

Issue: Step 4 Formal Performance Improvement Counseling Form with Termination (unwillingness to perform duties and unprofessional behavior during Performance Warning Period); Hearing Date: 05/05/14 Decision Issued: 05/08/14; Agency: UVA Medical Center; AHO: William S. Davidson, Esq.; Case No. 10324; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case Number 10324

Hearing Date: May 5, 2014  
Decision Issued: May 8, 2014

**PROCEDURAL HISTORY**

A Formal Performance Improvement Counseling Form - Step 4 Termination was issued to the Grievant on February 20, 2014, for:

[Grievant] is currently on a Performance Warning (11/27/13-2/26/14) due to a Step 3 - Performance Warning with Suspension issued on 11/27/13 for failure to maintain professional boundaries with patients, use of profanity and offensive language in the workplace, and actions that are discourteous towards patients and coworkers. During the 90-day Performance Warning period any violation of Medical Center Human Resources Policy No. 701-Employee Standards of Performance and Conduct may result in termination

[Grievant] is being terminated for perceived unwillingness to perform her duties and unprofessional behavior in the workplace in violation of Medical Center Human Resources Policy No. 701-Employee Standards of Performance and Conduct and Medical Center Policy No. 283-Behavioral Code of Conduct....<sup>1</sup>

Pursuant to this Formal Performance Improvement Counseling Form, the Grievant was terminated.<sup>2</sup> On March 11, 2014, the Grievant timely filed a grievance to challenge the Agency's actions.<sup>3</sup> On April 3, 2014, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On May 5, 2014, a hearing was held at the Agency's location.

**APPEARANCES**

Advocate for Agency  
Agency Representative  
Grievant  
Witnesses

**ISSUE**

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<sup>1</sup> Agency Exhibit 1, Tab 1, Pages 1-2

<sup>2</sup> Agency Exhibit 1, Tab 1, Pages 1-2

<sup>3</sup> Agency Exhibit 1, Tab 2, Page 1

1. Did the Grievant violate Medical Center Human Resources Policy No. 701 and Medical Center Policy No. 283?

### **AUTHORITY OF HEARING OFFICER**

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>4</sup> Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the

employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

### **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. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.<sup>5</sup> However, proof must go beyond conjecture.<sup>6</sup> In other words, there must be more than a possibility or a mere speculation.<sup>7</sup>

### **FINDINGS OF FACT**

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<sup>4</sup> See Va. Code § 2.2-3004(B)

<sup>5</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>6</sup> *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>7</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

After reviewing the evidence presented and observing the demeanor of each witness, I make the following findings of fact:

The Agency provided me with a notebook containing seven tabs, but during the course of the hearing, a drawing was introduced into evidence that delineated what the conference room looked like, and that Exhibit was introduced without objection as Tab 8 (located in front of notebook). The witnesses that testified before me, wrote their names on the newly introduced Exhibit to show me where they were sitting in the conference room. That notebook, as amended, was accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant provided me with a notebook containing six tabs (labeled as “issues”). That notebook was accepted in its entirety as Grievant Exhibit 1, without objection.

On November 27, 2013, the Grievant was issued a Formal Performance Counseling Form-Step 3.<sup>8</sup> The Grievant did not grieve the issuance of that form and, accordingly, it is final before me. The Warning Period time frame for this form was from November 27, 2013 through February 26, 2014.<sup>9</sup> This form stated in part as follows:

All performance expectations for the job must be met during this Performance Warning. Failure to meet performance expectations may result in termination.<sup>10</sup>

The Step 3 Performance Counseling Form further set forth that:

...[Grievant] will treat patients and **colleagues** with dignity and respect...[Grievant] will adhere to all Medical Center and departmental policies and procedures. Subsequent misconduct may result in further disciplinary acts up to and including termination.<sup>11</sup> (Emphasis added)

On February 5, 2014, while still within the Warning Period time frame, Grievant attended a meeting called by her supervisor. The meeting room where this took place is set forth in Agency Exhibit 1, Tab 8. The Grievant sat at a computer table which was behind and to the left of the leader of this meeting, which was her supervisor. The consensus of all of the witnesses that testified before me, both for the Agency and the Grievant, was that eating your lunch during a meeting of this type was a common occurrence. That, standing alone, clearly was acceptable.

There is some dispute amongst the various witnesses that testified before me. However, it is my finding that the best evidence is that the Grievant did sit with her back to her supervisor during the vast majority of this meeting.

