

Issue: Step 2 Formal Performance Improvement Counseling Form (insubordination, unprofessional conduct); Hearing Date: 04/02/13; Decision Issued: 05/06/13; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10033; 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: 10033

Hearing Date: April 2, 2013

Decision Issued: May 6, 2013

PROCEDURAL HISTORY

On October 24, 2012, Grievant was issued a Formal Performance Counseling Form Step 2 for not treating her supervisor with respect, courtesy and dignity and not conducting herself in a professional and cooperative manner.

On November 15, 2012, 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 February 25, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 2, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative

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. 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 Health Unit Coordinator. She has been employed by the Agency since 1982.

On October 10, 2012, Grievant sent the Supervisor an email asking for school leave. Grievant wanted to use leave to take her daughter to college. The Supervisor responded that Grievant did not have any remaining public school leave. Grievant replied that she had school leave and wanted to use that leave. The Supervisor informed Grievant that she did not have leave according to payroll records and that public service leave was not permitted for taking a child to college.

Following the email exchange, Grievant went to the Supervisor's office. The Supervisor was seated in her office. Her office is small. Grievant stood in the doorway. Grievant was angry and upset. Grievant said she had assumed the Supervisor would approve her leave so Grievant accessed the payroll system and reduced her leave balances for the public service leave. Grievant argued with the Supervisor regarding whether taking her daughter to college was covered under public service leave. The Supervisor read Grievant the applicable provision of the policy governing public service leave. The policy's definition of school did not include college. Transportation was not a covered activity under the policy. The Supervisor told Grievant that it was inappropriate for Grievant to make changes in her payroll balances.

As they spoke, the Supervisor mentioned Grievant's daughter had gone to court. Grievant was angry that the Supervisor had done so and said that the Supervisor

should not have known that information. The Supervisor said she knew of Grievant's daughter going to court because Grievant had requested public service leave for that purpose and the Supervisor had discussed the request with another employee involved in the request. Grievant stood over the Supervisor, pointed her finger at the Supervisor and said, "Don't you let my daughter come out of your mouth!" Grievant continued to speak even though the Supervisor had asked her to stop.

The Supervisor felt threatened by Grievant. Grievant was taller than the Supervisor and was blocking the Supervisor's exit out of the office. Grievant displayed anger and gestured towards the Supervisor. Grievant spoke in a loud voice and was shaking as she spoke.

The Supervisor stood up and pointed back at Grievant. The Supervisor told Grievant not to speak to the Supervisor so rudely and asked Grievant to leave. Grievant left the Supervisor's office.

After Grievant left the Supervisor, the Supervisor began meeting with another employee. Grievant returned to the Supervisor's office and interrupted the meeting. Grievant demanded that the Supervisor meet with Grievant and have another person in the room because what had happened was "just wrong." The Supervisor said she agreed that wrong actions had occurred and that she was committing another wrong action by coming into the Supervisor's office uninvited when the Supervisor was meeting with someone else. The Supervisor asked Grievant to leave and Grievant left.

CONCLUSIONS OF POLICY

Medical Center Policy No. 0283 governs the Behavioral Code of Conduct and requires employees to:

- Treat each other ... with fairness, courtesy, respect, and consideration.
- Cooperate and communicate with others, displaying regard for each person's dignity and worth.
- Use conflict management skills and direct verbal communication to manage disagreements.

The Policy also provides that, "the Medical Center strives to maintain an environment that is free from intimidation and disruptive behavior, whether implicit or explicit, which is used to adversely control, influence or affect the well-being of any member of its health care community, its patients or their families."¹

Medical Center Policy 701 creates four steps in the disciplinary process. Step 1 is Informal Counseling; Step 2 is Formal Performance Improvement Counseling, Step 3

¹ Agency Exhibit 6.

is Performance Warning and/or Suspension, and Step 4 is Termination of employment. This Policy provides:

If the performance issue persists subsequent to the informal counseling, formal performance improvement counseling shall be initiated. The severity of the performance issue may warrant formal counseling without prior informal counseling. Examples of when formal performance improvement counseling may be initiated without prior informal counseling included, but are not limited to:

- Use of profanity on work premises.
- Failure to properly notify the supervisor when leaving a work area thereby compromising patient care.
- Failure to adhere to Medical Center or departmental safety policies or procedures.

The Agency has presented sufficient evidence to support the issuance of a Step 2 Formal Performance Counseling Form.² On October 10, 2012, Grievant displayed anger towards the Supervisor, made gestures towards the Supervisor, leaned over the Supervisor and made the Supervisor feel threatened. Grievant was not courteous or respectful towards the Supervisor. She did not display any conflict management skills to attempt to resolve the conflict in a professional and appropriate manner. Grievant acted contrary to Medical Center Policy 0283 thereby justifying the issuance of a Step 2 Formal Performance Counseling Form.³

Grievant argued that her behavior was appropriate. She did not testify or present any evidence to support her position.

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”⁴ 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

² Grievant’s interaction with the Supervisor was not protected speech under *Va. Code § 2.2-3000(A)* because she adopted an intimidating presence directed towards the Supervisor.

³ The Agency presented evidence that Grievant had been counseled regarding her interactions with other employees. Grievant argued that she did not know she was being counseled. If the Hearing Officer disregards the Agency’s counseling of Grievant, the outcome of this case is not affected. The Agency presented evidence showing that Grievant acted contrary to a Medical Center policy and, thus, prior counseling was not a prerequisite for issuing a Step 2 Formal Performance Counseling Form.

⁴ *Va. Code § 2.2-3005.*

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 2 Formal Performance Counseling Form 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 14th St., 12th 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 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 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.⁵

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.