

Issue: Step 3 Formal Performance Improvement Counseling Form with 90 Day Performance Warning; Hearing Date: 03/27/15; Decision Issued: 04/01/15; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10554; Outcome: No Relief – Agency Upheld; **Administrative Review – EDR Ruling Request received 04/16/15; EDR Ruling No. 2015-4136 issued 05/21/15; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 04/16/15; DHRM Ruling issued 05/27/15; Outcome: AHO’s decision affirmed; Judicial Review: Appealed to Charlottesville Circuit Court (07/14/16); Circuit Court Ruling issued 01/06/16; Outcome: AHO’s decision affirmed.**



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10554**

Hearing Date: March 27, 2015

Decision Issued: April 1, 2015

#### **PROCEDURAL HISTORY**

On October 1, 2014, Grievant was issued a Step 3 Formal Performance Improvement Counseling Form with a 90 day performance warning for failure to meet performance expectations.

On October 14, 2014, 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 February 23, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 27, 2015, 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. 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 employs Grievant as a Registered Respiratory Therapist. She has been employed by the Agency for approximately 24 years.

Grievant worked in the Clinic approximately two days per week. When she worked in the Clinic, she met with approximately 10 patients per day. She was responsible for updating a spreadsheet containing Smoking Cessation Intervention Data and a spreadsheet containing Non-Smoking Cessation Log with information about her observations of patients. Updating the spreadsheet for each patient required approximately one or two minutes. She was expected to update those spreadsheets within the day.

On May 28, 2014, Grievant received a Step 2 Formal Performance Improvement Counseling Form for failure to timely update information in spreadsheets. She was advised, "[t]his spreadsheet must remain current at all times, which means documentation should be completed/updated at the end of each working day at [the Clinic]."<sup>1</sup>

On August 13 and August 14, 2014, Grievant was given additional time to update her spreadsheets to become timely.

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<sup>1</sup> Agency Exhibit 7.

On September 23, 2014, the Supervisor audited Grievant's work product. She determined that Grievant had last updated the first spreadsheet on September 9, 2014 and the second spreadsheet on September 3, 2014. Grievant had worked in the Clinic between those dates but failed to timely update the spreadsheets.

## CONCLUSIONS OF POLICY

Medical Center Policy 701 governs Employee Standards of Performance and Conduct. Under this policy, performance deficiencies are addressed through a performance improvement process which progresses through four Steps. Step One is Informal Counseling. Step Two is Formal Counseling. Step Three is Performance Warning and/or Suspension. Step Four is Termination.

Grievant was advised of the Agency's expectation that she timely update two spreadsheets. As of September 23, 2014, Grievant did not timely update the two spreadsheets. The Agency has established that her performance was deficient. Grievant received a Step 2 Formal Counseling on May 28, 2014. The Agency has presented sufficient evidence to support the issuance of a Step 3 Formal Performance Improvement Counseling Form with a 90 day performance warning.

Grievant argued that her work was often interrupted and it was sometimes difficult to complete her work on a timely basis. The evidence showed that Grievant was not given too much work to perform in a day and that she was capable of completing the spreadsheets on a timely basis.

Grievant argued that she suffered from disabilities causing her to need additional time to perform her work duties. Grievant did not testify at the hearing. Insufficient evidence was presented to support this assertion.

*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 ...."<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

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<sup>2</sup> Va. Code § 2.2-3005.

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 3, Formal Performance Improvement Counseling Form with a performance warning 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 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 e-mail.

2. 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 that EDR 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

or, send by e-mail 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 provide a copy of all of your appeals 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 requests for administrative 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>3</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>3</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.