At some point during the meeting, the supervisor began talking about a new program that would be instituted and it had the rather unique title of “Happy Feet.” Many of the witnesses,

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<sup>8</sup> Agency Exhibit 1, Tab 5A, Pages 1-2

<sup>9</sup> Agency Exhibit 1, Tab 5A, Page 2

<sup>10</sup> Agency Exhibit 1, Tab 5A, Page 2

<sup>11</sup> Agency Exhibit 1, Tab 5A, Page 1

including the Grievant, acknowledged that upon the announcement of this new program, the Grievant stated in a voice discernable by those around her and the speaker that, “I do not do feet.” There were many other iterations of this statement based on witness testimony. The Grievant testified that she was merely thinking out loud and that she did not intend for this statement, even though it seemed to be a statement of refusal to comply with the new program, to be disrespectful. She testified that everyone knew she had a phobia regarding feet.

Medical Center Human Resources Policy No. 701, is set forth at Agency Exhibit 1, Tab 6, Pages 1-7. Policy No. 701(C) states in part as follows:

...The Medical Center expects each employee to perform his/her duties and conduct himself/herself in a manner which enables all employees to work together in achieving Medical Center goals. To this end, **all individuals working in the Medical Center shall treat others with respect, courtesy, and dignity, and shall conduct themselves in a professional and cooperative manner...**<sup>12</sup> (Emphasis added)

Further, Policy No. 701(C), states in part that:

...All Medical Center employees shall adhere to all: Medical Center Policies; Human Resource Policies; departmental protocols, policies and addenda; and to such University policies as applicable...<sup>13</sup>

Medical Center Policy No. 0283 sets forth the Agency’s Behavioral Code of Conduct.<sup>14</sup> This Policy, at Paragraph C, states in part as follows:

This Behavioral Code of Conduct (“Code”) is a statement of the ideals and principles which govern personal and professional behaviors at the University of Virginia Medical Center. This code applies to all persons providing patient care or other services within or for the benefit of the Medical Center, regardless of employer (“Covered Persons”).

Adherence to the ideals and principles stated in this Code advances the mission of the Medical Center and its commitment to the core values of respect, integrity, stewardship and excellence.

Covered Persons are expected to, at all times:

- **Treat each other[s]**, patients and their families, with fairness, courtesy, respect and consideration;

- Cooperate and communicate with others, displaying regard for **each person’s dignity and worth...**;

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<sup>12</sup> Agency Exhibit 1, Tab 6A, Page 1

<sup>13</sup> Agency Exhibit 1, Tab 6A, Page 2

<sup>14</sup> Agency Exhibit 1, Tab 6B, Pages 1-2

- Support and follow hospital policies and procedures...<sup>15</sup>  
(Emphasis added)

Accordingly, I find that the Grievant was under a Formal Performance Improvement Counseling Form-Step 3, which required her to act professionally. Policies 701 and 0283, set forth the type of conduct contemplated in professional conduct. The Grievant eating her lunch during a staff meeting does not qualify as conduct that is unprofessional. However, the Grievant having her back to her supervisor who was leading this meeting can certainly be perceived as unprofessional conduct. The comment that, "I do not do feet," can also be perceived by the supervisor as a direct refusal of a directive. At least one participant in that meeting deemed that the Grievant's actions were disrespectful and inappropriate.<sup>16</sup>

Another witness, one called by the Grievant, in her oral testimony before me, testified that she did not hear the Grievant during the meeting. However, in a written statement, this witness stated that, "The only thing the Grievant said was that she don't like feet."<sup>17</sup> In her written statement, this witness also stated that the Grievant was not facing the supervisor the whole time.

Had this Grievant not been under the Formal Performance Counseling Form-Step 3, I would not deem that her conduct rose to the level of termination. However, this Grievant was operating under this Warning Period time frame and was clearly on notice that any unprofessional conduct would be sufficient to warrant termination. I find that the Grievant's spending all or the great majority of the meeting with her back to the supervisor and making comments that indicated a refusal to comply with a new program that was being introduced, warrants a finding that the Grievant was being unprofessional.

### **MITIGATION**

*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 Employment Dispute Resolution..."<sup>18</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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

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<sup>15</sup> Agency Exhibit 1, Tab 6B, Page 1

<sup>16</sup> Agency Exhibit 1, Tab 4A, Page 1

<sup>17</sup> Agency Exhibit 1, Tab 4D, Page 1

<sup>18</sup> Va. Code § 2.2-3005

## DECISION

For reasons stated herein, I find that the Agency has borne its burden of proof and that termination of the Grievant was acceptable and, accordingly, is upheld.

## APPEAL RIGHTS

You may file an administrative review request 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. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

2. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

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 of the original hearing decision. A copy of all requests for administrative review must be provided 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 administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>19</sup> 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>20</sup>

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<sup>19</sup>An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>20</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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]

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William S. Davidson  
Hearing Officer