

Issues: Step 3 Formal Performance Improvement Counseling Form with Suspension and 90-Day Performance Warning (insubordination and failure to follow instructions); Hearing Date: 06/07/16; Decision Issued: 06/09/16; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10808; 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: 10808**

Hearing Date: June 7, 2016

Decision Issued: June 9, 2016

### **PROCEDURAL HISTORY**

On February 16, 2016, Grievant was issued a Step 3, Formal Performance Improvement Counseling Form with a 16 hour suspension and a 90 day performance warning for insubordination including refusing to perform responsibilities reasonably requested.

On February 29, 2016, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On May 16, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 7, 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 employs Grievant as a Case Manager Supervisor. She has been employed by the Agency for approximately 21 years. No evidence of prior active disciplinary action was introduced during the hearing.

One of six supervisors served as the Care Management Division Leader-on-call on a weekly basis. This person worked on the weekend and was selected on a rotating basis. One of the duties of the Leader-on-call was to prepare a one page document entitled Care Management Division 2016 Weekend Coverage. This document listed the names of the employees in the Social Work unit and the Case Management unit who were scheduled to work on the weekend. The document was sent to other divisions in the Agency so those employees would know who to contact in the event assistance was needed.

Grievant was one of the supervisors serving as the Leader-on-call. She had completed Care Management Division Weekend Coverage documents on previous occasions.

The Supervisor began working for the Agency in January 2015. She had served as Leader-on-call only one time prior to January 23, 2016. The Supervisor was scheduled to be the Leader-on-call for January 23, 2016 and January 24, 2016. The Supervisor had access to the Agency's database containing the names of employees in

the Case Management unit but not employees in the Social Work unit. She was not familiar with how to complete the document and could not complete it without having access to the names of both units.

On January 20, 2016, Grievant and the Supervisor were discussing the need for the document to be prepared. The Supervisor asked Grievant to prepare the document for January 23, 2016 and January 24, 2016. Grievant refused to do so and suggested she would help the Supervisor learn how to prepare the document. The Supervisor instructed Grievant to prepare the document. Grievant refused and stated that Mr. N, the Administrative Assistant should prepare the document. Mr. N overheard the conversation and said that he did not know how to prepare the document. The Supervisor told Grievant to prepare the document. Grievant refused to do so. Mr. N decided to prepare the document. This delayed his other work duties.

### **CONCLUSIONS OF POLICY**

Medical Center Human Resources Policy 701 sets forth the Agency's Standards of Performance and Conduct for its employees. Progressive performance improvement counseling steps include an information counseling (Step One), formal written performance improvement counseling (Step Two), suspension and/or performance warning (Step Three) and ultimately termination (Step Four).

Serious Misconduct refers to acts or omissions having a significant impact on patient care or business operations. This includes, "refusing ... to execute or perform responsibilities as reasonably requested, assigned, or directed."

A Performance Warning is issued to address deficiencies in performance as well as acts of Serious Misconduct. Suspension generally accompanies the Performance Warning except in the case of attendance infractions.

On January 20, 2016, the Supervisor instructed Grievant to prepare a Care Management Division 2016 Weekend Coverage. The Supervisor had no experience completing the document and lacked access to the necessary database to complete the form. Grievant was capable of completing the document. The Supervisor instructed Grievant to complete the document. Grievant understood the instruction yet repeatedly refused to perform the task. The Administrative Assistant performed the task. The Agency has presented sufficient evidence to show that Grievant refused to perform responsibilities reasonably directed thereby justifying the issuance of Step 3, Formal Performance Improvement Counseling Form with a Performance Warning and 16 hour suspension.

Grievant argued that she did not refuse to perform the task. The evidence is overwhelming that Grievant refused to perform the task. Grievant made no attempt to perform the task.

Grievant argued communication between her and the Supervisor was poor. Grievant showed that the Supervisor was sometimes “bossy”, “condescending”, and “abrupt” in her communication with staff. This conclusion, however, has no effect on the outcome of this case. Grievant’s failure to perform an assigned duty did not arise from poor communication. The Supervisor made her instruction clear to Grievant and repeated it several times. Grievant understood the instruction but chose to reject it. Poor communication did not cause Grievant to refuse to perform the task.

*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 ....”<sup>1</sup> 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 3, Formal Performance Improvement Counseling Form with a 16 hour suspension and 90 day performance warning 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 14<sup>th</sup> St., 12<sup>th</sup> Floor

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<sup>1</sup> Va. Code § 2.2-3005.

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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>2</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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