

Issues: Arbitrary/Capricious Performance Evaluation, Step 2 Formal Performance Improvement Counseling Form (failure to meet performance expectations), Step 3 Formal Performance Improvement Counseling Form (failure to meet performance expectations during performance improvement plan), and Retaliation (other protected right); Hearing Date: 07/17/14; Decision Issued: 12/11/14; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10292, 10330, 10331; 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: 10292 / 10330 / 10331

Hearing Date: July 17, 2014
Decision Issued: December 11, 2014

PROCEDURAL HISTORY

Grievant received a 2013 Annual Performance Evaluation and an Employee Performance Improvement Plan (EPIP). He received a Formal Performance Improvement Counseling Form Step 2 on January 10, 2014. He received a Formal Performance Improvement Counseling Form Step 3 with suspension and performance warning on January 31, 2014. Grievant filed grievances to challenge these actions.

On March 26, 2014, the Office of Employment Dispute Resolution issued Ruling 2014-3825 and 2014-3826 qualifying Grievant's November 1, 2013 grievance challenging his annual performance evaluation for hearing. The Ruling specified that "[a]t the hearing, the grievant will have the burden of proof." The three grievances were consolidated for a single hearing.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel

ISSUES

1. Whether Grievant engaged in the behavior described in the Formal Performance Improvement Counseling Forms?

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?
5. Whether the Grievant's annual performance evaluation and Employee Performance Improvement Plan were arbitrary or capricious or inconsistent with policy.

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 burden of proof is on the Grievant to show by a preponderance of the evidence that the performance evaluation and performance plan given to him were arbitrary or capricious or inconsistent with policy. 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 AND CONCLUSIONS OF POLICY

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

University of Virginia Medical Center employs Grievant as a Systems Engineer Intermediate. He has been employed by the Agency for approximately seven years.

In April 2012, the Supervisor began supervising Grievant. The Supervisor had approximately 12 employees reporting to him. Grievant received an annual performance evaluation in August 2012 showing his work performance as Fully Meets Expectations for the time period beginning November 1, 2011 and ending June 30, 2012.

A modality is a device such as an x-ray or MRI, used to take images and acquire data for radiology.

Performance Management

Medical Center Human Resource Policy 209 governs Performance Management Program. The Agency's annual performance cycle began July 1st of the prior year and ended June 30th of the current year. Under Policy 209, a performance assessment must be completed by August 31 of each year.

Three possible levels of achievement on the performance appraisal are:

- Consistently Exceeds Expectations – Goals exceeded frequently; serves as role model to others; top performer who seeks additional responsibility.
- Fully Meets Expectations – Dependable results and/or behaviors; occasionally exceeds expectations; demonstrates skills and knowledge to perform effectively.
- Does Not Fully Meet Expectations – Inconsistent results and/or behaviors; improvement needed; minimum expectations not met.

Performance that does not meet expectations shall be addressed through timely Performance Improvement Counseling (See Medical Center Human Resources Policy No. 701, "Employee Standards of Performance.") The performance appraisal should not be the first notice the employee receives of a performance issue. If an employee receives an overall rating of Does Not Fully Meet Expectations on his or her annual performance appraisal, the supervisor should initiate [an] Employee Performance Improvement Plan.

An Employee Performance Improvement Plan is:

A written Employment Performance Improvement Plan (EPIP) is used to address employee performance issues such as quality or quantity of work, when other approaches such as coaching and performance feedback/review have not produced the desired results. The EPIP is a tool to monitor and measure the deficient work products, processes and/or behaviors of a particular employee in an effort to improve performance or modify behavior.

- An EPIP is required for any employee who receives an overall rating of "Does Not Fully Meet Expectations" on his/her annual performance appraisal.
- An EPIP may also be used in conjunction with progressive performance improvement counseling when an employee is placed on Performance Warning.
- An EPIP is time limited, usually 90 days, and the focus is on meeting and maintaining performance expectations.

