

Issue: Step IV Formal Performance Improvement Counseling Form with Termination (attendance/excessive tardiness); Hearing Date: 08/12/19; Decision Issued: 08/26/19; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 11369; 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: 11369

Hearing Date: August 12, 2019

Decision Issued: August 26, 2019

PROCEDURAL HISTORY

On April 24, 2019, Grievant was issued a Step 4 Formal Performance Improvement Counseling Form with removal for accumulating a ninth tardy while on a Step 3 Performance Warning.

On May 2, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On May 20, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 12, 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 Formal Performance Improvement 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. 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 Center employed Grievant as a Preauthorization Coordinator. She began working for the Agency in August 2013.

Grievant had prior active disciplinary action. On May 24, 2017, Grievant received a Step 1 Informal Counseling for tardiness. On June 25, 2018, Grievant received the Step 1 Informal Counseling for her sixth tardy. On August 28, 2018, Grievant received a Step 2 Formal Counseling for her seventh tardy. On November 16, 2018, Grievant received a Step 3 Performance Warning for her eighth tardy. Grievant was placed on a Performance Warning from November 16, 2018 through February 13, 2019. On February 26, 2019, Grievant received a Step 3 Formal Counseling for her eight tardy.¹ Grievant was placed on a Performance Warning from February 26, 2019 through May 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 frame shall normally result in termination.

¹ One tardy dropped off.

On April 9, 2019, Grievant was scheduled to report to work at 9 a.m. She reported to work at 9:21 a.m. This resulted in her ninth tardy.

At 9:33 a.m. on April 9, 2019, Grievant sent the Supervisor an email:

There was a 3 car accident on 250 today and traffic was a total standstill. No one could get through due to a fire truck in one lane and an ambulance in the other. Traffic could not move until after the ambulance left. Thanks!²

On April 10, 2019, the University held a predetermination meeting with Grievant. Grievant explained that she was late on April 9, 2019 because she encountered a traffic backup due to an accident at the intersection of US 250 and Interstate 64. Grievant stated that she sent a text to her supervisor³ once she realized there was an accident and that this was approximately 25 minutes after encountering the traffic. Grievant said there was no way for her to turn around her take another route so she had to wait for the accident to be cleared before she could get to work.

The Supervisor considered Grievant's reason for being tardy but did not mitigate Grievant's tardiness. The Supervisor's decision was consistent with how she treated other employees.

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.

University Policy 704 governs Attendance. Section C provides:

Regular and timely attendance is expected of all Medical Center employees as the Medical Center must be properly staffed in order to meet patient care and operational needs. Accordingly, employees will be held accountable for it hearing to their scheduled shifts. The purpose of this policy is to provide clear guidelines for employees and to assist supervisors with addressing situations when the frequency of employee absences or tardiness exceeds the standard set by the Medical Center.

² Grievant Exhibit 1.

³ Grievant sent the text at approximately 8:54 a.m.

Section D(7) defines Tardy as:

A failure to report promptly, ready to work, at the scheduled start times (e.g. beginning of shift, after a break or meal period) as established by each department in the Department's Addendum.

The Department's Attendance Policy Addendum provides:

Employees who clock in 15 minutes after the start of the scheduled shift, or after the return from a scheduled absence, will be considered tardy and will receive a Tardy Occurrence.

Section E(5) provides:

Failure to report to work promptly, as defined by the Department Addendum, will result in the employee being counted Tardy.

Section E(6) provides:

If an employee receives Formal Counseling for attendance during a calendar year, his/her Occurrences or Tardies will carry over into the next calendar year.

Once an employee receives a ninth tardy, the University may remove an employee. When an employee is under a Performance Warning, a tardy may result in removal.

On April 9, 2019, Grievant reported to work more than 15 minutes late for her shift. She was tardy for the ninth time under the University's policy. The University has presented sufficient evidence to support the issuance of a Step 4, Formal Performance Improvement Counseling Form with removal.

Grievant argued that she was unable to report to work because of something she could not control. The basis for the University's disciplinary action, however, was the frequency of tardiness and not the particulars of any single tardiness. The University's policy accounted for employees being tardy for reasons they could not control by allowing employees up to nine tardies before they could be removed.

Grievant argued that she suffered from a medical condition and was recently diagnosed. Grievant's tardiness on April 9, 2019 was not related to her medical condition and, thus, her medical condition would not serve to excuse the tardiness. Grievant did not appeal prior Formal Counselings and, thus, her medical condition would not affect those disciplinary actions.

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”⁴ 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 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.

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.

⁴ Va. Code § 2.2-3005.

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.