

Issues: Step 2 Formal Performance Improvement Counseling Form [FPICF] (failure to meet performance expectations), Step 3 FPICF (continued failure to meet performance expectations), Step 4 FPICF with Termination (multiple incidents of mishandling PHI), and Step 4 FPICF with Termination (insubordination); Hearing Date: 03/12/15; Decision Issued: 03/26/15; Agency: UVA Medical Center; AHO: William S. Davidson, Esq.; Case No. 10525, 10549, 10550; Outcome; Partial Relief; **Administrative Review: EDR Ruling Request received 04/11/15; Outcome: No Ruling – untimely (2015-4134); Judicial Review: Appealed to City of Charlottesville Circuit Court; Circuit Court Ruling issued 12/18/15; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case Nos.: 10525, 10549, 10550

Hearing Date: March 12, 2015
Decision Issued: March 26, 2015

PROCEDURAL HISTORY

The Grievant was issued several Formal Performance Improvement Counseling Forms (“FPICF”).

1. On October 30, 2014, the Grievant was issued a Step 2 FPICF, for Failure to Meet Performance Expectations, in violation of Medical Center Human Resources Policy No. 701.¹
2. On November 26, 2014, the Grievant was issued a Step 3 FPICF, for Failure to Meet Performance Expectations, in violation of Medical Center Human Resources Policy No. 701. Pursuant to this FPICF, the Grievant was suspended for 16 hours.²
3. On December 18, 2014, the Grievant was issued a Step 4 FPICF, for multiple careless incidents of mishandling Protected Health Information (“PHI”), in violation of Medical Center Human Resources Policy Nos. 701 and 707. Pursuant to this FPICF, the Grievant was terminated on December 18, 2014.³
4. On December 18, 2014, the Grievant was issued a Step 4 FPICF, for progressive counseling for insubordination, including refusing or failing to execute or perform responsibilities as reasonably requested, assigned or directed, in violation of Medical Center Human Resources Policy No. 701. Pursuant to this FPICF, the Grievant was terminated on December 18, 2014.⁴

The Grievant timely filed grievances to challenge the Agency’s actions. Those grievances were filed on November 17, 2014,⁵ on December 12, 2014⁶ and two on January 17,

¹ Agency Exhibit 1, Tab 2, Pages 2 and 2A

² Agency Exhibit 1, Tab 3, Pages 3 and 3A

³ Agency Exhibit 1, Tab 4, Pages 4 and 4A

⁴ Agency Exhibit 1, Tab 5, Pages 5 and 5A

⁵ Agency Exhibit 1, Tab 1, Page 5

⁶ Agency Exhibit 1, Tab 1, Page 3

2015⁷. On February 2, 2015, this appeal was assigned to a Hearing Officer. Due to the parties' respective calendars, the hearing was held at the Agency's location on March 26, 2015.

APPEARANCES

Advocate for Agency
Grievant
Agency Party Representative
Witnesses

ISSUE

1. Did the Grievant fail to meet performance expectations, in violation of Medical Center Human Resource Policy No. 701?
2. Did the Grievant, on multiple occasions, mishandle PHI, in violation of Medical Center Human Resources Policy Nos. 701 and 707?
3. Was the Grievant insubordinate?
4. Did the Grievant fail or refuse to execute or perform responsibilities as reasonably requested, in violation of Medical Center Human Resources Policy No. 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. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.⁸ 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,

⁷ Agency Exhibit 1, Tab 1, Pages 1-2

⁸ See Va. Code § 2.2-3004(B)

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. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, 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.⁹ However, proof must go beyond conjecture.¹⁰ In other words, there must be more than a possibility or a mere speculation.¹¹

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of the witness, I make the following findings of fact:

The Agency provided me with a notebook containing twelve tabs and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided me with a notebook containing seven tabs, with multiple alphabetic tabs for each numeric tab, and that notebook was accepted in its entirety as Grievant Exhibit 1.

I had three grievances that had been consolidated before me. Accordingly, I will attempt to address each of these grievances in the order that they are found within both the Grievant and Agency notebooks.

Case 10525 deals with an allegation that the Grievant failed to meet performance expectations, which is a violation of Policy No. 701.¹² The Grievant in this matter is a Systems Engineer in the Department of Radiology and Imaging. On October 9, 2014, the Grievant received an email from a fellow Systems Engineer reminding him that the Certegra installation needed to be completed before Monday, October 13, 2014.¹³ The author of this email testified

⁹ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

¹⁰ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

¹¹ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

¹² Agency Exhibit 1, Tab 2, Pages 2 and 2A

¹³ Grievant Exhibit 1, Tab 1, Page H2

before me and stated that he had been in verbal communication with the Grievant as to the requirements and deadlines for this job.