Failure to comply with the EPIP, or to make adequate progress under the EPIP, may result in termination of employment in accordance with Medical Center Human

Resource Policy No. 701 “Employee Standards of Conduct”; termination may occur before the end of the 90 day EPIP period.

2013 Annual Performance Evaluation

State agencies may not conduct arbitrary or capricious performance evaluations of their employees. Arbitrary or capricious is defined as “[i]n disregard of the facts or without a reasoned basis.” GPM § 9. If a Hearing Officer concludes an evaluation is arbitrary or capricious, the Hearing Officer’s authority is limited to ordering the agency to re-evaluate the employee. GPM § 5.9(a)(5). The question is not whether the Hearing Officer agrees with the evaluation, but rather whether the evaluator can present sufficient facts upon which to form an opinion regarding the employee’s job performance.

Grievant received a performance evaluation for the time period from July 1, 2012 to June 30, 2013. On or about October 22, 2013, the grievant was issued an Employee Performance Improvement Plan (“EPIP”) to address the performance deficiencies noted in his evaluation. Grievant filed a grievance dated November 1, 2013 challenging the Agency’s evaluation as unfair and biased.

The Supervisor evaluated each element of Grievant’s job performance and assigned a number from 1 to 3 where number one represented Does Not Fully Meet, number two represented Fully Meets Expectations, and number three represented Consistently Exceeds Expectations. The Hearing Officer will only address those items for which Grievant received a Does Not Fully Meet rating.

Grievant was evaluated¹ as follows:

Section 1 Job Function & Responsibility:

Performs advanced implementation/support for systems, application and monitoring.	2.00
Performs rotating and supplemental on-call.	3.00
Plans and analyzes project budgets.	1.00
Implement systems.	2.00
Performs System support.	1.00
Performs LAN administration/maintenance of assigned services.	2.00
Performs server hardware maintenance.	2.00
Performs application level support.	2.00
Accountability.	1.00
Job Function & Responsibility Summary Summary Weight 55%	1.78
Comments:	

¹ Agency Exhibit 2.3 provides greater detail describing Grievant’s work functions and duties for each item.

<p>***</p> <p>Manager Input: [Grievant] was primary support engineer on PACS for half the year and VNA for the second half. He also is the primary support for CD burners and modalities. [Grievant] meets expectations in several areas of job performance & responsibility and exceeds in performing call rotation, by always being available and volunteering to cover cost shortages. [Grievant] is deficient in several areas. [Grievant] frequently does not plan ahead for modality installations resulting in frequent "ASAP" request to the networks group for completion of tasks he needs in his project. [Grievant] has frequently taken on modality projects without notifying his manager allowing for prioritization. [Grievant] failed to completely repair a CD burner that went down on Jan 23 and left it unusable until Apr 17.</p>	
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Grievant has presented sufficient evidence to reverse the Agency's assessment that Grievant did not fully meet his expectations for Plans and analyzes project budgets. Grievant's job duties did not include planning and analyzing project budgets. There is no basis for the Agency to evaluate his work performance for planning and analyzing budgets. This item of Grievant's evaluation must be disregarded.

Grievant has not presented sufficient evidence to reverse the Agency's assessment that Grievant did not fully meet his expectations for Performs Systems Support. On January 23, 2013, Grievant was informed of a needed repair on a CD burner. He did not provide basic customer support on a timely basis. Grievant was required to have completed a configuration modality work list by April 1, 2013. As of May 7, 2013, he had not completed that configuration. Grievant was required to have provided configuration of modality work list regarding a bone density device requirement as of February 22, 2013. As of March 14, 2013, Grievant had not completed the task.

Grievant has not presented sufficient evidence to reverse the Agency's assessment that Grievant lacked Accountability. Grievant was required to "clock out" using his desk telephone not his personal cell phone. On November 6, 2012, the Supervisor went to Grievant's office but he was not there. The Supervisor called Grievant's cell phone but could not reach him. Grievant called back and said he had a sick child and that he had gone to take care of his child. The Supervisor approved Grievant's early departure but did not authorize Grievant to clock out using his personal cell phone. Grievant left the workplace without following the Agency's procedure. Grievant argued that the Supervisor gave him permission to clock out using his cell phone. The evidence does not support this assertion.

