

Issue: Step 2 Formal Performance Improvement Counseling Form with Suspension (unsatisfactory performance); Hearing Date: 10/14/16; Decision Issued: 10/27/16; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10866; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10866

Hearing Date: October 14, 2016
Decision Issued: October 27, 2016

PROCEDURAL HISTORY

On June 3, 2016, Grievant was issued a Step 2 Formal Performance Improvement Counseling Form with a three day suspension for being rude and disrespectful to a patient.

On June 8, 2016, 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 September 13, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 14, 2016, 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 School employs Grievant as a Registered Nurse. She began working for the Agency on October 10, 2010. Grievant had prior active disciplinary action. On January 25, 2016, Grievant received a Step I Informal Counseling.

On April 22, 2016, a Patient entered the Emergency Department with abdominal pain. He was given bed number 53 in Grievant's work area. He asked a nurse for pain medication and believed a nurse was mean to him. He reported the matter to the Agency. Two emails describe what the Patient's description of his interaction with the nurse.

Ms. M wrote:

I just spoke to [Patient. He] states a nurse was rude to him while he was in the ED recently (4/22). He states that he asked for pain medication and when no one responded, he again asked. He states a nurse came in and said, "You are not the only one here today." He states he told her "I am just asking for medication" and said the nurse was "very mean" during the stay in the ED.

The Supervisor wrote:

I spoke with pt today. He identified the RN as an older lady who was tall with [gray] hair with light complexion. He stated she did not share her name. He shared he asked for pain medication and she stated "you're not

the only one here". He reports he asked for pain medication again and reports she told him to "shut it".

He said he has been a patient for 20 years here. He said he has the upmost respect for all that we do but this nurse was just [plain] rude. He said she was not patient oriented and it seemed that no one mattered to her. He said he is not trying to get anyone in trouble but that he did not think her behavior was right.¹

Numerous employees including Grievant entered or could have entered the area where bed 53 was located.

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.

The Agency may take disciplinary action against an employee who is disrespectful and rude to a patient. The Agency, however, must be able to identify the employee who was rude and disrespectful by a preponderance of the evidence in order to support the issuance of disciplinary action.

The Agency has not established that Grievant was the employee who was rude and disrespectful to the Patient. The Patient was the person most likely to be able to identify the employee who was rude and disrespectful to him. The Agency did not call the Patient as a witness. As part of its investigation, the Agency did not show the Patient pictures of staff members with whom he might have interacted and then allow the Patient to identify which staff member he spoke with on April 22, 2016.

Many of the Patient's descriptors of the employee use relative terms. For example, the Patient referred to the nurse as "older". Grievant is in her early 60s and thus would match the description of older relative to the rest of the population. The Patient described the nurse as "tall". The question becomes "tall" compared to what height? The height of the average of a woman in America is approximately 5'4" and Grievant testified she is 5'5". Is one inch more than average considered "tall"? Probably not without knowing what the Patient considered to be tall. The Patient described the nurse as having gray hair. Grievant's hair color at the hearing was more

¹ Agency Exhibit 6.

blonde than gray.² Grievant did not fit the description of an employee with gray hair. The Patient described the nurse as having a light complexion. Grievant described her complexion as being “olive”. Without knowing the Patient’s perspective, it is not possible to understand what the Patient considered to be a light complexion. Without additional information from the Patient, Grievant matches only one of four descriptors expressed by the Patient. This is not sufficient evidence to conclude by a preponderance of the evidence that Grievant was the nurse who interacted with the Patient.

The Agency argued that of the approximately 17 female nurses working that night, none of them except Grievant matched the Patient’s description of the nurse. The problem with this argument is that even Grievant did not match the Patient’s description.

It is certainly possible that Grievant was the nurse that the Patient encountered. Grievant was a nurse who worked at the same location and at the same time the Patient received services. Although she claimed she did not provide services to the Patient, it is equally likely that Grievant provided services to the Patient as it is that she did not encounter the Patient. Grievant received several counseling sessions regarding how she interacted with patients. Grievant described herself as a “direct” person. The Agency presented a witness who claimed that one of Grievant’s co-workers heard Grievant say to another patient “you are not the only one here.” The Agency did not call the co-worker to testify because she refused to participate in the hearing. Grievant may be the “type” of person who might make an offensive statement to a patient. The possibility that Grievant made the offensive comment to the Patient is not sufficient to support disciplinary action. The Agency must show it is more likely than not that Grievant was rude to the Patient. The Agency’s hearsay evidence is not sufficient to support its burden of proof.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Step 2 Formal Performance Improvement Counseling Form is **rescinded**. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

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

² The Agency did not allege Grievant’s hair color on the day of the hearing differed from her hair color on the day of the Patient’s encounter with the nurse.

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 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.