

Issue: Step 2 Formal Performance Improvement Counseling Form (serious misconduct); Hearing Date: 11/22/16; Decision Issued: 11/23/16; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10883; Outcome: Full Relief; **Administrative Review**: EDR Ruling Request received 12/07/16; EDR Ruling No. 2017-4457 issued 12/21/16; Outcome: Remanded to AHO; Remand Decision issued 01/05/17; Outcome: Full Relief changed to Partial Relief; **Administrative Review**: DHRM Ruling Request received 12/07/16; DHRM Ruling issued 01/27/17; Outcome: AHO's Remand Decision affirmed.



# **COMMONWEALTH of VIRGINIA**

*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10883**

Hearing Date: November 22, 2016  
Decision Issued: November 23, 2016

### **PROCEDURAL HISTORY**

On June 29, 2016, Grievant was issued a Step 2, Formal Performance Improvement Counseling of disciplinary action for serious misconduct.

On July 26, 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 October 18, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 22, 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?
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 Medical Assistant. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant wanted to take a vacation from June 10, 2016 through June 17, 2016. On December 28, 2015, she received approval for paid time off but the approval was contingent on Grievant having sufficient leave balances to cover the vacation period.

Towards the end of May 2016, the Supervisor realized Grievant did not have sufficient leave balances to apply to Grievant's requested vacation. The Supervisor met with Grievant to discuss the leave balance deficit. At the conclusion of the meeting, the Supervisor told Grievant that she would "get back" with Grievant. Grievant assumed this meant the Supervisor would speak with Grievant in person.

On June 8, 2016 at 4:44 p.m., the Supervisor sent Grievant an email advising Grievant:

You will not have enough PTO time saved up to take this entire time off and will be 18.82 hours short of the 40 hours needed to take this required time. You have been placed back on the schedule to work on Wednesday 6/15/2016 from 1400-1700, as well as Thursday and Friday 6/16/16-6/17/16 from 0830-1700. \*\*\*

If you have any questions or concerns, please see me tomorrow afternoon. Let me know if there is anything I can do to help you.<sup>1</sup>

Grievant worked on June 9, 2016 but did not read the email. She was busy providing services to patients.

Grievant received a telephone call from a coworker informing her that she had to report to work on June 15, 2016. Grievant became angry because the Supervisor had not called her as she had expected.

On June 10, 2016, the Supervisor was meeting with a new employee in her office. Grievant called the Supervisor. The Supervisor answered the telephone call because she routinely received emergency calls and other calls. Grievant spoke with a disrespectful tone. Grievant spoke loudly. The Supervisor said "I don't need to be talked to like this." The Supervisor had to hold the telephone approximately six inches away from her ear because of Grievant's loud voice. Grievant began yelling questions at the Supervisor about the upcoming weekly work schedule. At one point, the Supervisor attempted to answer one of Grievant's questions but Grievant abruptly and rudely responded "I'm not done talking." Grievant continued with her aggressive, accusatory, and derogatory manner throughout the call. Grievant called the Supervisor "cowardly" and "sneaky". Grievant accused the Supervisor of trying to "undermine her". The Supervisor told Grievant that the telephone conversation needed to end because Grievant's behavior was inappropriate. The Supervisor told Grievant, "when you get back next week we will continue our conversation as to if this will be handled as an occurrence or not." Grievant hung up on the Supervisor before the Supervisor finished her entire sentence.

## CONCLUSIONS OF POLICY

State Agencies may not take disciplinary action against employees for engaging in protected activities. To permit such disciplinary action would have the effect of retaliating against the employee.

Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right **otherwise protected** by law."<sup>2</sup> (Emphasis added).

Virginia Code § 2.2-3000(A) states:

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<sup>1</sup> Agency Exhibit 6C.

<sup>2</sup> See Grievance Procedures Manual Section 4.1(b)(4) and Virginia Code § 2.2-3004 (A).

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In EDR Ruling 2008-1964, 2008-1970, the EDR director concluded:

Under Virginia Code § 2.2-3000, “[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management.” Thus, bringing a concern about an annual performance evaluation to a reviewer would appear to be an act “otherwise protected by law.”

In this case, Grievant brought her concerns about her leave to her immediate supervisor. Grievant’s actions were contrary to Agency Policy 283 which required Grievant to “[t]reat each other ... with fairness, courtesy, respect and consideration.” Her behavior must be evaluated within the context of protected activity. It is not unusual for an employee with a strong opinion about his or her treatment by an employer and who is angry to express that opinion in a loud voice with intensity. Grievant’s behavior was protected activity and the Agency may not take disciplinary action because of her behavior in this case.

The protection afforded by Va. Code § 2.2-3000 is not without limits. An employee who threatens harm of another employee, for example, may exceed the protection afforded by the statute. In this case, Grievant did not threaten the Supervisor or otherwise cause her to be concerned for her safety.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Step 2, Formal Performance Improvement Counseling is **rescinded**.

## 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.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
*Office of Employment Dispute Resolution*

**DECISION OF HEARING OFFICER**

In re:

**Case No: 10883-R**

Reconsideration Decision Issued: January 5, 2017

**RECONSIDERATION DECISION**

In EDR Ruling 2017-4457, the Director of the Office of Employment Dispute Resolution wrote:

The hearing officer correctly states that under Section 2.2-3000 of the Code of Virginia, “[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management.” Further, EDR has interpreted this statutory language to provide that engaging in such conduct is protected activity for purposes of a claim of retaliation.