The Job Function & Responsibility Summary rating should be revised to: 1.88

Section 2 – I Care

Customer Service	2.00
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Integrity and Respect	1.00
I Care Summary Summary Weight: 15% *** Manager Input: [Grievant] is courteous to customers, patients, families and visitors. [Grievant] does not fully meet the expectations of Integrity and Respect. Co-workers, colleagues, and vendors have voiced concerns with competency and integrity in communications and work ethic resulting in a measure of lack of respect.	1.50

Grievant has not presented sufficient evidence to reverse the Agency's assessment that Grievant did not fully meet his expectations for Integrity and Respect. On November 19, 2012 at approximately 2 p.m., the Supervisor called Grievant's cell phone number and spoke with Grievant. Grievant said he needed to leave right away and take care of a situation at his child's school. The Supervisor told Grievant to clock out from his desk. The Supervisor asked Grievant where he was at the time and Grievant said that he was with Mr. D. Shortly after the conversation, the Supervisor spoke with Mr. D in his office. Mr. D indicated he had not seen Grievant. At approximately 3 p.m., Grievant called the Supervisor to say he was at S Hall working on a server problem. Grievant did not clock out from his desk until 3:26 p.m. Grievant's misrepresentations to the Supervisor support the Agency's claim that Grievant lacked integrity on November 19, 2012. Grievant did not build a trusting relationship with the Supervisor.

The I Care Summary rating should be: 1.50.

Section 3 -- I Heal

Quality Improvement & Excellence	1.00
Safety and Quality	1.00
I Heal Summary: Summary Weight 15% Comments: *** Manager input: [Grievant] does not seem to learn from mistakes as is evidenced with the number of calls over the last year for modality wordlist problems that could have been handled with proper preparation and knowledge. The deficiency was noted and class room training was conducted, but failures continue to occur. [Grievant] regularly does not seek assistance from within the team when he is struggling with a problem, often deferring to vendors at the cost of time and occasionally patient/customer care. [Grievant] does not meet commitments such as restoration of the Research folder, shipping of returns and setup of remote support of the GE AW workstation.	1.00

Grievant has not presented sufficient evidence to reverse the Agency's assessment that Grievant did not fully meet his expectations for Quality Improvement & Excellence and Safety and Quality.

The Image Management Supervisor reported that a CD burner stopped working on January 23, 2013. The Agency tracked work tasks using a remedy ticket system. Grievant received a remedy ticket on January 23, 2013. He marked the matter resolved on January 24, 2013 even though the CD burner needed a ribbon replacement. On March 5, 2013, the Supervisor called Grievant to discuss the CD burner. Grievant said the CD burner was working. The Supervisor asked the Image Management staff if the CD burner had been down since January 23, 2013 and he was told it had been down since that time. On March 25, 2013, the Supervisor learned that the CD burner remained not working. He went to the unit and found a sticker on the CD burner saying "Down 1/23". The Supervisor sent Grievant an email about the CD burner but Grievant did not respond and did not create a new ticket. On April 3, 2013, Grievant contacted the Vendor for support with respect to the CD burner. Grievant stated that "I have restarted all services, I have also completely unplugged the box and the printer as well. I will try again once more, but it does not seem to be resolving the issue."² The Vendor's employee responded that he was available that day. Grievant did not respond to the Vendor until April 5, 2013 and told the Vendor's employee that he would call. On April 16, 2013, Grievant sent the Vendor's employee an email stating that there was still a problem with a CD burner and that "I do believe you need to come down ASAP so that we can get this back online."³ The Vendor's employee confirmed that he would come to the University on the following day. Grievant was not present when the Vendor's employee arrived to make the repairs. The CD burner began functioning properly after the Vendor completed the repairs.

