

Issue: Formal Performance Improvement Counseling with Termination (threatening statement); Hearing Date: 08/30/12; Decision Issued: 09/05/12; Agency: UVA Medical Center; AHO: William S. Davidson, Esq.; Case No. 9869; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9869

Hearing Date: August 30, 2012
Decision Issued: September 5, 2012

PROCEDURAL HISTORY

The Grievant was issued a University of Virginia Medical Center Formal Performance Counseling Form (“FPCF”) on April 27, 2012. ¹ Pursuant to the FPCF, the Grievant was terminated by the Agency on April 27, 2012. The FPCF, in summary, states that the reasons for termination were as follows:

1. On March 28, 2012, the Grievant was insubordinate when she made inflammatory statements about management and her co-workers in spite of repeated counseling and thereby was in violation of Medical Center Policy 701, and;
2. The Grievant, on March 29, 2012, made a statement to a fellow co-worker that violated Medical Center Policy 175, in that it caused fear and concern by co-workers and subsequently disrupted the workplace. ²

Pursuant to the FPCF, on May 25, 2012, the Grievant timely filed a grievance to challenge the Agency’s actions. ³ On July 19, 2012, the Department of Human Resource Management (“DHRM”) assigned this Appeal to a Hearing Officer. Because of scheduling conflicts with the parties, the hearing was convened August 30, 2012, at the Agency’s location.

APPEARANCES

Agency Representative
Counsel for Agency
Grievant
Counsel for Grievant
Witnesses

¹ Agency Exhibit 1, Tab 2, Pages 1-3

² See Agency Exhibit 1, Tab 2, Page 1 for a more complete description

³ Agency Exhibit 1, Tab 1, Pages 1-2

ISSUE

1. Did the Grievant violate Medical Center Policy 175?
2. Did the Grievant violate Medical Center Policy 701?

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. 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 raising and establishing any affirmative defenses to discipline 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. ⁴ However, proof must go beyond conjecture. ⁵ In other words, there must be more than a possibility or a mere speculation. ⁶

FINDINGS OF FACT

⁴ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁵ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁶ *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, the Hearing Officer makes the following findings of fact:

The Agency provided the Hearing Officer with a notebook containing fifteen (15) tabs. Counsel for the Grievant, in preliminary Motions, objected to several of the exhibits in the Agency notebook. The Hearing Officer took those objections under advisement and stated to counsel for the Grievant that he would be allowed to restate his objections as those exhibits were actually used by the Agency in its case. No such objections were subsequently raised and, accordingly, the Agency notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing six (6) tabs. This notebook was accepted in its entirety as Grievant Exhibit 1.

The Grievant and this Agency have had a long and contentious relationship. The Grievant has been terminated by the Agency and, subsequently, reinstated in a prior case brought before a Hearing Officer. On March 29, 2012, the Grievant and a fellow co-worker (“CW”) had a conversation in the morning of their work day. This co-worker testified before the Hearing Officer and stated that she was sufficiently concerned by a part of the conversation that she had with the Grievant that within thirty (30) minutes she reduced it to writing. Her handwritten note indicated that the Grievant’s statement was as follows:

I told one of the nurses on the floors that if I were to go postal and start shooting the place up that I would let her know ahead of time so she would not be collateral damage.⁷

CW testified that she did not notify anyone of the Grievant’s statement during the day of March 29, 2012. That evening, in conversation with her partner, she was encouraged to make someone in management aware of the Grievant’s statement. The next day, March 30, 2012, CW informed her manager. CW testified that it was never her intent for the Grievant to be terminated. Indeed, the entirety of her intent was to seek help for the Grievant. She was aware of many of the Grievant’s prior conflicts with the Agency and the totality of her concern was for the Grievant and for the Grievant to seek or be provided help.

Medical Center Policy 701 deals with Employee Standards of Performance.⁸ This Policy adopts, by reference, Medical Center Policy 283 “Behavioral Code of Conduct” and Medical Center Policy 235 “Compliance Code of Conduct.” Medical Center Policy 701(D)(3)(d) states in part as follows:

...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:

...Mistreatment, including verbal and physical abuse or harassment, of a ... fellow employee.

⁷ Agency Exhibit 1, Tab 4, Page 3

⁸ Agency Exhibit 1, Tab 2, Pages 4-11

...Threatening a Medical Center employee...with physical harm...⁹

Medical Center Policy 175 deals with Threat Assessments at the Medical Center.¹⁰ This Policy, at Section C, states in part as follows:

To the greatest extent possible, patients, employees and visitors at the University of Virginia Medical Center shall be protected from harm due to aggressive or violent acts of others. If a situation leads to a reasonable belief that an individual or situation creates a threat of potential harm to others, Medical Center Security and University Police shall be available to conduct a threat assessment and to determine whether enhanced levels of security may be required to prevent a situation from escalating.¹¹

Medical Center Policy 175(D)(4) states, in part, as follows:

If the source of the threat is an employee:

...Medical Center employees who have a reasonable belief that another employee...creates a threat of potential harm to others shall report this information to his/her supervisor or manager. The supervisor or manager shall assess the situation and make the decision to contact Medical Center Security...to seek a threat assessment...

Medical Center Security, in coordination with the appropriate manager and/or administrator and with a representative from the appropriate Human Resource Department, shall gather information to determine the appropriate level of intervention. The supervisor or manager shall meet with the employee in accordance with the appropriate human resource policies to communicate the findings and interventions. Medical Center Security officers or police officers will stand by as requested to provide support and/or protection. Internal resources such as the Employee Assistance Program may be offered to the employee whose behavior is problematic.¹²

Medical Center Policy 172 deals with Responding to Behavior/Security Emergencies.¹³ This Policy, at Section C, states as follows:

The University of Virginia Medical Center seeks to provide a safe environment for patients, visitors, and staff. Behavioral/security emergencies

⁹ Agency Exhibit 1, Tab 2, Pages 8 and 9

¹⁰ Agency Exhibit 1, Tab 2, Pages 12-15

¹¹ Agency Exhibit 1, Tab 2, Page 12

¹² Agency Exhibit 1, Tab 2, Page 13

¹³ Agency Exhibit 1, Tab 5, Pages 6-10

shall be addressed through a comprehensive approach that includes prevention, early recognition and intervention, communication, de-escalation, and post-episode evaluation and recovery.¹⁴

Medical Center Policy 172(D)(1) defines behavioral/security emergency as follows:

...Whenever an individual demonstrates actual or threatened/potential behavior(s) of a violent, aggressive, and/or assaultive nature. Such behavior exists on a continuum. It may arise from a variety of personal and situational factors, may manifest verbally and/or physically, and may result in harm to the individual or to others.¹⁵

Medical Center Policy 172(D)(3) states, in part, as follows:

Call for Security: Procedure activated for a threatening act involving a non-patient (...staff)...or for situations not related to patient care or service. Security Staff will respond and seek additional assistance as indicated; the threatening act may also lead to threat assessment (see Medical Center Policy No. 0175, "Threat Assessment at the Medical Center").¹⁶

Pursuant to the statement made by the Grievant to CW and CW's reporting of that statement to her manager, this matter made its way to the Human Resources Department. As soon as the appropriate party in Human Resources heard about this statement, he called 911, notified the University Police, saw to it that the Grievant was removed from her duties and initiated policies to secure both staff and patients from any potential threat. The Grievant was subsequently placed on administrative leave, was subject to a fitness-for-duty evaluation, wherein she was reported fit for duty as of April 10, 2012.¹⁷

The Grievant testified and did not deny that she made the statement to CW. The Grievant indicated that she did not make it to a nurse at the hospital but rather made it only to CW and was trying to indicate to CW that she would be the one to be notified in order that she (CW) not be collateral damage. Further, the Grievant disputed the language, "shoot the place up." The Grievant did not deny using the phrase, "going postal" or using the phrase, "collateral damage." The Grievant and her witness spent an extended amount of time testifying before the Hearing Officer that CW was a friend of hers and that she thought this was a statement between friends and that there was no threat implied and that CW would not infer a threat. Further, she and her witness testified that CW had used such inflammatory language on numerous occasions when speaking with the Grievant and the Grievant had never felt threatened and had certainly never reported such a statement by CW to the Grievant's management. The Grievant also stated that she did not own a gun.

¹⁴ Agency Exhibit 1, Tab 5, Page 6

¹⁵ Agency Exhibit 1, Tab 5, Page 6

¹⁶ Agency Exhibit 1, Tab 5, Page 7

¹⁷ Grievant Exhibit 1, Tab 4, Page 1

The essential kernel of the Grievant's defense is that the statement was made sarcastically and in jest to a friend. The Grievant and the Grievant's witness did not seem, during their testimony, to understand the gravity of such an inflammatory statement. Based on the demeanor of the Grievant and her witness and the demeanor of CW, the Hearing Officer finds that CW's testimony was completely believable and the Grievant and her witness' testimony was clearly self-serving and simply was not credible.

Pursuant to the Medical Center policies quoted earlier in this Decision, it is clear that, even if the Hearing Officer takes the Grievant's acknowledged statement of, "going postal," and "collateral damage," and disregards the portion of the statement regarding, "shooting the place up," such statements are a serious violation and warrant immediate termination. As stated, the Hearing Officer finds CW's testimony more credible than the Grievant or her witness and the Hearing Officer believes that the statement, as recorded by CW, was made in its entirety. Because this statement alone is sufficient to warrant termination, the Hearing Officer does not need to reach a decision on the other allegation made by the Agency.

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..."¹⁸ 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.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof in this matter and that termination of the Grievant was appropriate.

APPEAL RIGHTS

You may file an administrative review request 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.

¹⁸Va. Code § 2.2-3005

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. You may fax your request to 804-371-7401, or address your request to:

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

3. 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 804-786-0111, or address your request to:

Office of Employment Dispute Resolution
101 North 14th Street, 12th 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.¹⁹ 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.²⁰

[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]

William S. Davidson
Hearing Officer

¹⁹An 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).

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