On October 13, 2014, the Grievant's sister, who lived out-of-state, died.¹⁴ At 7:51 a.m., on October 14, 2014, the Grievant sent his manager an email stating that he would not be in the office on October 14, 2014, because of a death in his family.¹⁵

I heard no testimony from anyone, including the Grievant, that the Certegra job was fully completed before Monday, October 13, 2014. Accordingly, I find that the Grievant failed to meet his performance expectation in this matter. Policy No. 701, states in part, as follows:

...All Medical Center employees shall:

...perform their tasks...responsibly in accordance with department and supervisory expectations...¹⁶

I find that the Grievant did not comply by performing his job responsibly.

Case 10549 also involves allegations of Failure to Meet Performance Expectations and resulted in a 16 hour suspension. In Case 10549, there are three instances of alleged Failure to Meet Performance Expectations. The first involves the PACS02 System. The evidence that was presented before me in this matter was muddled at best. It seems clear that this is a system that is so old that it is no longer being supported. It seems that this is a system that crashes frequently. Further, it appears that, whether or not the Grievant failed to meet the performance expectation regarding this issue, could well be determined by whose definition I use as to a system being "up and running." Because of the vagueness of the testimony presented by the Agency, I find that the Grievant did not fail to meet performance expectations regarding the PACSO2 system.

The next two issues of failed expectations under Case 10549, deal with a fire system inspection test. This test required that the UPS system be placed in "bypass mode." On October 29, 2014, a series of emails were exchanged regarding this matter. The first email was sent at 8:35 a.m., and the last relevant email was sent at 3:33 p.m. The last email indicated that the Grievant would be in charge of the UPS system or the battery backup system during the fire systems inspection test.¹⁷ There is an allegation that the Grievant was approximately 20 to 30 minutes late at arriving at the appropriate location for this test. However, the more important allegation is that, if the servers involved lost all power, including the battery backup system, then the Grievant would have to make certain, once power was restored, that all of the servers were back online.

¹⁴ Grievant Exhibit 1, Tab 1, Page P1

¹⁵ Grievant Exhibit 1, Tab 1, Page A1

¹⁶ Agency Exhibit 1, Tab 7, Page 2

¹⁷ Agency Exhibit 1, Tab 3, Page 30

I heard testimony from both witnesses for the Agency and for the Grievant that several servers did not come back online once all power, including the backup system, was lost. The Grievant testified that there were perhaps as many as 75 to 100 servers and that they were in server closets, which would require him to open the doors in order to determine whether or not the servers were back online. The Grievant offered other excuses, but in the end acknowledged that several servers were not back online at the end of the test and that he did not return them to an online status. This problem was discovered the next morning when the users of those servers began contacting the Grievant's manager. Accordingly, I find that the Grievant failed to comply with Policy No. 701, and that his performance was below expectations in this matter.

Finally, regarding the allegations in Case 10550, there are two Step 4 FPICF's that resulted in termination. The first one alleges that the Grievant was terminated for multiple careless incidents of mishandling PHI, resulting in a violation of Policy Nos. 701 and 707. The testimony before me by both the Agency and Grievant clearly indicated that the Grievant, while employed, had proper access to PHI. On the day in which the Grievant was terminated, he went to his office, removed papers from that office and was in the process of going to the Faculty Employee's Assistance Program Office ("FEAP"). The Grievant's manager stopped him within a hall of the hospital and asked him about the papers that he had in his hand. Part of those papers included PHI. The manager took those papers from him and ultimately, the Grievant's possession of these papers within the hospital, resulted in this allegation of mishandling PHI. Policy No. 707 deals with PHI. I can find no section, under that Policy, that deals with incidents of mishandling of PHI. Policy No. 707(D)(9), sets forth a definition of violations of confidentiality. This is defined as follows:

...Access to, or use or Disclosure of, Confidential Information for purposes other than those for which an individual is authorized...¹⁸

It was conceded by all that the Grievant had proper access to PHI when he was employed. The Grievant testified that he simply removed a stack of information from his office in which these documents were found. The Grievant stated that he was going to the FEAP Office to attempt to determine his rights regarding his termination and his possession of these papers at this point was accidental. In looking at the levels of corrective measures under Policy No. 707(E)(6), I find Level 1 issues at 6(a), for Careless Access or Disclosure of Confidential Information. This is defined as follows:

This occurs when an employee carelessly Accesses Confidential Information that he/she has no need to know in order to carry out his/her job responsibilities, or carelessly Discloses information to which he/she has authorized Access.¹⁹

¹⁸ Agency Exhibit 1, Tab 7, Page 9

¹⁹ Agency Exhibit 1, Tab 7, Page 10

Clearly the Grievant did not carelessly access PHI, as he had proper access to it in the first place. There is no allegation that the Grievant disclosed PHI to anyone. Intentional access is set forth at 6(b) of this Policy. This is defined as follows:

This occurs when an employee intentionally Accesses Confidential Information without authorization...²⁰

Again, there is no evidence before me of the Grievant intentionally accessing PHI without authorization. Finally, at 6(c) of this Policy, I find a definition of Intentional Disclosure of Confidential Information. This is defined as follows:

This occurs when an employee intentionally discloses Confidential Information without authorization...²¹

There is no information or testimony before me to indicate that the Grievant accidentally or intentionally disclosed PHI. The problem with the Agency's position is that it is clear that the Grievant had proper access to PHI and that he was simply walking down a hall in the hospital with PHI in his possession. The Agency attempted to introduce evidence that it was fearful that the Grievant would divulge this PHI to members of the FEAP Office. However, he clearly did not do this and no one from the FEAP Office testified that he had ever disclosed PHI to them. Indeed, it is clear that any employee of the FEAP Office would have had an affirmative duty to disclose such an act by the Grievant. Mere possession of that which the Grievant had an absolute right to be in possession of, certainly while he was an employee of the Agency, does not rise to the level of mishandling; improper access; or intentional disclosure of PHI. Accordingly, I find that the Agency has not borne its burden of proof regarding this allegation for termination. As an aside, the logical extension of the Agency's position is that the Grievant would have violated Policy 707 by simply leaving the PHI at his desk once he was terminated. This places the Grievant in a "no win" position.

Finally, we come to the second Step 4 FPICF, wherein the Agency alleges that the Grievant was insubordinate. On November 25, 2014, at approximately 5:04 p.m., the Grievant's manager sent him a meeting request regarding predetermination meetings. This meeting was to be held at the manager's office and scheduled to take place on November 26, 2014, at 10:30 a.m.²² From that email, the following email thread took place on November 26, 2014:

- At 8:59 a.m. - Grievant sent his manager an email declining to attend the 10:30 a.m. meeting regarding predetermination.²³

- At 9:06 a.m. and 9:08a.m. - Grievant's manager sent the Grievant emails indicating that the 10:30 a.m. meeting was mandatory, was not an optional meeting and his attendance was required.²⁴

²⁰ Agency Exhibit 1, Tab 7, Page 10

²¹ Agency Exhibit 1, Tab 7, Page 11

²² Agency Exhibit 1, Tab 5, Page 4

²³ Agency Exhibit 1, Tab 5, Page 6

- At 9:07 a.m. and 9:25 a.m. - Grievant wrote to his manager and various other parties indicating that he was filing with the EOP as well as FEAP and perhaps as well as the Ombudsman and would not attend the 10:30 a.m. meeting.²⁵

- At 9:30 a.m. - Grievant sent an email to his manager and indicated that he had filed an EOP Complaint and he wanted instructions from them before he did anything further.²⁶

- At 9:55 a.m. - Grievant's manager sent an email to the Grievant indicating that he intended to move forward with the meeting as scheduled and that he expected the Grievant to be present.²⁷

- At 10:16 a.m. - Grievant sent an email to his manager indicating that he was under a great deal of stress and he was requesting an emergency meeting with FEAP.²⁸

- At 10:47 a.m. - Grievant sent an email to his manager indicating that he has left a meeting with FEAP and he was requesting PTO for the rest of the day for medical reasons.²⁹

Ultimately, the Grievant did not ever attend the 10:30 a.m. meeting on November 26, 2014. I heard testimony from the Human Resources Manager regarding this issue. She testified that she and the Grievant's manager went to the Grievant's office sometime after 10:30 a.m. on November 26, 2014, and found him typing on his computer. She testified that the Grievant stood up and was in the process of leaving his office. The Human Resources manager then asked the Grievant at that time if he was refusing the meeting and he answered in the affirmative. Only when she told him that would constitute a separate issue in and of itself did the Grievant stop long enough to be handed the documentation that his manager had intended to deliver to him at the mandatory 10:30 a.m. meeting.