Grievant had been the primary engineer for a particular server and all modalities since November 2011. On May 7, 2013, Grievant received an email from an external customer, the Operations Manager, stating:

There should be no outside study showing up on this unit, only to the one scheduled here at [Location]. The age of the unit has nothing to do with this, the unit is only 3 years old. The complaint of the sending images to pacs has slowed, started after your work on the work list, before that [it] was fine. You have been working on this (work list) for too long (April 1st) to not have things resolved. You spoke to [Vendor] last Wednesday when she was here and also to one of the field engineers on the phone about the work list. **Perhaps it's time to bring in someone else.**⁴ (Emphasis added)

² Agency Exhibit 2.15.

³ Agency Exhibit 2.15.

⁴ Agency Exhibit 2.16.

Grievant was responsible for the DEXA work list. The Administrator sent an email on March 14, 2013 stating, in part:

[Grievant] is still having challenges getting the full capacity of the connectivity functional. When I spoke with [Ms. M] morning she reported that the [vendor] rep is reluctant to keep working with [Grievant] on the issue, because **he does not think [Grievant] is competent.**⁵ (Emphasis added).

On June 13, 2013, the Lead Radiologic Technologist sent the Supervisor an email stating that he was having trouble with “the exam XR VP SHUNT SERIES coming over to the worklist on our YSIO spine rooms.”⁶ On June 14, 2013, the Supervisor told Grievant to “[p]lease take care of this today.” Grievant did not acknowledge the Supervisor’s email. He did not create a ticket in the remedy tracking system. On August 2, 2013, the problem remained unresolved and the customer complained. The Supervisor resolved the problem.

One of the Agency’s research units needed to transfer data from an old computer server to a new computer server as part of an upgrade to the new computer system. Dr. S spoke with Grievant in January 2013 who indicated he would take care of migrating data to the new server in advance of the upgrade. The research data was not transferred to the new computer server. On April 2, 2013, Dr. S sent an email complaining:

I spoke with the PACS guys [Grievant] specifically about what data we needed migrated to the “New Research PACS” way in advance of the upgrade and these guys said that they would take care of it, but it does not seemed that this was done!! This is quite frustrating.⁷

The Agency had equipment that needed to be returned to the vendor. The vendor issued a Return Merchandise Authorization along with the steps necessary to make the return. On November 2, 2012, the Supervisor sent Grievant an email stating, “Please take care of this return. It should be the M4000 we most recently received. Let me know if you need anything.”⁸ The amount of time necessary to complete the task was less than a day. Grievant did not ensure that the equipment was returned until March 2013.

Grievant argued that he encountered various problems beyond his control that prevented him from timely returning the equipment. The evidence showed, however,

⁵ Agency Exhibit 2.17.

⁶ Agency Exhibit 2.18.

⁷ Agency Exhibit 2.20.

⁸ Agency Exhibit 2.21.

grievant failed to timely resolve the problems and to keep the Supervisor informed of the problems he was encountering.

Grievant did not follow through on commitments and eliminate obstacles. At times, he was not dependable and resourceful.

The I Heal Summary rating should be: 1.00.

Section 4 -- I Build

Stewardship	1.00
Professionalism	2.00
I Build Summary	1.50
<p>Summary Weight: 15%</p> <p>Comments:</p> <p>***</p> <p>Manager Input:</p> <p>[Grievant] is professional in his attitude and attire and fully meets the requirements of attendance. [Grievant] does not always use his resources wisely, frequently choosing to forgo remote support at the cost of delays to other activities. [Grievant] was requested by customers on two occasions to be replaced on projects that were not going well and running over time with questions to competency being raised. A manager also stated that they were delaying projects because of [Grievant's] inability to complete on time. [Grievant] was given the challenge with cross training teammates to assist and modality connections, but that effort has only recently gained traction. [Grievant] was also issued a formal PIC for behavioral problems on March 28. [Grievant] received a written complaint from a colleague regarding inappropriate communication regarding HR issues.</p>	

Grievant has not presented sufficient evidence to reverse the Agency's assessment that Grievant did not fully meet his expectations for Stewardship. Grievant failed to use resources wisely by failing to timely return the M4000 equipment. The Agency's concern about Grievant failing to utilize remote access to solve problems was not established by the evidence presented. The Agency established that Grievant had not supported the community of employees because other employees/customers asked that Grievant be replaced from certain tasks. The Agency's concern about Grievant's setup of the Dexa unit is better addressed in other portions of the evaluation than under Stewardship. On March 28, 2013, Grievant received a Formal Performance Counseling Form Step 2 for failure to follow a supervisor's instructions that was downgraded to an Informal Counseling Memorandum.

