

Issue: Step 4 Formal Performance Improvement Counseling Form with Termination (sleeping during work hours); Hearing Date: 04/14/16; Decision Issued: 04/15/16; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10780; 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: 10780

Hearing Date: April 14, 2016

Decision Issued: April 15, 2016

PROCEDURAL HISTORY

On February 18, 2016, Grievant was issued a Step 4 Formal Performance Improvement Counseling Form with removal for sleeping or giving the appearance of sleeping during work hours, failure to meet performance expectations, and use of profane and offensive language.

On February 22, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 8, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 14, 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 a Supply Clerk. He began working for the Agency in April 2011. Grievant had prior disciplinary action. On December 30, 2014, Grievant received a Step 3 Formal Performance Improvement Counseling Form with a performance warning and suspension for testing positive for alcohol during work hours. On September 18, 2015, Grievant received a Step 3 Formal Performance Improvement Form with a performance warning and suspension for using offensive and unwelcomed language of a sexual nature in the workplace.

At approximately 1 p.m. on a date in November or December 2015, Grievant was working at the Facility. He was wearing his uniform and supposed to be responding to pages and delivering items to various employees throughout the Facility. Grievant entered a room reserved for patients and families. He placed a side chair with arms against a wall with the back of the chair against the wall. He pulled another chair close to him and placed his feet on the second chair. He crossed his left ankle over his right ankle with his legs extended. He leaned back in the side chair and rested his head against the wall. He clasped his hands and rested them on his stomach. He rested his forearms on the chair's arms. He closed his eyes and began sleeping. As he slept, his mouth was slightly open.

Employee 1 was working in a position similar to Grievant's position. Grievant was paged several times to deliver packages but he failed to respond. Employee 1 was asked to deliver a package that Grievant should have delivered if he had responded to

the page. After she delivered the package, Employee 1 suspected that Grievant was somewhere in the building so she went to find him. She entered the room where Grievant was sleeping and took a 15 second video of him sleeping.

CONCLUSIONS OF POLICY

University of Virginia Medical Center Policy #701, Employee Standards of Performance and Conduct, provides for a series of steps when University staff believe an employee's work performance is inadequate. An employee who receives a Step 4 Formal Performance Improvement Counseling Form may be removed from employment.

Policy #701 provides, "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."

Serious misconduct includes "[s]leeping or giving the appearance of sleeping during working hours." In November or December 2015, Grievant went to a secluded room in the Building, arranged furniture to enable him to sleep, and went to sleep. He engaged in serious misconduct.¹

In this case, Grievant received a performance warning on September 18, 2015. He engaged in serious misconduct within a year of that performance warning thereby justifying the issuance of a Step 4, Formal Performance Improvement Counseling Form with removal.

Grievant argued he was not told he could not take a break in the room where he was found sleeping. The evidence showed that Agency employees were advised of the location of the Agency's break room and that employees were advised not to go into the area where Grievant was found sleeping.

Grievant argued that he was being targeted by staff in the supply room. The evidence showed that Grievant's work performance was a concern to at least one of his co-workers (who took a video of him sleeping). No evidence was presented showing that the Agency took action against him because of any protected status or in a manner contrary to policy.

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

¹ It is not necessary for the Hearing Officer to address the Agency's other two reasons for issuing disciplinary action. The Agency's evidence showing Grievant was asleep is sufficient to show serious misconduct.

Management² 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 is **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:

Office of Employment Dispute Resolution
Department of Human Resource Management

² Va. Code § 2.2-3005.

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.³

[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

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.