It is clear to me, from both documentary evidence and testimony, in particular the Grievant's demeanor as he testified, that it was his intent to not attend the 10:30 a.m. meeting on November 26, 2014, which his manager had amply made clear to him was a mandatory meeting. Indeed, to the extent that a mandatory meeting took place, the manager had to go and find the Grievant. I also heard testimony from the person to whom the Grievant spoke to at the FEAP Office on November 26, 2014, and that witness testified that the Grievant was advised to attend the 10:30 a.m. meeting. The Grievant offered no policy to justify not attending this mandatory meeting.

Policy No. 701(C)(2), defines Serious Misconduct as:

²⁴ Agency Exhibit 1, Tab 5, Pages 7 and 12

²⁵ Agency Exhibit 1, Tab 5, Pages 8 and 9

²⁶ Agency Exhibit 1, Tab 5, Page 12

²⁷ Agency Exhibit 1, Tab 5, Page 16

²⁸ Agency Exhibit 1, Tab 5, Page 16

²⁹ Agency Exhibit 1, Tab 5, Page 19

...acts or omissions having a significant impact on patient care or **business operations...**³⁰ (Emphasis added)

This Policy cites, as an example of Serious Misconduct:

...Insubordination, including refusing or failing to execute or perform responsibilities as reasonably requested, assigned or directed...³¹

Policy No. 701(D)(1)(d), states in part as follows:

...If an employee does not successfully meet expectations following progressive performance improvement counseling, or if the employee's Serious or Gross Misconduct has a significant or severe impact on patient care or Medical Center operations, termination may be the appropriate course of action. **If, in Medical Center management's opinion, the employee's misconduct or deficient performance has a significant or severe impact on patient care or Medical Center operations, employment may be terminated without resorting to Steps 1 through 3...**³² (Emphasis added)

Clearly, management felt in this matter, that the Grievant's actions in refusing to comply with his manager's reasonable request for a meeting, was insubordinate. Further, such insubordination affected Medical Center operations. I find that the Grievant was insubordinate, and that his termination was justified.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." 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.

³⁰ Agency Exhibit 1, Tab 7, Page 2

³¹ Agency Exhibit 1, Tab 7, Page 3

³² Agency Exhibit 1, Tab 7, Page 6

I find no reason to address mitigation in this grievance.

The Grievant alleged, in his Grievance Form A, that a white colleague did not receive the same punishment that he had received when there was a power failure.³³ Further, the Grievant alleged that he knew of no non-minority employee who was ever suspended when the death of a family member was involved.³⁴ The Grievant offered no evidence whatsoever to support these allegations. The Agency conceded that there was white employee who was, at the time he caused a power issue, in a training period before he became a full-time employee and he was not suspended. Other than these unsupported allegations, the Grievant has offered no testimony before me regarding race discrimination or disparate treatment.

Prior to the issues that are before me, the Grievant had received a Step 3 Performance Warning and/or suspension, dated January 31, 2014, for which he was suspended for 16 hours.³⁵ In addition, the Grievant had received a Step 2 FPICF for Failure to Meet Performance Expectations, dated January 10, 2014.³⁶

DECISION

For reasons stated herein, I find that, regarding Grievance No. 10525, the Agency has borne its burden of proof. Regarding Grievance No. 10550, the Agency has not borne its burden of proof regarding the allegation that the Grievant mishandled PHI, but has borne its burden of proof regarding the allegation that the Grievant was insubordinate. Regarding Grievance No. 10549, I find that the Agency has not borne its burden of proof regarding the allegation that the Grievant failed to meet performance expectations relative to the PACSO2 system but has borne its burden of proof regarding the allegation that the Grievant failed to meet performance expectations relative to the fire system inspection test. Accordingly, I find that termination of the Grievant was proper.

APPEAL RIGHTS

You may file an administrative review request 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. 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

³³ Agency Exhibit 1, Tab 1, Page 5

³⁴ Agency Exhibit 1, Tab 1, Page 5

³⁵ Agency Exhibit 1, Tab 6, Pages 1 and 2

³⁶ Agency Exhibit 1, Tab 6, Pages 3 and 4

2. 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 804-786-1606, 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.³⁷ 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.³⁸

[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

³⁷An 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).

³⁸Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.