

Issue: Step 4 Formal Performance Counseling Form with Termination (use of abusive & profane language and intimidating gestures causing workplace disruption); Hearing Date: 03/19/14; Decision Issued: 03/21/14; Agency: UVA Medical Center; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10273; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10273

Hearing Date: March 19, 2014
Decision Issued: March 21, 2014

PROCEDURAL HISTORY

Grievant, a patient care technician with the University of Virginia Medical Center (“Agency”) was removed from employment pursuant to a Step 4 formal performance counseling form issued December 27, 2013. Agency Exh. 1. The discipline was issued under the authority of the Agency’s Human Resources Policy No. 701, Employee Standards of Performance and Conduct. Grievant timely filed a grievance to challenge the Agency’s action. On February 5, 2014, the Office of Employment Dispute Resolution, Department of Human Resource Management (“EDR”) appointed the Hearing Officer. At the pre-hearing conference, the hearing was scheduled at the first date available between the parties and the hearing officer, March 6, 2014. Because of illness, the Grievant requested a continuance of the hearing, and for such good cause shown, the hearing was continued to March 19, 2014, at which time the grievance hearing was held at the Agency’s offices.

Both sides submitted exhibits that were admitted into the grievance record, and they will be referred to as Agency’s or Grievant’s Exhibits, numbered respectively. The hearing officer has carefully considered all evidence presented.

Other disciplinary counseling and notices are part of the grievance record, as the Agency relied on the progressive disciplinary process.

APPEARANCES

Grievant
Advocate and Representative for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the termination memorandum?
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 under applicable 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?

The Grievant requests rescission of the termination and job reinstatement.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

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 which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency's Human Resources Policy No. 701, Employee Standards of Performance and Conduct, defines the progressive discipline that must be followed before a termination may occur. Agency Exh. 7.A. 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.

Policy No. 701 provides that serious misconduct includes acts or omissions having a significant impact on patient care or business operations. An example of serious misconduct is use of profanity or offensive language in the workplace whether verbally, through gestures, or in writing. Agency Exh. 7.A., p. 3.

Agency Policy No. 0283, Behavioral Code of Conduct, provides that staff treat each other, patients and their families with fairness, courtesy, respect and consideration. Agency Exh. 7.B., p. 1.

Agency Policy No. 0291, Clinical Staff Code of Conduct, addresses professionalism in the workplace. The policy sets forth the responsibility for cultivating and sustaining a healthcare environment which encourages quality patient care, civility, and a collaborative spirit, and holding all staff to the highest personal and professional standards, with adherence to the University of Virginia Medical Center's Core Values of:

- Respect
- Integrity
- Stewardship
- Excellence

Agency Exh. 7.C.

Policy No. 701 provides guidance to management officials for handling workplace behavior and for taking corrective action. The policy lists the four-step process as follows: (1) informal counseling; (2) formal (written) counseling; (3) performance warning and suspension; and, (4) termination.

More specifically, serious misconduct generally will be addressed at Step 2 or Step 3. If an employee does not successfully meet expectations following progressive improvement counseling, or if the employee's Serious or Gross Misconduct has a significant or severe impact on patient care or Medical Center operations, termination may be the appropriate course of action. If, in Medical Center management's opinion, the employee's misconduct or deficient performance has a significant or severe impact on patient care or Medical Center operations, employment may be terminated without resorting to Steps 1 through 3. Agency Exh. 7.A., p 6.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing

officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a “super personnel officer” and shall give appropriate deference to actions in Agency management that are consistent with law and policy...“the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action.”

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions. The operable facts alleged by the Agency are set forth in the Agency’s Step 4 termination form. It states the Grievant

is being terminated for multiple instances of the use of abusive and profane language and intimidating gestures in the workplace around colleagues and visitors regarding a colleague and disruption of the workplace.

The Step 4 termination form references multiple events occurring on December 12, 2013: an incident in which the Grievant’s lead RN requested the Grievant’s action regarding consent forms, the dot tracking system, and the refrigerator temperature log book. Following these interactions, the Grievant spoke harshly about the lead RN, using profanity in reference to the lead RN. A colleague requested the Grievant cease and the Grievant persisted.

The Step 4 termination form references another incident later in the same day, when the Grievant was checking the refrigerator thermostat, and the Grievant again, in the presence of a visitor known to her, used profanity in reference to the lead RN. The visitor asked the Grievant to cease, and the Grievant persisted.

The Step 4 termination form references a prior Step 2 Formal Counseling on May 3, 2013, involving discourteous behavior. Also, on October 5, 2012, the Grievant was issued a Step 1 Informal Counseling for discourteous behavior. The Agency concluded that the Grievant used abusive and profane language which was demeaning, berating, rude, loud, and offensive, and that she participated in an unwarranted level of disruption in the clinic. Further, the Agency concluded that the pattern of behavior is seriously egregious and has had a profound impact on the Agency’s operations. Based on the progressive discipline and seriousness of the conduct, the Agency concluded the offenses justified termination and no mitigating factors weighed against termination.

The clinic manager testified consistently with the Step 4 termination notice, and also described the Grievant's prior annual performance evaluations that addressed behavior deficiencies. Agency Exh. 8. The manager also testified that the Grievant's personal conflicts involved in the incidents do not excuse the responsibilities and expectations for workplace professionalism.

The lead RN testified to the incidents referenced in the Step 4 termination form, and she testified that the Grievant acted "defensive" when she asked the Grievant about the consent forms, the dot tracking system, and the refrigerator thermostat. The lead RN only heard about subsequent disruption during the day from others.

A patient care assistant testified to the Grievant's outburst in her presence, responding to the lead RN's requests by saying that she was "done with this f***ing shit." The patient care assistant requested the Grievant to cease her use of profanity, and the Grievant's reply was "I don't give a God d*** any more." The assistant also testified to her two written statements concerning the incident and the aftermath. Agency Exh. 5.B. and 5.C.

A nurse testified to her observation of the Grievant's outburst in the presence of her daughter and granddaughter, visitors to the clinic at the time. The nurse testified to the obvious friction involving the Grievant and her profanity in the presence of her daughter, granddaughter, and herself. The nurse testified that the Grievant referred to the lead RN as a "f*****g b***h!" She also testified that the Grievant threw the thermostat logbook against the wall during the outburst. The nurse also testified to her written statement of the incident. Agency Exh. 5.D.

A nurse practitioner testified to her statement of the incident. Agency Exh. 5.E. She testified that the visitor (the nurse's daughter) aggressively ordered her out of a room so that she could communicate privately with the Grievant. The nurse practitioner heard loud voices in the room after she left, but she did not know what transpired in the room.

The Grievant testified that she has been a patient care technician with the Agency for 12 years, and worked for an affiliated agency prior to her tenure with the Agency. She testified that she had a personal relationship with the visitors (the nurse's daughter and granddaughter). The Grievant testified that her annual performance evaluations were good overall and she always received a raise in salary. She testified that she was the victim of a double standard and unfairness, and that the lead RN, with whom she had previously been friendly, wanted her gone. The Grievant testified that the clinic can be a stressful place to work and that profanity is commonly used. The Grievant submitted a written statement into the grievance record that addressed, specifically, her position against the credibility of the patient care assistant who testified. Grievant Exh. 1. She also referenced letters of recommendation for her work performance. Grievant Exh. 2 and 3, Agency Exh. 2. On cross-examination, the Grievant conceded that she was aware of the Agency's policies on acceptable conduct, and understood the distinction between job performance and conduct.

Through the grievance process, the Grievant denied use of profanity, but in her testimony she did not deny her use of profanity as described by the Agency's witnesses. She actually expressed that the stress of clinic work leads to the use of profanity. The Grievant testified to her

belief of a “double standard” that I take to mean an ulterior motive by the lead RN to have the Grievant fired. However, the testimony of the lead RN does not involve the Grievant’s conduct in which she used profanity in reference to the lead RN. Thus, the Grievant’s evidence does not show that any animosity between the lead RN and the Grievant led to the Agency’s discipline. The testimony of others regarding the Grievant’s conduct outside the presence of the lead RN supports the Agency’s termination.

The Agency has shown that the Grievant’s conduct occurred as alleged in the Step 4 termination form. The Agency has demonstrated a record of progressive discipline of the Grievant concerning her discourteous behavior. The Agency has shown that the Grievant is guilty of serious misconduct by her use of profanity or offensive language in the workplace, affecting colleagues and visitors, and the Agency is entitled, if not obligated, to impose discipline. Applicable policy allows the Agency, in its discretion, to exercise discipline at the Step 4 termination level. Based on the evidence presented, the Agency has met its burden of showing a Step 4 termination offense based on the severe conduct and disciplinary record.

The Agency considered the issue of mitigation in reaching its decision to terminate the employment of the Grievant, but found no sufficient mitigating circumstances.

While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency’s discipline falls within the limits of reasonableness. The Agency has the discretion to act within the continuum of disciplinary options. The Agency has proved (i) the employee engaged in the behavior described in the termination memorandum, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* (“Hearing Rules”) § VI.B.1.

Mitigation

Termination is the normal disciplinary action for Step 4 in the disciplinary process unless mitigation weighs in favor of a reduction of discipline. Under Virginia Code § 2.2-3005, the hearing officer has the duty to “receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution.” Va. Code § 2.2-3005(C)(6). 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.

The letters of commendation supporting the Grievant show that she has a good record of performance delivering patient care. The agency expressed consideration of mitigating circumstances, but concluded termination was appropriate. Under the *Rules for Conducting Grievance Hearings*, an employee's length of service and satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. The hearing officer finds that this Grievant has a good record of performance, and it is regrettable that the Agency is losing an employee capable of providing valued service. However, in light of the applicable standards, the Hearing Officer finds no basis that provides any authority to reduce or rescind the disciplinary action. In this case, the Agency's action of imposing discipline of termination is within the limits of reasonableness.

DECISION

For the reasons stated herein, the Agency's Step 4 discipline and termination 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.¹

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer

¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.