

Issue: Step 4 Formal Performance Improvement Counseling Form with Termination (gross misconduct); Hearing Date: 07/26/16; Decision Issued: 07/27/16; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10831; 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: 10831

Hearing Date: July 26, 2016

Decision Issued: July 27, 2016

PROCEDURAL HISTORY

On April 26, 2016, Grievant was issued a Step 4, Formal Performance Improvement Counseling Form of disciplinary action with removal for being under the influence of alcohol during work hours.

On April 26, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 13, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 26, 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 Center employed Grievant as an Anesthesia Tech. He had been employed by the Agency since 2007. His duties included rendering services to patients at the Medical Center.

Grievant had prior active disciplinary action. On December 13, 2013, Grievant received a Step 2 Formal Counseling. On January 3, 2014, Grievant received a Step 2 Formal Counseling.¹

On April 13, 2016, Grievant reported to work after having consumed alcohol. He spoke with two nurses. They smelled alcohol on his breath. They reported their concern to their supervisor who contacted Grievant's Supervisor. After the Supervisor spoke with the Agency's Employee Relations Consultant, the Supervisor escorted Grievant to Student Health for a fitness for duty examination to be conducted. The waiting room was crowded and Grievant sat in a chair while the Supervisor stood. Grievant fell asleep several times. When his name was called out in the waiting room, Grievant did not hear the call because he was asleep. The Supervisor had to awaken Grievant. Grievant went into the examination area. Grievant signed a release consenting to the alcohol testing and asking that the results be sent to the Agency's Faculty Employee Assistance Program.

¹ The Agency's exhibits did not contain any additional disciplinary action.

A laboratory owned by the Agency examined Grievant's blood sample and it showed positive for alcohol with a Blood Alcohol Content of .09. On April 14, 2016, Agency managers were notified of the test results.

On April 15, 2016, Grievant reported to the Agency for a predetermination meeting regarding possible disciplinary action. Grievant had been consuming alcohol. The Supervisor smelled alcohol on Grievant's breath, noticed that he was unsteady when walking, and appeared under the influence of alcohol. Agency managers decided to have a taxi transport Grievant home and re-scheduled the meeting for April 18, 2016.

On April 18 2016, Agency managers met with Grievant and asked him provide any reasons or defenses as to why the test result was positive. Grievant responded that he drinks alcohol to reduce stress but he has never had a problem with his job performance.

CONCLUSIONS OF POLICY

Medical Center Human Resources Policy Number 701 sets forth the Agency's Employee Standards of Performance. Employee performance issues are addressed through a process of progressive performance improvement counseling. This process consists of four steps: (1) informal counseling, (2) formal performance improvement counseling, (3) performance warning and/or suspension, and (4) termination. In some cases, the Agency may bypass steps 1 and 2.

Gross Misconduct includes ... "being under the influence of alcohol" "Gross Misconduct generally will result in termination."

On April 13, 2016, Grievant reported to work and was under the influence of alcohol during work hours. Two nurses smelled alcohol on his breath. He tested positive for alcohol with a BAC of .09. A BAC of .09 exceeds the limits the .08 standard for Virginia drivers to be considered driving under the influence of alcohol. If an employee can be deemed unsafe to drive, he should also be considered unsuitable to perform his work duties. Grievant demonstrated the effects of alcohol by falling asleep while waiting for his blood test. The Agency has presented sufficient evidence to support the conclusion that Grievant reported to work while under the influence of alcohol thereby justifying the issuance of a Step 4 Formal Performance Improvement Counseling Form with removal.

Grievant argued that the Agency failed to follow Policy 701 because it did not provide him with a Step 3 Formal Performance Improvement Counseling that would not have resulted in his removal. Policy 701 encourages progressive disciplinary action, but a first offense of Gross Misconduct may result in removal.

Grievant presented evidence that he had conducted research and had several of his research papers published. The Agency does not contest Grievant's technical skills

to perform his work duties. The fact that Grievant may be a competent researcher in his field does not affect the outcome of this case. Grievant was expected to be competent in his field and report to work fit for duty. Instead, he reported to work on April 13, 2016 under the influence of alcohol.

Grievant argued that he had not changed his routine or lifestyle but he had not been warned about his alcohol consumption in the past. Whether Grievant reported to work under the influence of alcohol on other occasions would not excuse or justify Grievant reporting to work under the influence of alcohol on April 13, 2016.

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

² Va. Code § 2.2-3005.

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.