

Issue: Step 2 Formal Performance Improvement Counseling Form (failure to meet performance expectations); Hearing Date: 09/13/16; Decision Issued: 09/15/16; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10857; 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: 10857

Hearing Date: September 13, 2016

Decision Issued: September 15, 2016

PROCEDURAL HISTORY

On June 22, 2016, Grievant was issued a Step 2 Formal Performance Improvement Counseling Form for failure to meet performance expectations.

On June 22, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 15, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 13, 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 employs Grievant as a Scheduling Coordinator. She has been employed by the Agency for approximately 20 years. Grievant had prior active disciplinary action. On February 2, 2016, Grievant received a Step 1 Informal Counseling Memorandum for unsatisfactory job performance.

The Agency has schedulers who assign specific Operating Rooms to doctors and schedule the length of each of the doctor's surgeries. Schedulers are required to use "default" historic times or use the surgeon's estimate of the procedure time and then add 30 minutes for anesthesia and preparation time. The Agency's computer system also adds 15 minutes preparation time if necessary and 15 minutes clean up time.

The Agency's policy requires that surgeries in the Operating Room should be scheduled to end by 5:30 p.m. When the last surgery of the day extends beyond 5:30 p.m., staff in the Operating Room and in the Recovery Room must work overtime hours that would otherwise not be necessary. These staff were inconvenienced and the Agency incurs overtime costs it would prefer to avoid.

Grievant received training informing her that she was to notify the Assistant Nurse Manager if a Remote Scheduler scheduled a surgery for a shorter length of time than necessary based on the Agency's standards.

Four surgeries were scheduled to be performed by Dr. K in the Operating Room on May 24, 2016. Mr. D, a Remote Scheduler, reduced the scheduled times below the Agency's standards. Grievant contacted the Remote Scheduler and asked him why he

had reduced the times for several of Dr. K's scheduled surgeries. Mr. D said he reduced the scheduled times at the request of Dr. K. Grievant did not contact the Assistant Nurse Manager to confirm that the surgeries could be completed within the times set by Dr. K.

Dr. K was not able to complete the surgeries within the times scheduled on May 24, 2016. The last surgery ended approximately 42 minutes after 5:30 p.m. The Agency incurred overtime costs and some staff complained about having to work later than they expected.

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.

"Formal Counseling is used to address deficiencies in performance"¹ Grievant was obligated to contact the Assistant Nurse Manager when she became aware that surgeries were scheduled for shorter periods of time than the Agency's standards. Grievant failed to do so thereby justifying the Agency's decision to take disciplinary action for deficient performance. Grievant already had a Step 1 Formal Performance Improvement Counseling Form. The Agency has presented sufficient evidence to support the issuance of a Step 2 Formal Performance Improvement Counseling Form.

Grievant argued that the disciplinary action was unnecessary, too harsh, and undermined her ability to seek another position within the Agency. The Agency's decision to issue disciplinary action is supported by the evidence and is consistent with the Agency's Standards of Conduct. Grievant's concerns are understandable but do not provide a basis to reverse the disciplinary action.

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

¹ Agency Exhibit 3.

² Va. Code § 2.2-3005.

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 2 Formal Performance Improvement Counseling Form 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 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.