

Issue: Step 4 Formal Performance Improvement Counseling Form with Termination (continued excessive tardiness); Hearing Date: 02/27/28; Decision Issued: 03/19/18; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 11159; 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: 11159

Hearing Date: February 27, 2018

Decision Issued: March 19, 2018

PROCEDURAL HISTORY

On December 29, 2017, Grievant was issued a Step 4 Formal Performance Improvement Counseling Form with removal.

On January 8, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 22, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On February 27, 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 Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
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 Transporter I. Grievant had prior disciplinary action. He received a Step 1, Informal Counseling Memo on March 30, 2017 for violating policy. On June 15, 2017, Grievant received a Step 2 Formal Performance Improvement Counseling Form for violation of policy. On September 6, 2017, Grievant received a Step 1, Informal Counseling Memo for failing to follow policy. On November 29, 2017, Grievant received a Step 2, Formal Performance Improvement Counseling Form for failure to follow policy.

Grievant had prior disciplinary action relating to tardiness. On November 3, 2017, Grievant received a Step 1, Informal Counseling Memo regarding excessive tardiness. Although he had been tardy eleven times, he was counseled for his sixth tardy in accordance with the Agency's Policy 704 governing attendance. On November 29, 2017, Grievant received a Step 2, Formal Performance Improvement Counseling Form for excessive tardiness. He was counseled for his seventh tardy under the Agency's policy. On December 6, 2017, Grievant received a Step 3, Formal Performance Improvement Counseling Form for his eighth tardy. He was placed on a Performance Warning from December 6, 2017 through March 6, 2018. During the performance warning period, Grievant was obligated to meet all of his job expectations otherwise he face removal.

During a predetermination meeting on November 22, 2017, Grievant stated that he had a lot going on in his personal life. The Agency referred him to the Faculty and Employee Assistance Program.

On Saturday December 16, 2017, Grievant clocked in at 11:03 p.m. to begin his shift which started at 11 p.m. He worked until 7:30 a.m.

At 11:27 p.m. on December 16, 2017, Grievant sent the Supervisor an email stating:

I clocked in at 2303 on [12/16/17] which I know I am technically late but I did my best leaving my other job to get here, I wanted to make sure that I was dressed and ready for work before I clocked in. I'm sorry for the tardiness and I understand there will be consequences. I wanted to let you know now instead of waiting until Monday. Hope you have a good weekend.¹

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.

The Agency's Policy 704 governs Attendance. Under this policy an employee who is tardy for the sixth time in a year should receive an Informal Counsel. An employee tardy for the seventh time in a year should receive a Formal Counseling. An employee tardy for the eighth time in a year should receive a Performance Warning. An employee tardy for the ninth time in a year should be removed from employment.

Policy 0003 is an addendum to the Agency's Health System Attendance Policy 704. This addendum states:

Employees who report to work and clock in 1 minute after the start of the scheduled shift will be considered tardy.

On December 16, 2017, Grievant clocked in 3 minutes after his shift was scheduled to start at 11 p.m. He was tardy for work for the ninth time during the year thereby justifying the issuance of a Step 4, Formal Performance Improvement Counseling Form with removal.

¹ Agency Exhibit 5.

Grievant argued that the Agency failed to account for his mental health condition. During one of the Step 2 determination meetings, Grievant told the Supervisor about the emotional and personal difficulties he was experiencing as the result of an automobile accident death he caused. Grievant told the Supervisor Grievant felt he is the one who should have died instead of the other driver. Grievant also expressed trauma from serving in combat in Afghanistan. The Agency referred Grievant to the Faculty and Employee Assistance Program.

Grievant's description of his depression and other emotional trauma was sufficient to notify the Agency that Grievant had a serious health condition allowing him to claim Family Medical Leave including intermittent leave. Several of Grievant's tardies may have been excused if he had been afforded intermittent leave. The Agency did not notify Grievant of his rights to claim leave under the Family Medical Leave Act which allowed for intermittent leave.

The Agency's failure to provide Grievant with adequate notice of his eligibility for Family Medical Leave does not affect the outcome of this case. On December 16, 2017, Grievant was not tardy for a mental health reason. He was late arriving after working at another job. His prior tardies were subject to disciplinary action that he did not appeal and are not before the Hearing Officer.

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"² 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**.

² *Va. Code § 2.2-3005.*

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
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.