

Issue: Step 4 Formal Performance Improvement Counseling Form with Termination (excessive unscheduled absences); Hearing Date: 06/18/19; Decision Issued: 07/08/19; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 11342; 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: 11342

Hearing Date: June 18, 2019

Decision Issued: July 8, 2019

PROCEDURAL HISTORY

On February 28, 2019, Grievant was issued a Step 4 Formal Performance Improvement Counseling Form with removal for excessive unscheduled absence.

On March 15, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 1, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 18, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 School employed Grievant as a Phlebotomist. With the exception of the facts giving rise to this disciplinary action, Grievant's work performance was satisfactory to the Agency. Grievant had been employed by the Agency for approximately 18 years.

When employees failed to report to work as scheduled, they receive "occurrences." Employees receive progressive discipline depending on the number of occurrences they have accumulated.

Grievant's first occurrence was due to his absences on April 3, April 4, and April 5, 2018.

Grievant's second occurrence was due to his absences on April 12, 2018 and April 13, 2018.

Grievant's third occurrence was due to his absences on July 20, July 27, and July 31, 2018.

Grievant's fourth occurrence was due to his absences on August 1 and August 2, 2018.

Grievant's fifth occurrence was due to his absences on August 20, August 29, August 30, and August 31, 2018.

Grievant's sixth occurrence was due to his absences on September 17, September 19, September 20, and September 21, 2018.

Grievant received an informal counseling for poor attendance on September 24, 2018.

On October 24, 2018 through October 26, 2018, Grievant was scheduled to work but was absent from work. He reached 12 unscheduled absences but the Agency treated his absences as a seventh occurrence. On November 18, 2018, Grievant received a Step 2 Formal Counseling.

Each time Grievant was counseled or disciplined, the Agency provided him with a copy of the Agency's policy governing attendance.

On December 17, 2018 and December 19 through December 21, 2018, Grievant was scheduled to work but was absent from work. He reached 14 unscheduled absences but the Agency treated his absences as an eighth occurrence. On December 27, 2018, Grievant received a Step 3 Performance Warning. His Performance Warning was to last from December 27, 2018 through March 26, 2019. Grievant was advised:

All performance expectations for the job must be met during the Performance Warning Period annotated above; failure to meet all performance expectations during this time shall normally result in termination.

On Friday January 18, 2019, Grievant learned that his father was seriously ill with stage 4 cancer. Grievant was distraught. His father's illness weighed on Grievant.

Grievant was scheduled to work from 4 a.m. to 8 a.m. on January 19, 2019. He reported to work at 3:57 a.m. At 4:13 a.m., Grievant told the Senior Phlebotomist that he needed to leave work immediately. Grievant left work and went home. His absence affected the team's staffing needs because the Agency was not able to easily replace Grievant.

Grievant was the secondary care taker for his father. Grievant worked half of the day on Monday January 21, 2019 and then left work to care for his father.

CONCLUSIONS OF POLICY

Policy 701 sets forth the Agency's Standards of Performance for its employees. Progressive performance improvement counseling steps include an information counseling (Step One), formal written performance improvement counseling (Step Two),

suspension and/or performance warning (Step Three) and ultimately termination (Step Four). Depending upon the employee's overall work record, serious misconduct issues that may result in termination without prior progressive performance improvement counseling.

Medical Center Human Resources Policy 704 governs Attendance. Under this policy, an Occurrence is:

An Unscheduled Absence that does not qualify as leave under Medical Center Human Resources Policy 600 "Leaves of Absence", Medical Center Human Resources Policy No. 512 "Workers Compensation" is excused pursuant to Medical Center Human Resources Policy No. 510 "Emergency Event Declaration" or is excused pursuant to this Policy.

An Unscheduled Absence is:

An absence from work in which the employee does not report to work for or remain at work without advance supervisory approval, but has given proper notification of his/her absence to the supervisor or designee. Unless an exception is set forth in this Policy, an Unscheduled Absence counts as an Occurrence."

Employees, who leave more than two hours before the end of their shift for an unscheduled event, where the workload cannot be covered without them, will be charged with an unscheduled absence under the Agency's policy.

Upon the accumulation of nine occurrences, an employee may be removed from employment under the Agency's Policy 704.

On January 19, 2019, Grievant was scheduled to work from 4 a.m. to 8 a.m. He left more than two hours before the end of his shift thereby justifying the Agency's decision to count his unscheduled absence as an occurrence.

Grievant was under a Performance Warning requiring him to comply with all of the requirements of his position. Grievant accumulated nine occurrences thereby justifying the Agency's decision to issue him a Step 4 Formal Performance Improvement Counseling Form with removal.

Grievant argued that once he learned of his father's illness he was unable to perform his work duties. Although the evidence suggests that the Agency would not have been well-served by an employee who was upset after learning his father's illness, the Agency did not conclude that Grievant's absence should be excused. Under the Agency's policy, the Agency had the discretion to make this determination. The Hearing Officer will not interfere with the Agency's exercise of its discretion.

Grievant argued that he was notified of the opportunity to take Family Medical Leave. The evidence showed that Grievant was on Family Medical Leave from June 18, 2018 through July 10, 2018. He was aware of the procedures to request Family Medical Leave but did not request Family Medical Leave regarding his father's illness.

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 request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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.

¹ Va. Code § 2.2-3005.

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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]

[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

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