

Issue: Step 4 Formal Performance Improvement Counseling Form with Termination (threatening/intimidating other employees); Hearing Date: 04/21/16; Decision Issued: 05/18/16; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10774; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 06/02/16; EDR Ruling No. 2016-4366 issued 06/14/16; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10774

Hearing Date: April 21, 2016

Decision Issued: May 18, 2016

PROCEDURAL HISTORY

On January 6, 2016, Grievant was issued a Formal Performance Improvement Counseling Form with a Step 4 removal for threatening and intimidating employees of the Medical Center. The Agency issued a revised Formal Performance Improvement Counseling Form with a Step 4 removal on April 12, 2016.

On February 5, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 23, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 21, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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?
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?
5. Whether the Agency retaliated against Grievant.

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 a RN Charge Nurse (Clin II). She had been employed by the Agency for approximately two years prior to her removal. Grievant had prior active disciplinary action. On October 16, 2015, Grievant received a Step 1 Informal Counseling for pointing her finger and pushing it against a co-worker's shoulder several times in order to iterate her verbal discussion points.

A doctor and a patient complained that the patient had received the wrong medication. The Supervisor investigated the allegation and concluded Grievant gave medication intended for one patient to another patient. The Supervisor spoke with the Employee Relations Consultant (ERC) regarding how to proceed. The ERC said to place Grievant on paid administrative leave pending a predetermination meeting to find out Grievant's information about the incident. A predetermination meeting was not disciplinary under the Agency's policies. The ERC drafted a letter for the Supervisor to give to Grievant along with several human resource policies.¹

¹ Grievant complained that several other white employees had made medication errors yet they were not placed on paid leave. It appears that the Agency did not follow policy possibly because other human resource employees failed to properly advise the other supervisors how to conduct an investigation into a medication error.

On December 4, 2015, the Supervisor and another employee met Grievant at approximately 7 p.m. as Grievant was about to begin her shift. The Supervisor told Grievant she was being placed on paid administrative leave pending an investigation. The Supervisor handed Grievant a letter in an envelope² from the ERC and human resource policies. The letter from the ERC provided, in part:

In accordance with University of Virginia Medical Center Human Resource Policies #701 and #600, this letter is to confirm in writing that you are being placed on administrative leave as of Friday, December 4, 2015. Administrative Leave is a paid leave status during which you are required to remain available during working hours in order to reach you.

The reason you are being placed on administrative leave is to allow the department time to investigate the allegation[s] that were brought against you. ***

You are expected to remain available during normal working hours to be contacted regarding this investigation.³

On December 8, 2015, the Supervisor called Grievant and said she needed to schedule a predetermination meeting for that afternoon. Grievant became angry. She reflected her anger in her tone of voice. Grievant said she did not want to come in to meet with the Supervisor. Grievant said she had already reported this to the federal government. Grievant said, "you don't know who you are doing this to, do you?" Grievant said she was a federal agent. Grievant said the Supervisor should send her the termination letter if the Supervisor had decided to end her job and if Grievant was to come back to work, the Supervisor should call Grievant and tell her to come back. Grievant said that many other employees made medication errors and nothing was done about it. Grievant told the Supervisor, "I need to know if my job is over because I have to call somebody and if I am to come back to work then let me know. I need to call somebody to tell them my job is over, I am federal, you didn't know that, I am a national. I need to know if my job is over." Grievant repeated that that there was no point in her coming in to meet if her job was over. The Supervisor said no determination had been made and she would call her back.

The Supervisor felt intimidated by Grievant during their telephone call. The Supervisor was "shaken" and felt unsafe after speaking with Grievant. The Supervisor sent the ERC an email notifying the ERC of her conversation with Grievant. The ERC called the Supervisor.

The Supervisor and ERC spoke with Grievant by telephone later in the day on December 8, 2015 in an attempt to hold a predetermination meeting. They spoke to

² Grievant may have read the letter on a date after December 4, 2015.

³ Agency Exhibit 3.

Grievant by speaker phone. The Supervisor told Grievant they were calling to investigate a report of a patient receiving another patient's medication. The Supervisor said they needed Grievant's explanation of events in order to complete the investigation.

Grievant said she was the only one this was happening to and that many other employees had medication errors and nothing was done about it. Grievant said, "your plan has failed." Grievant told them "we needed to be careful" and that she was giving them "one last chance" to think about what they were doing. Grievant said she was told not to speak to them and that she had her own federal investigators and that she did not have to say anything to them. Grievant said they needed to "think twice" and to just send her termination papers and that what they were doing was punishable by law and that they could go to jail for the rest of their lives. Grievant said she knew their plan before they called her and that their plan had failed. Grievant asked how the ERC could sleep at night and that when the ERC was in her car and in her home she needed to ask God for forgiveness. Grievant said, "you are going to be surprised." Grievant mentioned that "you don't know who I am, you see it every day in the media." The ERC asked Grievant what she meant. Grievant replied, "you know, what happens when HR and Employee Relations does the wrong thing." Grievant said several times that they didn't know who she was. Grievant told them they needed to be smarter or there would be consequences. Grievant said they thought she was "a black immigrant with an accent."