The I Build Summary rating should be: 1.50.

Section 5 – Overall Summary

A rating of 2.61 to 3.00 results in a rating of Consistently Exceeds Expectations. A rating of 1.71 to 2.60 results in a rating of Fully Meets Expectations. A rating of 1.00 to 1.70 results in a rating of Does Not Fully Meet Expectations. Upon consideration of Grievant's 2013 annual performance rating it is not arbitrary or capricious. Grievant's overall summary rating should be 1.63 with an overall rating of Does Not Fully Meet Expectations. The evaluation was issued consistent with policy.

October 2013 Employee Performance Improvement Plan

On October 22, 2013, Grievant was given an Employee Performance Improvement Plan. Grievant asserted that the EPIP was unfair and biased.

Medical Center Human Resource Policy 209 provides, "[i]f an employee receives an overall rating of Does Not Fully Meet Expectations on his/her annual performance appraisal, the supervisor should initiate [an] Employee Performance Improvement Plan. Grievant received an overall rating of Does Not Fully Meet Expectations on his annual performance evaluation thereby justifying the issuance of an EPIP.

An eight day review was held on November 1, 2013. A sixty day review of the EPIP was held on December 2, 2013. A ninety day review of the EPIP occurred on January 27, 2014.⁹

The EPIP was issued on accordance with the Agency's policy. Any defects in following procedure were minor and harmless error. It was not arbitrary or capricious in its terms. It related to Grievant's work duties. Grievant's request for relief must be denied.

January 10, 2014 Formal Performance Improvement Counseling Form Step 2

On January 10, 2014, Grievant received a Formal Performance Improvement Counseling Form, Step 2 for failure to meet performance expectations. Under the Medical Center Human Resources Policy No. 701, "Serious Misconduct" includes "failing to execute or perform responsibilities as reasonably requested, assigned or directed." The Agency has presented sufficient evidence to support the issuance of a Formal Performance Improvement Counseling Form Step 2.

⁹ The Agency determined that Grievant successfully completed the EPIP and did not remove him from employment. The EPIP provided Grievant with notice of the Agency's expectations of his work performance.

On November 25, 2013, the Supervisor sent Grievant an email instructing Grievant to move a CD burner from one location to another. The Supervisor wrote, "You'll need assistance lifting it, so please reach out to one of your teammates."¹⁰

The CD burner weighted approximately 60 lbs. Grievant placed a cart next to a workstation holding the CD burner and began un-cabling the unit. The Supervisor observed Grievant and realized that Grievant had not obtained the assistance of a teammate to move the unit. The Supervisor asked Grievant why he was not working with a coworker, Mr. J, and how he was going to load the unit without Mr. J's assistance. Grievant pointed¹¹ to another employee, Mr. N, who is not one of Grievant's teammates. The Supervisor spoke with Mr. N's supervisor and concluded that Mr. N did not have lifting of equipment in his job responsibilities and that helping Grievant move the equipment would have put Mr. N and the Medical Center at risk. The Supervisor began to assist Grievant with moving the CD burner. Grievant asserted that he decided to move the CD burner himself. If the Hearing Officer adopts this assertion as true, Grievant's behavior remained contrary to the Supervisor's instruction which was to obtain the assistance of a teammate.

