

Issue: Step 4 Formal Improvement Counseling Form with Termination (no call/no show); Hearing Date: 12/06/18; Decision Issued: 02/19/19; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 11280; 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: 11280

Hearing Date: December 6, 2018

Decision Issued: February 19, 2019

PROCEDURAL HISTORY

On September 14, 2018, Grievant was issued a Step 4 Termination Formal Performance Improvement Counseling Form for two instances of No Call/No Show.

On October 1, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 16, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On December 6, 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 Pharmacy Technician. He began working for the Agency in October 2011. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was arrested and incarcerated. He was unable to call the Agency. He asked his sister to contact the Agency. Grievant was later acquitted of the charges.

Grievant was scheduled to begin working at 11 a.m. on July 30, 2018. At 8:44 a.m., Grievant's Sister called the Pharmacy Supervisor¹ and said that Grievant would not be coming into work that day due to a family emergency and said that Grievant would be in touch as soon as he could.

Grievant was scheduled to begin working at 11 a.m. on August 2, 2018. At 9:30 a.m., Grievant's Sister called the Pharmacy Supervisor and said that Grievant was not coming to work that day and that he was going to be out for the rest of the week.

¹ The Pharmacy Supervisor did not inform the Sister that Grievant was expected to call the Pharmacy Supervisor. The Pharmacy Supervisor did not have an obligation to inform the Sister of Grievant's obligation. Grievant received adequate notice of his obligation to call the Agency on each day he would be absent.

Grievant was scheduled to work on August 3, 2018, August 5, 2018, August 6, 2018, and August 7, 2018. Neither he, nor his Sister called the Agency on those days.

The Agency conducted a predetermination meeting on August 10, 2018 to ask Grievant for his explanation. Grievant said he was unable to call because he did not have a phone. He said the situation was unavoidable but he was unable to provide any further details. Grievant did not explain that he had been arrested and unable to call. Agency managers concluded Grievant had not provided any mitigating circumstances and issued the Step 4 Termination Formal Performance Improvement Counseling.

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.

Policy 704 governs Attendance. "No Call/No Show" is defined as:

An absence from work in which the employee has failed to report to work and failed to provide notification to the supervisor, or designee, of an unscheduled absence as required by the Department's Addendum. No Call/No Show will not be compensated.

Section 7 provides:

No Call/No Show is Serious Misconduct. The first instance of a No Call/No Show shall result in a performance warning. The second offense may result in termination of employment.

If the employee has already begun the formal disciplinary process (formal counseling or performance warning) for attendance when a No Call/No Show occurs, the disciplinary process shall be accelerated to termination of employment.

However, notwithstanding the above, Managers may consider extenuating circumstances when determining discipline for a No Call/No Show (e.g. if the employee is in a serious accident or is unexpectedly hospitalized) and should, in consultation with Human Resources, exercise discretion in such cases.²

² Agency Exhibit B.

Grievant's Department had a Scheduling and Attendance Addendum Policy. Section b. governs Unscheduled Absences and provides:

Notification of absence must be made daily unless prior arrangements are made in advance with a director, supervisor, manager, or respective coordinator.³

Grievant was obligated to notify the Agency on each day of his absence. On July 30, 2018 and August 2, 2018, his Sister called the Pharmacy Supervisor. Neither Grievant, nor his Sister called the Agency on August 3, 2018, August 5, 2018, August 6, 2018, and August 7, 2018. Grievant was "No Call/No Show" for at least four days assuming Grievant is given credit for having his sister call on two days. Thus, Grievant engaged in serious misconduct under the Agency's standards of conduct.

Serious misconduct refers to acts or omissions having a significant impact on patient care or business operations. Serious misconduct can result in removal if it has a significant or severe impact on patient care or Medical Care operations. In this case, the Agency's policy authorizes removal for a second offense of No Call/No Show. Grievant failed to call or show for more than two days and, thus, the Agency's decision to remove him must be upheld.

In this case, Grievant met with Agency managers on August 10, 2018 but did not provide the Agency with any extenuating circumstances that would serve to mitigate the disciplinary action. The Agency elected to issue Grievant a Step 4 Formal Performance Improvement Counseling Form With removal. In accordance with EEDR rulings, the Hearing Officer cannot consider the fact that Grievant was arrested and unable to call the Agency because Grievant did not provide that information to the Agency during the predetermination meeting.

Grievant stated during the hearing that he did not wish to be reinstated to his former position that sought removal of the Agency's decision to make him ineligible for rehire. Medical Center Human Resources Policy Number 405 governs Separation from Employment. Section D(3) governs Eligibility for Rehire and provides:

At the time of separation, resignation, or termination the employee's manager must inform the employee of his/her eligibility for rehire status and document that information about rehire eligibility has been communicated to and acknowledged by the employee. *** Former employees who have left the Medical Center in good standing and whose documented performance met expectations under the performance management system will be eligible for rehire. *** At the time of separation, employees may be determined to be in eligible for rehire by the Medical Center for the reasons that include, but are not limited to: ***

³ Agency Exhibit C.

separation from employment due to gross misconduct or violation of policy.⁴

Grievant was removed from employment for violating policy. Accordingly, the Agency's decision to render him ineligible for rehire must be upheld.

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"⁵ 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
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.

⁴ Hearing Officer Exhibits 1.

⁵ *Va. Code § 2.2-3005.*

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.