

Issue: Step 2 Formal Performance Improvement Counseling Form (repeated unsatisfactory performance); Hearing Date: 05/05/14; Decision Issued: 05/06/14; Agency: UVA Medical Center; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10327; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10327

Hearing Date: May 5, 2014
Decision Issued: May 6, 2014

PROCEDURAL HISTORY

Grievant, an anesthesia technician with the University of Virginia Medical Center (“Agency”), was issued a Step 2-Formal Counseling on January 3, 2014. Agency Exh. 2. The discipline was issued under the authority of the Agency’s Human Resources Policy No. 701, Employee Standards of Performance and Conduct. Grievant timely filed a grievance to challenge the Agency’s action. On April 9, 2014, the Office of Employment Dispute Resolution, Department of Human Resource Management (“EDR”) appointed the Hearing Officer. The hearing was scheduled at the first date available between the parties and the hearing officer, May 5, 2014, at which time the grievance hearing was held at the Agency’s offices.

Both sides submitted exhibits that were admitted into the grievance record, and they will be referred to as Agency’s or Grievant’s Exhibits, numbered respectively. The hearing officer has carefully considered all evidence presented.

A prior informal counseling is a part of the grievance record, as the Agency relied on the progressive disciplinary process. Agency Exh. 5.

APPEARANCES

Grievant
Advocate and Representative for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the termination memorandum?
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 under applicable 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?

The Grievant requests rescission of the Step 2 Formal Counseling.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency's Human Resources Policy No. 701, Employee Standards of Performance and Conduct, defines the progressive discipline that is expected from Agency management. Agency Exh. 7. 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.

Policy No. 701 provides that formal counseling, Step 2, is used to address deficiencies in performance or acts of serious misconduct as well as repeated performance issues that have not been corrected following receipt of Informal Counseling. Agency Exh. 7, p. 5.

Va. Code § 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 § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), 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."

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions. The operable facts alleged by the Agency are set forth in the Agency's Step 2 formal counseling form. It states

On 12/12/13, [the Grievant] failed to properly clean Operating Room (OR) 2002 by leaving blood in the BIS Patient Unit Cable (PUC) anesthesia machine keyboard and cart. Properly cleaned and disinfected equipment is the best step in preventing infections for patients.

...

On 10/17/2013, [the Grievant] received Informal Counseling for failure to properly clean OR 2001 by leaving blood on cables and a cart.

The anesthesia technician supervisor, Grievant's direct supervisor, testified consistently with the Step 2 counseling form. He testified to the job description for anesthesia technicians, including the duty of cleaning and ensuring contaminated items are disposed of. Agency Exh. 6. The supervisor testified to semi-annual training of the technicians and his personal counseling of

the Grievant. He also testified that he has the same expectations for the twenty technicians under his supervision and that other technicians have been disciplined for the same issue. The chief Certified Registered Nurse Anesthetist testified to his handling of a complaint made to him about the unsatisfactory state of operating rooms under the Grievant's responsibility. Agency Exh 3.

Three witnesses testified for the Grievant, essentially establishing that completely cleaning an operating room, particularly a cardiac room, is challenging, and that everybody works as a team and does the best they can do. The charge nurse testified that sometimes blood residue is missed, but that the Grievant is a good technician, respectful, and reliable.

The Grievant did not challenge the factual basis for the formal counseling, but he asserted that he was being singled out and that an assignment for cardiac rooms was much tougher than the other types of rooms. The Grievant also suggested he has not received proper training in his many years in this position.

The Agency has shown that the Grievant's conduct occurred as alleged in the Step 2 Formal Counseling. The Agency has demonstrated a record of progressive discipline of the Grievant concerning his performance. The Agency has shown that the Grievant has been counseled informally regarding insufficient cleaning of operating rooms and that the conduct has reoccurred, justifying the next step in progressive discipline. Applicable policy allows the Agency, in its discretion, to exercise discipline at the Step 2 Formal Counseling level. Based on the evidence presented, the Agency has met its burden of showing justification for the Step 2 discipline.

While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness. The Agency has the discretion to act within the continuum of disciplinary options. The Agency has proved (i) the employee engaged in the behavior described in the Formal Counseling, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

Mitigation

Step 2 is the normal disciplinary action for repeated conduct unless mitigation weighs in favor of a reduction of discipline. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." Va. Code § 2.2-3005(C)(6). 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.

Under the *Rules for Conducting Grievance Hearings*, an employee's length of service and satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action. On the issue of mitigation, the Grievant bears the burden of proof. The Grievant has questioned the existence of consistent discipline, but there is no evidence that the Agency has not applied the expectations and level of discipline consistently. The Grievant has also suggested a bias against him by his supervisor, but the evidence presented is insufficient to make such a finding. On the issue of adequate training, the Grievant did not testify that his failures addressed in the counseling were because of improper or lack of training for a job he has held for many years.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. However, in light of the applicable standards, the Hearing Officer finds no basis that provides any authority to reduce or rescind the disciplinary action. In this case, the Agency's action of imposing Step 2 Formal Counseling is within the limits of reasonableness.

DECISION

For the reasons stated herein, the Agency's Step 2 Formal Counseling issued January 3, 2014 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.¹

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer

¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.