The ERC and the Supervisor attempted multiple times to discuss the reason for their call and why they were holding a predetermination meeting. Grievant kept saying "be careful" and "your plan has failed" and to "send the termination papers" and to ask God for forgiveness. Grievant consistently referred to them by saying their first and last name.

Grievant refused to provide her version of the events relating to the possible medication error despite repeated requests to do so.

Following the Supervisor's and ERC's conversation with Grievant, the Supervisor felt "rattled" and "shaken." She was fearful someone might attack her. The Supervisor was happy with Grievant as an employee and considered Grievant typically to be "soft spoken". Grievant's tone of voice and demeanor on December 8, 2015 was a side of Grievant she had not seen before. The Supervisor had nightmares after December 8, 2015 because of the telephone calls with Grievant. The ERC was frightened by Grievant's statements and became afraid of Grievant. The ERC contacted her supervisor who told her to write a memorandum about the telephone call and recommended filing a police report. The ERC contacted the University Police.

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. In some cases, the Agency may bypass steps 1 and 2.

Gross misconduct includes, “[t]hreatening a patient, employee or visitor with physical harm.” “Gross Misconduct generally will result in termination.”

On December 8, 2015, Grievant engaged in Gross Misconduct. She told the Supervisor and the ERC that they “needed to be careful”, “think twice”, “you are going to be surprised”, “you see it every day in the media”, “you know, what happens when HR and Employee Relations does the wrong thing” and that there would be consequences. The context of Grievant’s comments is significant. Approximately three and a half months earlier, the local and national media reported a story of a Virginia TV reporter and her colleague who were murdered by a disgruntled former employee. The two victims were surprised by the former employee who approached them while they were broadcasting. The Supervisor and ERC understood Grievant to be suggesting they could suffer a surprise attack when HR and Employee Relations do the wrong thing. The Agency has presented sufficient evidence to show that Grievant threatened the Supervisor and ERC with physical harm. Grievant’s disciplinary action and removal must be upheld.⁴

Grievant denied making threatening comments. The question arises regarding why the Hearing Officer should believe the Agency’s employees instead of believing Grievant’s account of the events. The Agency’s employees were credible. Grievant made threatening comments to the Supervisor during the first telephone call. She repeated similar threats during the second telephone call. Both agency employees wrote accounts of their conversations immediately after the telephone calls. Their testimony was consistent with their written accounts. Grievant was angry and believed she was about to be terminated. She refused to respond to the Supervisor’s and ERC’s questions about the medication error. These are factors sufficient to conclude that the Agency has met its burden of proof.

The Agency’s objective was to meet with Grievant to investigate the incident. The Agency had not yet decided whether to take disciplinary action. The Agency used the term “predetermination” to describe the intended meeting. The term “predetermination” does not convey what the Agency intended (a meeting as part of an investigation) but rather conveyed that the Agency had reached its decision regarding Grievant’s behavior and sought Grievant’s comments prior to her receiving disciplinary action. In other words, “predetermination” referred to the decision making phase (following an investigation), not the investigative phase of the disciplinary process.

Grievant’s anger appears to have arisen from her assessment that the Agency intended to take disciplinary action even though it had not fully investigated her behavior

⁴ Grievant’s behavior was not protected behavior because she threatened harm to other employees.

or given her a chance to explain what happened.⁵ Grievant's frustration with the Agency is understandable, but that does not give her sufficient justification to threaten Agency employees.

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"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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁷ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.⁸

On November 2, 2015, Grievant sent the University President a letter regarding poor work performance by another employee. On November 2, 2015, Grievant sent an

⁵ During the first telephone conversation, Grievant understood the Agency to be requesting a "termination" meeting. During the second telephone conversation she heard the phrase "predetermination meeting."

⁶ *Va. Code § 2.2-3005.*

⁷ See *Va. Code § 2.2-3004(A)(v)* and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

⁸ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

email to another employee complaining that her paycheck was not accurate and she was being “punished due to retaliation” by the Supervisor. On December 4, 2015, Grievant filed a complaint form with the University of Virginia Office of Equal Opportunity Programs alleging racial discrimination and retaliation. She complained about an interaction she had with another nurse and the failure of her Supervisor to take action to address her concern. On December 7, 2015, Grievant filed a Charge of Discrimination with the Equality Employment Opportunity Commission for discriminatory comments made by co-worker and the Supervisor’s retaliation.

Grievant engaged in several protected actions. She suffered an adverse employment action because she received disciplinary action. Grievant has not established a connection between her protected activity and the adverse employment action. The evidence showed that Grievant was disciplined for her behavior on December 8, 2015 and not because of her protected activities. The Agency did not take disciplinary action as a pretext of retaliation. Grievant’s request for relief due to retaliation is denied.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Step 4 Formal Performance Improvement Counseling Form with removal is **upheld**. Grievant’s request for relief is **denied**.

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:

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.⁹

[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

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.