Grievant was attempting to find a "work around" to solve a problem encountered by a research assistant. On November 22, 2013, Grievant sent an email to Ms. S and Mr. W indicating that the "transfer issue to the MAC has been completely resolved." He added, "[t]o get [Ms. S] working as quickly as possible we might look into getting her an account on the VNA so that she can export directly to the MAC until we can look a little further into the OsiriX retrieval settings." In response to Grievant's email, Mr. W sent the Supervisor an email stating, "[c]ould you please grant [Ms. S] an account on the VNA ASAP?" The Supervisor denied Mr. W's request which angered Mr. W but Mr. W understood why access had to be denied after the Supervisor explained his reason. On November 26, 2013, the Supervisor sent Grievant an email stating, "[y]ou should have discussed opening VNA to end-users with me first. I need you to give me a detailed overview of the troubleshooting done today."¹² Grievant asserted that the Agency failed to consider that he said "might look into" language of his email. Permitting end users to have access to the VNA was something that Grievant should have recognized was unusual enough to require supervisor approval. By suggesting the option to the user without indicating supervisory approval was a condition to gaining access, Grievant created a false expectation by the user.

When equipment users had problems needing assistance, the request for assistance often was tracked using remedy tickets. One of Grievant's responsibilities was to acknowledge the ticket in a computer data base and update the ticket as he

¹⁰ Agency Exhibit 3.7.

¹¹ It appears that the Supervisor assumed Grievant had asked Mr. N to help lift the CD Burner. Although Mr. N helped steady the dolly being used to lift the CD burner, Grievant specially asked Mr. N not to help with lifting the equipment. See, Grievant Exhibit 12.

¹² Agency Exhibit 3.8.

progressed with the task. During a February 19, 2013 staff meeting, Grievant was reminded that after being assigned a ticket, he was to follow up with the user as soon as available. He needed to follow up tickets every few days to make sure things were finished and up to date.

On October 7, 2013, Grievant was assigned responsibility for a task in the ticket system. On October 8, 2013, he acknowledged the ticket but did not update the ticket any further until December 13, 2013 when he changed the ticket to "resolved." On November 8, 2013, Grievant was assigned responsibility for a task in the ticket system. He acknowledged the ticket on November 21, 2013. He changed the ticket status to "resolved" on December 13, 2013. Grievant did not document that he performed any work on these tickets thereby suggesting the customer's request was never addressed.

On November 25, 2013, Grievant was assigned responsibility for a task in the ticket system. He acknowledged the ticket on December 2, 2013 at 10:19 and marked it resolved 24 seconds later. The ticket was closed December 5, 2013. On November 25, 2013, Grievant was assigned responsibility for another task in the ticket system. He changed the ticket status to "work in progress" on December 6, 2013 at 1:30 p.m. and to "resolved" at 4:30 p.m. The ticket was closed on December 10, 2013.

Grievant attempted to move a CD burner with the assistance of someone other than a team member contrary to the Supervisor's instructions. Grievant used poor judgment to suggest an employee have access to the VNA. Grievant did not follow up timely on remedy tickets. The Agency has presented sufficient evidence to support the issuance of a Formal Performance Improvement Counseling Step 2.

January 31, 2014 Formal Performance Improvement Counseling Form Step 3.

Under the Medical Center Human Resources Policy No. 701, "Serious Misconduct" includes "failing to execute or perform responsibilities as reasonably requested, assigned or directed." "Serious misconduct generally will be addressed at Step 2 or Step 3" "A Performance Warning is issued to address deficiencies in performance as well as acts of Serious Misconduct. In addition, a Performance Warning may be issued to address issues that the employee has not corrected following Information counseling and/or Formal Counseling."

On January 31, 2014, Grievant received a Formal Performance Improvement Counseling Form Step 3 for failure to meet performance expectations while in a 90 days EPIP. Grievant was suspended for sixteen hours and placed on a Performance Warning from January 31, 2014 through April 30, 2014.

On February 3, 2014, Grievant filed a grievance to challenge the Agency's disciplinary action. Grievant claimed that the process under Policy 701 was not followed, inaccurate statements were used to support the Agency's claim, and he was not given the opportunity to refute the charges.

