

Issue: Step 4 Performance Improvement Counseling Form with Termination (sleeping during work hours); Hearing Date: 09/08/14; Decision Issued: 09/10/14; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10429; 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: 10429

Hearing Date: September 8, 2014
Decision Issued: September 10, 2014

PROCEDURAL HISTORY

On July 3, 2014, Grievant was issued a Step 4, Formal Performance Improvement Counseling Form with removal for sleeping during work hours.

On July 18, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 29, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 8, 2014, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

APPEARANCES

Agency Party Designee
Agency Counsel

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 employed Grievant as a Polysomnographic Technologist. She was responsible for observing patients undergoing sleep studies.

On April 27, 2014, Grievant was working at the Agency’s facility and was responsible for observing a patient and information displayed on diagnostic equipment as the patient completed a sleep study. Grievant reclined in a chair with her feet up on another chair. She covered her body and head with a blanket and went to sleep. She was observed by a co-worker who told her she needed to stay awake. She disregarded the instruction and was observed sleeping with her head covered at 1:30 a.m., 2:00 a.m., and 4:55 a.m. on April 28, 2014.

CONCLUSIONS OF POLICY

Medical Center Human Resource Policy Number 701 sets forth the Employee Standards of Performance and Conduct. Under this policy serious misconduct refers to acts or omissions having a significant impact on patient care of business operations and includes:

Sleeping, or giving the appearance of sleeping, during working hours
(termination shall result if such actions compromise patient safety.)

On April 27, 2014 and April 28, 2014, Grievant was responsible for monitoring a patient and observing information displayed on diagnostic equipment to ensure the study was completed correctly and for patient safety. The evidence showed that on

occasion patients may stop breathing while sleeping or have arrhythmia problems requiring emergency medical attention. Grievant was unable to perform her duties and monitor patient safety because she was asleep during several portions of her work shift. The Agency has presented sufficient evidence to support the issuance of a Step 4 Formal Performance Improvement Counseling Form with removal.

Grievant raised several defenses to the disciplinary action as part of her grievance request. She did not appear at the hearing and did not present any evidence to support her position. The Agency's witness testified that the Agency considered all of her arguments and considered them to be without merit.

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"¹ 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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Step 4 Formal Performance Improvement 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

¹ Va. Code § 2.2-3005.

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.²

[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

² Agencies must request and receive prior approval from EDR before filing a notice of appeal.