

Issue: Step 4 Formal Performance Improvement Counseling Form (gross misconduct);
Hearing Date: 01/29/18; Decision Issued: 02/01/18; Agency: UVA Medical Center;
AHO: Carl Wilson Schmidt, Esq.; Case No. 11132; Outcome: No Relief – Agency
Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11132

Hearing Date: January 29, 2018

Decision Issued: February 1, 2018

PROCEDURAL HISTORY

On October 25, 2017, Grievant was issued a Step 4 Formal Performance Improvement Counseling Form with removal for serious misconduct and gross misconduct.

On November 15, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 5, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On January 29, 2018, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Front Door Greeter. Grievant had prior disciplinary action. He received a Step Three Performance Warning and suspension on May 18, 2016.

The Manager held a staff meeting attended by Grievant to discuss how to respond to unreasonable patients. Mr. T worked as a Lead Greeter with the Agency. He assisted a patient who then unexpectedly called him a racial name. Mr. T told the patient that his behavior was inappropriate and then walked away from the patient. The Manager told staff of the encounter and told staff that Mr. T responded appropriately. The Manager told Grievant and the other staff that they should respond as Mr. T did to a patient who was behaving inappropriately.

On October 17, 2017, Grievant was working at his assigned station in front of the main hospital. A vehicle drove in the first lane and stopped in front of Grievant. Inside the vehicle were the Driver and the Patient. The Patient was a 50 or 60-year-old woman who received oxygen and pulled an oxygen tank behind her when she walked.

Grievant walked to the driver's side door and asked if he could help them. One of them said they wanted valet service. Grievant said valet services was in the middle lane and asked them to drive to a sign next to the middle lane. The Driver asked if Grievant could park the vehicle. Grievant said he is not a valet and that the valet

service would be with them shortly. He explained that they were shorthanded that day. The Patient began “fussing” at Grievant. She said she wanted her car parked and she was not leaving. The Patient began yelling and cursing at Grievant. At some point, the Patient got out of the vehicle and continued berating Grievant.

The Supervisor and Ms. B noticed that Grievant and the Patient were in a dispute. They left the Building and walked towards Grievant and the Patient. Ms. B told the Driver to move her vehicle to the second land for valet parking.

Grievant approached the Supervisor and asked him to say something to the Patient. The Supervisor directed Grievant to “come on” and walk away from the Patient. The Patient continued to curse and yell at Grievant. Grievant was angry and speaking with his voice elevated. The Patient called Grievant several insulting names. She taunted Grievant by saying he was not going to do anything since he needed his job. Grievant turned to the Patient and approached her. While standing approximately three feet from the Patient, Grievant “puffed his chest out” and demanded “What did you say to me!” The Patient said “I called you a little bi--h!” Ms. B was concerned about Grievant’s interaction with the Patient. She quickly placed herself between the Patient and Grievant. She faced Grievant to stop him from getting too close to the Patient. Grievant turned to the Supervisor and asked if he was going to let that lady talk to him like that. The Supervisor said nothing to the Patient who then entered the Building. The Supervisor told Grievant the Supervisor did not want to lose his job, it was best to walk away from the situation, and that he did not like to deal with those types of people.

A few moments later, the Patient left the Building and came outside to speak to Grievant. The Patient apologized to Grievant. Grievant said he did not accept the apology because he felt she should not have degraded him and that the apology was not sincere. The Patient walked back into the Building.

CONCLUSIONS OF POLICY

Policy 701 sets forth the Agency’s Standards of Performance 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). Depending upon the employee's overall work record, serious misconduct issues that may result in termination without prior progressive performance improvement counseling.

Gross misconduct includes, “[v]erbal harassment and/or physical abuse, of a patient, visitor or fellow employee.” On October 17, 2017, Grievant engaged in a heated argument with the Patient. The Patient was abrasive and insulting. Grievant had been informed of the Agency’s expectation that he remove himself from conflicts with unreasonable patients, yet he continued to argue with the Patient. After she insulted him, Grievant confronted the Patient. He puffed out his chest and in a loud

voice demanded to know what she said. His behavior was sufficiently threatening that Ms. B believed it was necessary to step between Grievant and the Patient to stop his movement towards and conflict with the Patient. The Agency has presented sufficient evidence to support the issuance of a Step 4 Formal Improvement Counseling Form with removal for gross misconduct.

Grievant argued that the Supervisor did little to address the Patient's inappropriate behavior. The Agency argued that the Supervisor attempted to diffuse the conflict by asking Grievant to move away from the Patient. Although it is clear the Supervisor could have been more assertive in diffusing the conflict, Grievant received training informing him to separate from conflict with unreasonable patients. Grievant should have moved away from the Patient regardless of how the Supervisor acted.

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 is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution

¹ Va. Code § 2.2-3005.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.