

Issue: Step 4 Formal Performance Improvement Counseling Form with Termination (unsatisfactory performance during performance warning period); Hearing Date: 11/06/15; Decision Issued: 11/09/15; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10690; 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: 10690

Hearing Date: November 6, 2015
Decision Issued: November 9, 2015

PROCEDURAL HISTORY

On August 5, 2015, Grievant was issued a Step 4 Formal Performance Improvement Counseling Form for failure to respond to a patient's needs.

On August 31, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 21, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 6, 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 (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. 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 Patient Care Assistant. He had been employed by the Agency for approximately one and a half years. Except for the facts giving rise to this disciplinary action, Grievant provided satisfactory services to the Agency.

Grievant had prior active disciplinary action. On June 22, 2015, Grievant received a Step 3 Formal Performance Improvement Counseling Form. He was placed on a performance warning from June 20, 2015 through September 18, 2015. The Counseling Form stated:

All performance expectation for the job must be met during the Performance Warning Period. Failure to meet performance expectations may result in termination.¹

Some of the Agency's patients were at risk of falling out of their beds. If they fell, they could be injured. To prevent a patient from getting out of his or her bed, the Agency attached an alarm to the patient's bed. When the patient attempted to leave the bed, the alarm would sound and a light outside of the room would activate. The sound of the alarm could be heard throughout the nursing unit. The light served to indicate in which room the alarm activated.

¹ Agency Exhibit 7.

Grievant was responsible for listening for alarms, responding to the patients' room, and helping patients remain in their beds.

On July 31, 2015, Grievant was in the nursing unit. He had an earbud in each ear and was watching a video on a computer. The video was from a subscription entertainment service unrelated to Grievant's work duties.

Grievant failed to respond to several alarms. For example, Ms. M was working on the unit with Grievant. An alarm for room 77 sounded. Grievant was approximately 15 feet away from the room. He did not respond to the alarm. He was watching and listening to a video on the computer in front of him. Ms. M was at least 30 feet away from the room and heard the sound. She responded immediately to the room and assisted the patient. The patient was at the edge of the bed with her legs out of the bed and leaning forward. Ms. M helped the patient move back into the center of the bed.

CONCLUSIONS OF POLICY

University of Virginia Medical Center Policy #701, Employee Standards of Performance and Conduct, provides for a series of steps when University staff believe an employee's work performance is inadequate. An employee who receives a Step 4 Formal Performance Improvement Counseling Form may be removed from employment.

Grievant received a Step 3 Formal Performance Improvement Counseling Form with a 90 day performance warning. During that performance warning period, Grievant failed to respond to alarms as required by the Agency. His work performance was unsatisfactory to the Agency thereby justifying the issuance of a Step 4 Formal Performance Improvement Counseling Form. Grievant's removal must be upheld.

Grievant argued that it was common practice for employees to use earbuds while at work. He argued that he had one earbud in his ear and was able to hear the alarm with his other ear. Grievant was not disciplined for wearing earbuds; he was disciplined for not responding to alarms. The evidence showed that several bed alarms sounded and Grievant failed to respond to those alarms as required by the Agency.

Grievant argued that he was singled out for discipline by the Supervisor because of his sexual orientation. The evidence showed that two employees complained to the Supervisor about Grievant's failure to perform his job duties. The Supervisor participated in the disciplinary process because of the complaints she received and not based on an improper purpose.

Grievant argued that it was inappropriate for the Agency to impose a Step 3 with a performance warning as part of the prior disciplinary action. The prior disciplinary action is not before the Hearing Officer. Grievant could have addressed his concerns

with the prior disciplinary action by filing a grievance. He did not do so. He cannot correct any error in the prior disciplinary action through his active grievance.

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”² 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 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 14th St., 12th 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

² Va. Code § 2.2-3005.

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 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 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.³

[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

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.