Grievant was assigned a project on September 17, 2013 to have images from Siemens Ysio modalities displayed in sequence in PACS. The project was completed on January 15, 2014. Grievant's October 22, 2013 EPIP required that he, "[r]eport project activity daily to manager."¹³ Grievant failed to report the project's status on a daily basis as required. Grievant argued that he did not complete the task because the Supervisor told him not to complete the task and Mr. O said to put it on hold. Although the project was removed from Grievant on November 15, 2013 and then re-assigned to him on November 26, 2013¹⁴, Grievant's duty was to report the project's status during those times he was responsible for the project. Grievant argued that he frequently verbally reported the status to the Supervisor. The evidence did not support this assertion.

Grievant's October 22, 2013 EPIP required him to "[d]evelop and implement modality set up process workflow documentation including network setup and modality worklist setup, collaborating with manager and teammates."¹⁵ On December 11, 2013, Grievant sent the Supervisor an email stating that he was working on the document. As of January 27, 2014, Grievant had not provided the Supervisor with this information.

On December 16, 2013, Grievant was assigned a task using the Agency's ticket system. On December 16, 2013, Grievant acknowledged the task. On January 9, 2014, Grievant changed the task status to "resolved." He wrote, "I will contact medical records and see how they want this handled."¹⁶

On January 10, 2014, Ms. S wrote:

I have a couple of problems with this trouble ticket.

1. I originally placed this order on 12/16, the first time I heard from [Grievant] of the trouble ticket was yesterday 1/9.
2. I was asked by [Grievant] what I wanted them to do to fix this.
3. This ticket has been closed, but according to [Grievant] there is nothing they can do with it. They were going to have to go to the vendor to fix it.¹⁷

Grievant was on leave from December 17, 2013 through January 6, 2014. Grievant's excused absence is a sufficient reason to explain his delay. The Agency's discipline is not supported by this example.

¹³ Agency Exhibit 2.2.

¹⁴ See Grievant Exhibit 5.

¹⁵ Agency Exhibit 2.2.

¹⁶ Agency Exhibit 4.10.

¹⁷ Agency Exhibit 4.9

Grievant argued that the Agency did not follow Medical Center Policy 701. He claims he was not given proper notice and an opportunity to refute the charges against him. The evidence showed that Grievant had proper notice of the charges against him and had the opportunity to present his concerns to Agency managers. Even if the Hearing Officer assumes for the sake of argument that the Agency failed to provide him with an opportunity to present his defenses, he was able to present any defenses to the charges as part of the grievance hearing. The hearing served to cure any defect in procedural due process.¹⁸

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 Human Resource Management”¹⁹ 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.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;²⁰ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant’s evidence shows

¹⁸ To the extent Grievant made this argument with respect to his other grievances, the same outcome results – the hearing process cured any defects in procedural due process created by the Agency.

¹⁹ Va. Code § 2.2-3005.

²⁰ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.²¹

Grievant argued that his 2013 Performance Appraisal was issued in retaliation for speaking out about his disparate treatment. He argued that the Agency took disciplinary action as a form of retaliation. Grievant asserted that his October 22, 2013 EPIP was given to him as a form of retaliation. He believed the Agency's disciplinary actions were also retaliatory.

Grievant engaged in protected activities by filing grievance including a grievance specifically directed at his Supervisor beginning in March 2013. Grievant suffered an adverse employment action because he received disciplinary action. Grievant has not established a nexus between his protected activities and the adverse employment action. There is no basis to grant Grievant relief from retaliation.

DECISION

For the reasons stated herein, Grievant's request for relief with respect to his 2013 Annual Performance Evaluation is **denied**. Grievant's request for relief with respect to the October 2013 EPIP is **denied**. The Agency's issuance to the Grievant of a Formal Performance Improvement Counseling Form Step 2 is **upheld**. The Agency's issuance to the Grievant of a Formal Performance Improvement Counseling Form Step 3 with suspension and performance warning 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

²¹ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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.²²

[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

²² Agencies must request and receive prior approval from EDR before filing a notice of appeal.