

Issue: Step 4 Formal Performance Counseling with Termination (failure to meet performance expectations); Hearing Date: 01/25/13; Decision Issued: 01/28/13; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10000; 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: 10000**

Hearing Date: January 25, 2013

Decision Issued: January 28, 2013

#### **PROCEDURAL HISTORY**

On November 21, 2012, Grievant was issued a Step 4 Formal Performance Counseling Form with removal for failing to wear Personal Protective Equipment.

On November 26, 2012, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 10, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this grievance due to the illness of a party. On January 25, 2013, 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 Former Performance 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 Certified Clinical Hemodialysis Technician at one of its facilities. She began working for the Agency on August 16, 2006. Grievant's job summary was, "[p]rovides direct patient care to patients with kidney disease in the Health Science Center or in satellite areas."<sup>1</sup>

Grievant had prior active disciplinary action. On September 10, 2012, Grievant received a Step 3 Formal Performance Counseling Form with a Performance Warning from September 10, 2012 through December 10, 2012. The Form stated, "All performance expectations for the job must be met during this Performance Warning Period. Failure to meet performance expectations will result in termination."<sup>2</sup>

Grievant received training from the Agency regarding her obligation to handle any "dirty" machines only while wearing gloves. A machine was "dirty" once a patient sat in the chair and began receiving medical services and procedures. As part of that process, a patient's blood could be exposed to employees and other patients, if the Agency's procedures were not followed. Grievant knew that the Agency required her to use gloves when adjusting "dirty" machines to minimize the risk that she would come into contact with any bloodborne pathogens.

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<sup>1</sup> Agency Exhibit 6.

<sup>2</sup> Agency Exhibit 3.

On November 14, 2012, Grievant was performing duties such as adjusting machines that were dirty and while patients were receiving services. She touched at least three machines without wearing gloves.

## CONCLUSIONS OF POLICY

Medical Center Human Resources Policy Number 701 sets forth the Agency's Employee Standards of Performance. Employee performance issues are addressed through a process of progressive performance improvement counseling. This process consists of four steps: (1) informal counseling, (2) formal performance improvement counseling, (3) performance warning and/or suspension, and (4) termination.

Once an employee is placed on a performance warning, the employee may be removed from employment for failing to meet any performance expectations. One of Grievant's performance expectations was to wear gloves when touching "dirty" machines. On November 14, 2012, Grievant touched dirty machines without wearing gloves. The Agency has presented sufficient evidence to support the issuance of a Step 4 Formal Performance Counseling Form with removal.

Grievant argued that she wore gloves as required on November 14, 2012 but did not present any evidence to support her assertion. The Agency presented credible testimony of witnesses who observed Grievant touching dirty machines without wearing gloves.

*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>3</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.

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<sup>3</sup> *Va. Code § 2.2-3005.*

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Step 4 Formal Performance 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 14<sup>th</sup> St., 12<sup>th</sup> 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  
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>4</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>4</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.