As EDR has held, however, this protection is not without exception. For instance, an employee might still be disciplined for raising workplace concerns with management if the manner in which such concerns are expressed is unlawful (for instance, a threat of violence to life or property) or otherwise unreasonable under the circumstances. The limited exceptions to the general protection of employees who raise workplace concerns can only be determined on a case-by-case basis. \*\*\*

However, the hearing officer’s analysis of whether the grievant’s behavior exceeded any protections afforded by the statute were focused on whether the grievant engaged in threats. As stated in this ruling, the analysis must consider more than just whether an employee engaged in threats, but whether the conduct was reasonable under the circumstances. Yet, the hearing officer has already determined the grievant’s conduct violated agency policy. Thus, in this instance, it is unclear whether Section 2.2-3000 should properly provide protection to the manner of the grievant’s conduct during the June 10 phone call. The

hearing officer is directed to reconsider his decision in accordance with this ruling. (footnotes omitted)

This Ruling has the effect of reducing the protection previously afforded employees by the Statute.

In this case, Grievant's behavior is sufficient to support the issuance of corrective action. The level of disciplinary action selected by the Agency, however, is not supported by the evidence.

Grievant had no prior active disciplinary action.<sup>4</sup>

The Agency's disciplinary policy suggests employee misconduct should be addressed through a process of progressive performance improvement counseling beginning with a Step 1 Informal Counseling. "Informal Counseling is used to address deficiencies in performance of assigned duties or to spot correct minor incidents of employee misconduct. \*\*\* The counseling session shall be documented in the supervisor/competency file in the department, but does not become a part of the employee's personnel file except as supporting documentation with any future Formal Counseling." A Step 2 Formal Counseling is appropriate for acts of Serious Misconduct. "Serious Misconduct refers to acts or omissions having a significant impact on patient care or business operations."

The Agency has not established a "significant impact" on business operations. The impact on the Agency fell solely on the Supervisor. The Supervisor testified she was not fearful of Grievant. She did not testify that she had to go home early for the day or was so distracted or upset that she was unable to otherwise perform her duties. The best description of the impact on Grievant's supervisor was that it was annoying and unpleasant to the Supervisor. The Supervisor told Grievant that the phone call needed to end and "when you get back next week we will continue our conversation as to if this will be handled as an occurrence or not." No evidence was presented showing the Supervisor was, for example, "shaken" "disturbed" or "traumatized" such that she could no longer perform her work duties. Following this annoying encounter, the Supervisor resumed her normal work duties.

Grievant's actions were contrary to Agency Policy 283 which required Grievant to "[t]reat each other ... with fairness, courtesy, respect and consideration." The Agency's policy was aspirational in nature. Treating others with courtesy and respect would be a minimum standard in any State government workplace regardless of the existence of any policy. Grievant's failure to comply with the Agency's policy does not affect the outcome of this case. In other words, the existence of a policy stating what should otherwise be obvious to State employees does not form a basis to heighten scrutiny of Grievant's behavior.

The Agency argued Grievant's behavior caused a significant impact on business operations because it was the "[u]se of profanity or offensive language in the workplace

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<sup>4</sup> The Agency did not present a copy of any prior Step 1 Informal Counseling.



whether verbally, through gestures, or in writing.” Grievant did not use profanity when speaking to the Supervisor. Grievant called the Supervisor cowardly and sneaky but from Grievant’s perspective, the Supervisor was cowardly and sneaky. The Supervisor spoke with Grievant in person and told Grievant she would “get back” with Grievant. The Supervisor knew that telling Grievant she could not go on her planned vacation would be an uncomfortable and unpleasant conversation. Rather than facing Grievant a second time, the Supervisor elected to send Grievant an email. The Supervisor knew Grievant worked on her feet most of the day and did not always have an opportunity to read emails on a timely basis. From Grievant’s perspective, the Supervisor failed to confront Grievant regarding a difficult topic (and a topic that was important to Grievant<sup>5</sup>) and instead sent Grievant an email. From the Supervisor’s perspective, the Supervisor did not like being called cowardly or sneaky. From Grievant’s perspective, the words accurately described the Supervisor’s behavior. The Hearing Officer cannot conclude that Grievant’s words were offensive language in the workplace.

The Agency asserted that the Supervisor had to interrupt her meeting with a new employee to address Grievant’s telephone call. This fact does not affect the outcome of this case. Grievant did not know that the Supervisor was meeting with other employee. The Supervisor could have let Grievant’s call go to voice mail but instead chose to answer the phone because the Supervisor did not know whether the call might be about an emergency.

### **RECONSIDERATION ORDER**

Based on the foregoing, the Step 2, Formal Performance Improvement Counseling is **reversed** and **reduced** to a Step 1, Informal Counseling

### **APPEAL RIGHTS**

A hearing officer’s original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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<sup>5</sup> Grievant wrote in her grievance that “I could not just cancel my reservation this late because I would be penalized and had to pay more for cancelling this late.”

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer