

Issues: Formal Performance Improvement Counseling Form and Termination (verbal abuse and harassment); Hearing Date; 07/11/12; Decision Issued: 07/17/12; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 9848; 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: 9848**

Hearing Date: July 11, 2012

Decision Issued: July 17, 2012

#### **PROCEDURAL HISTORY**

On March 20, 2012, Grievant was issued a Formal Performance Counseling Form with removal for not treating others with fairness, courtesy, respect, and consideration and verbal abuse of a fellow employee. The Agency issued an amended Formal Performance Counseling Form on April 26, 2012.

On April 4, 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 June 12, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 11, 2012, a hearing was held at the Agency's office.

#### **APPEARANCES**

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

#### **ISSUES**

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

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?

### **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 an OR Supply Chain Specialist. She had been employed by the Agency for approximately 18 years. Grievant's Position Summary provided:

Performs a variety of administrative functions for the Surgical Supply Department. Responsible for inventory of all items from the implant room. Contributions to the departmental and/or institutional quality improvement programs and development activities are demonstrated. Communicates with staff to provide feedback on Quality issues and regulations. Work often requires detailed knowledge of the area, specific knowledge of the inter-departmental needs between Surgical Supply and the OR environment and the application and interpretation of organizational and departmental policies and procedures.<sup>1</sup>

Grievant had prior active disciplinary action. She had been counseled regarding inappropriate interactions with coworkers. Except with respect to interacting with other employees, Grievant's work performance often exceeded the Agency's expectations.

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<sup>1</sup> Grievant Exhibit 1.

Grievant worked in an office cubicle within several feet of Ms. A's office. Ms. A's office was sufficiently small that Ms. A could stretch out her arms and come close to touching the walls on each side. Ms. A's desk was against the wall in the office.

On February 27, 2012, Grievant reported to work at 3 p.m. to begin her shift. Ms. A was in her office working. Ms. A's shift was scheduled to end at 4:30 p.m. Grievant went to Ms. A's door and knocked. Ms. A opened the door and observed Grievant with paper in her hands. Grievant said that there was no product on the shelf. Ms. A asked what Grievant was talking about. Grievant said that the Supervisor told her to look over the products and see what products were necessary to order. Ms. A said that was not Grievant's job to order certain products and that she doubted the Supervisor "told you that". Ms. A said that she had ordered the product to arrive the next day. She said "let's wait a minute" and let her call the Supervisor. Ms. A turned her back to Grievant and picked up the telephone on her desk in her office. Ms. A was standing. She called the Supervisor's office telephone number but did not receive an answer because the Supervisor had left for the day. When Ms. A turned around, Grievant was standing in Ms. A's personal space. Grievant's face was within a few inches of Ms. A's face. Grievant was shaking. Grievant was speaking angrily and cursing at Ms. A. Ms. A placed her hands down and reached for the edge of the desk behind her. She grasped the desk because she believed Grievant was about to knock her down given Grievant's facial expressions, words, and position. Ms. A had been instructed previously by a human resource employee to begin yelling if she felt in danger. Ms. A began yelling for Grievant to get out of her office. As Ms. A yelled for Grievant to get out of her office, Ms. A continued to believe that Grievant was poised to hit her. A vendor entered the main door to the implant room. Grievant walked out of Ms. A's office. Ms. A used her cell phone to call the Supervisor on his cell phone. Ms. A told the Supervisor about Grievant's behavior. Ms. A was upset as she spoke with the Supervisor and the Supervisor tried to calm her down. The Supervisor told Ms. A to get her things and leave for the day. Ms. A grabbed some of her personal items and began walking towards the main door. Ms. A told Grievant she was leaving and Grievant said "to-da-lee-to". As Ms. A opened the main door to leave, Grievant said "f—k you". After exiting the building, Ms. A used her cell phone to call the Supervisor again. Ms. A informed the Supervisor of Grievant's behavior when Ms. A exited the building.

## **CONCLUSIONS OF POLICY**

Medical Center Human Resources Policy Number 701 sets forth the Agency's Employee Standards of Performance. 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.

Under certain circumstances the Agency may interrupt the process of progressive counseling and take action depending upon the facts surrounding a first occurrence of certain behavior. Policy Number 701 provides:

Depending upon the employee's overall work record, serious misconduct issues that may result in termination without prior progressive performance improvement counseling include, but are not limited to:

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Mistreatment, including verbal and physical abuse or harassment, of a patient, visitor poor fellow employee, or patient neglect.

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Policy Number 0283 sets forth the Agency's Behavioral Code of Conduct. The Code "applies to all persons providing patient care or other services within and for the benefit of the Medical Center, regardless of employee or ('Covered Persons')." Under this policy, Covered Persons are expected, at all times, to "[t]reat each other, patients and their families, with fairness, courtesy, respect, and consideration."

On February 27, 2012, Grievant engaged in verbal abuse and harassment of Ms. A. On February 27, 2012, Grievant was angry and directed her anger towards Ms. A. Grievant positioned herself within a few inches of Ms. A's face. Her presence was intimidating to Ms. A. Grievant caused Ms. A to fear that Grievant would hit her. Grievant cursed at Ms. A and insulted her by saying "f—k you" as Ms. A left the building. The Agency has presented sufficient evidence to support the issuance of a Step 4, Formal Performance Counseling Form with removal.

Grievant contends that the interaction as described by Ms. A did not occur. The question becomes whether the testimony of Ms. A is sufficient to meet the Agency's burden of proof. The Hearing Officer finds that the Agency has met its burden of proof based on the testimony of Ms. A for several reasons. First, the Hearing Officer closely observed Ms. A's demeanor as she testified and was unable to determine that Ms. A was untruthful. Second, immediately following her interaction with Grievant, Ms. A called the Supervisor and reported Grievant's behavior. The description of Grievant's behavior given to the Supervisor on February 27, 2012 did not vary materially from Ms. A's testimony at the hearing. Third, when Grievant was asked why Ms. A would make up the allegations against Grievant, Grievant responded "I don't know". Although it is clear that Grievant and Ms. A had had conflicts in the past, Ms. A testified credibly that "I would never want anybody to lose their job; that's not me". Fourth, no credible evidence was presented to establish that Ms. A was overly sensitive or lacked the ability to correctly perceive Grievant's behavior. When these factors are considered, the Agency has presented sufficiently credible evidence to support its disciplinary action against Grievant.

*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>2</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, and (3) the disciplinary action was free of improper motive.

Grievant presented evidence that she suffers from bipolar II meaning that she experiences long periods of depression with minor mania. Her depression manifests itself as irritability.

Grievant’s medical condition does not affect the outcome of this case. Grievant’s defense was that the allegations of Ms. A were untrue and that she did not engage in inappropriate behavior. Because Grievant denies engaging in inappropriate behavior, whether she suffered from a medical condition becomes irrelevant. Only if Grievant had admitted to engaging in inappropriate behavior would the degree of influence of her medical condition on her inappropriate behavior become an issue.

If the Hearing Officer assumes for the sake of argument that Grievant’s bipolar disorder affected her behavior on February 27, 2012, the outcome of this case does not change. Having bipolar disorder could have explained Grievant’s behavior, but it would not excuse that behavior or form the basis to mitigate the disciplinary action. No evidence was presented to show the Grievant’s medical condition was so extreme as to render her unable to control her behavior.<sup>3</sup> In addition, although Grievant’s bipolar disorder would constitute a disability under the Americans with Disabilities Act, her disability would not affect the outcome of this case. In Jones v. Am. Postal Workers Union, 192 F.3d 417, 429 (4<sup>th</sup> Cir. 1999), the Court held:

The law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability.

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<sup>2</sup> Va. Code § 2.2-3005.

<sup>3</sup> Grievant’s medical provider wrote a letter dated March 18, 2012 stating, in part, “over the past few months, she has been very stable from a medical and psychiatric perspective. Concerns regarding her behavior at work surprises me ....”

To the extent Grievant's bipolar disorder may be considered a disability protected under the Americans with Disabilities Act, the Agency is not prevented from taking disciplinary action against Grievant even if her behavior related to her disability.<sup>4</sup>

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Formal Performance 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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or email.

3. 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 the Office of Employment Dispute Resolution to 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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<sup>4</sup> Grievant also presented evidence that the Agency failed to provide her with a quiet work environment when she returned to work in February 2012. Although this may have been an error by the Agency, it does not excuse Grievant's behavior towards Ms. A on February 27, 2012.

Or, send by email to [EDR@dhrm.virginia.gov](mailto: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 give a copy of all of your appeals to the other party and to EDR. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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.<sup>5</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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