

Issue: Step 4 Formal Performance Improvement Counseling Form with Termination (failure to meet performance expectations); Hearing Date: 02/03/16; Decision Issued: 02/23/16; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 10744; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10744

Hearing Date: February 3, 2016
Decision Issued: February 23, 2016

PROCEDURAL HISTORY

On November 10, 2015, Grievant was issued a Step 4 Formal Performance Improvement Counseling Form with removal.

On November 30, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 28, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 3, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
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 Medical Center employed Grievant as an EMT B. He had prior active disciplinary action. On November 17, 2014, Grievant received a Step 1 Informal Counseling. On May 18, 2015, Grievant received a Step 2 Formal Performance Improvement Counseling Form. On June 29, 2015, Grievant received a Step 3 Formal Performance Improvement Counseling Form with a ten hour suspension and a Performance Warning period from June 30, 2015 through September 29, 2015.

Grievant worked with Mr. R. They were to respond to emergency calls together. Grievant was trained that he was expected to acknowledge an emergency announcement made by a dispatcher within 60 seconds. If he could not acknowledge the emergency call within 60 seconds, he was supposed to notify his partner so his partner could respond without him.

On October 20, 2015, Grievant was working at the Facility. The Dispatcher made a radio announcement indicating a patient in the Transplant Clinic was having difficulty breathing. Within a minute of the announcement, Mr. R responded by radio that he had received the call. Mr. R went to the ambulance located outside the Emergency Department to collect equipment. Mr. R waited for Grievant to arrive. Grievant did not acknowledge the radio announcement. Grievant did not report to the ambulance. After waiting four minutes, Mr. R told another employee he could not wait any longer. Mr. R took the equipment from the ambulance and walked quickly to the patient's location. Grievant first contacted Mr. R eight minutes after the radio announcement to ask Mr. R his location. Mr. R was at an elevator of the building where

the patient was located. Grievant did not arrive at the patient's location until after Mr. R had already had the patient ready to be transported.

CONCLUSIONS OF POLICY

Medical Center Human Resources Policy 701 governs Employee Standards of Performance and Conduct. The policy provides for a series of steps including a Step 4 with removal. This policy provides:

All Medical Center employees shall: *** perform their tasks safely and responsibly in accordance with department and supervisory expectations.

If an employee is being progressively counseled pursuant to this or any Medical Center policy at the time a new performance issue arises or act of misconduct occurs, the new issue/act may be addressed at a higher level of performance improvement counseling. ***

Furthermore, if another performance issue arises or the employee engages in misconduct within one (1) year from the date of the Performance Warning, immediate termination may result.

On October 20, 2015, Grievant received an announcement by radio of an emergency call. He knew he was expected to acknowledge the call within one minute. He did not acknowledge the call within one minute. He was not performing other duties that would have prevented him from responding timely. His behavior rose to the level of misconduct thereby justifying the issuance of disciplinary action.

Grievant received a Step 3 Formal Performance Improvement Counseling Form with a Performance Warning on June 29, 2015. Grievant's misconduct occurred within one year of June 29, 2015 thereby justifying the issuance of a Step 4 Formal Performance Improvement Counseling with removal.

Grievant argued that he went to the ambulance and waited six to seven minutes for Mr. R to arrive. The evidence showed that Grievant did not acknowledge the radio call and did not arrive at the ambulance until after Mr. R had already left. Grievant's response was not acceptable to the Agency.

Grievant argued that he was bullied by his supervisors and employees in the department in which he worked. Insufficient evidence was presented to prove this assertion. Grievant presented no evidence showing that any bullying prevented him from acknowledging the radio announcement within one minute as required by the Agency.

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 Human Resource Management”¹ 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 Step 4 Formal Performance Improvement Counseling Form with removal **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 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 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

¹ Va. Code § 2.2-3005.

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals 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 requests for administrative 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.²

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

² Agencies must request and receive prior approval from EDR before filing a notice of appeal.