate.

APPEAL RIGHTS

You may file an administrative review request 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. You may fax your request to 804-371-7401, or address your request to:

Director of the 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. You may fax your request to 804-786-0111, or address your request to:

Office of Employment Dispute Resolution
101 North 14th Street, 12th Floor
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 of the original hearing decision. A copy of all requests for administrative review must be provided to the other party, EDR and the hearing officer. 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.¹³ 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.¹⁴

[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]

William S. Davidson
Hearing Officer

¹³An 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).

¹⁴Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.