

Issues: Appointment Cessation (just cause), Retaliation (race), and Retaliation (other protected right); Hearing Date: 06/16/15; Decision Issued: 07/08/15; Agency: UVA Medical Center; AHO: John V. Robinson, Esq.; Case No. 10609; Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10609

Hearing Officer Appointment: May 13, 2015

Hearing Date: June 16, 2015

Decision Issued: July 8, 2015

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge termination of her employment pursuant to a Notice of Just Cause Cessation dated March 24, 2015 (the "Written Notice") by Management of the University of Virginia Medical Center (the "Department" or "Agency"), as described in the Grievance Form A dated April 24, 2015.

In her Form A, the Grievant described the issues as:

Appointment cessation/termination-dismissed unjustly from position as Assistant Nurse Manager at [Clinic].

AE 1.

The Grievant was first hired by the Agency as a Registered Nurse on or about February 6, 2012. Later in July 2014, the Grievant was hired by the Agency as the Assistant Nurse Manager for a particular clinic at the Agency (the "Clinic").

The hearing officer was appointed on May 13, 2015. The hearing officer scheduled a pre-hearing telephone conference call at 10:00 a.m. on May 19, 2015. The Grievant, the Agency's advocate and the hearing officer participated in the pre-hearing conference call. The Grievant is seeking rescission of the Written Notice and the other relief described in the Form A. Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on May 20, 2015, which is incorporated herein by this reference.

In this proceeding the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

At the hearing, the Grievant represented herself and the Agency was represented by its advocate. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely exhibits 1-29 in the Agency's exhibit binder and exhibits A-H in the Grievant's exhibit binder.¹

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as the Assistant Nurse Manager for the Clinic. As such, the Grievant was expected to be aware of all policies which applied to her as a Manager. Additionally, the Grievant admitted on cross-examination that when the Grievant was employed by the Agency as a Registered Nurse, she recalled signing a form stating that she was subject to all Agency policies which applied to her in any position.
2. The responsibilities of the Grievant as Assistant Nurse Manager included the following:

POSITION SUMMARY:

Responsible for supporting the nurse manager in administrative duties of the unit, especially during off shifts. The Assistant Nurse Manager will provide leadership by collaborating with members of the health care team to maintain standards for professional nursing practice in the clinical setting. Participates in organization and unit based quality improvement activities, and provide input on standards of care. Able to provide patient care when needed, remains competent in clinical skills as demonstrated by weekly patient care shift assignments.

¹ References to the agency's exhibits will be designated AE followed by the exhibit number. References to the Grievant's exhibits are designated GE followed by the exhibit number.

ESSENTIAL DUTIES AND RESPONSIBILITIES:

- Supervises care provided by maintaining high visibility to patients/families and staff in the clinical area(s).
- Share accountability with manager for unit/department/organizational goals achievement.
- Staff Management to include recruitment, coaching, training, evaluation and development, as well as preparation and delegation of work schedules and workflow.
- Under supervision from manager, participates in basic human resource functions.
- Provides managerial support as required. Develops, implements and participates in Quality Improvement Processes activities. Works with members of the health care team in activities designed to improve patient care outcomes.
- Provides leadership and serves as a resource in the provision of patient care and unit activities. Assists staff in development of problem solving and decision making skills.
- Maintains all records pertaining to the staff competency and quality audits and other related records.
- Serves as a professional role model, coach, and resource for employees. Participates actively in Nursing and/or hospital committees and work groups.
- Assumes responsibility for own professional growth.
- Performs other related duties as assigned.

ORGANIZATIONAL DUTIES:

1. Communicates appropriately using good interpersonal skills.
 - a. Positive, professional demeanor is projected through verbal and non-verbal communications.
 - b. Information for patients and staff is delivered in a manner that is supportive, timely and understandable.
 - c. Interpersonal conflicts are resolved using appropriate methods and

- organizational resources, including but not limited to Employee Relations Services and Faculty Employee Assistance Program.
- d. Diverse perspectives are acknowledged; language and behaviors are modeled that build inclusiveness in the work environment.
 - e. Ideas and suggestions are clearly communicated.
 - f. Clarification of communication is requested when appropriate.
2. Serves, manages and supports internal and external customers.
- a. Privacy is maintained at all times for patient and employee information.
 - b. Actions are initiated to meet or exceed customer/co-workers expectations in delivering service by implementing the I Make the Difference philosophy (Ownership begins with me; Greet customers by making eye contact and smiling; Provide positive professional and prompt responses, e.g. helping visitors find their way; Close every interaction with - Is there anything else I can do for you?).
 - c. Appropriate resources throughout the Organization are used consistently to meet customer needs.
 - d. Relationships with staff in other work areas are fostered to meet internal and external customer needs.
 - e. Positive working relationships with peers, management and customers are maintained at all times.
 - f. Organizational Mission and Values of Respect, Integrity, Stewardship and Excellence are evident in behaviors.
3. Participates in performance improvement activities.
- a. Participation in Performance Improvement activities and initiatives is on-going.
 - b. Initiative is demonstrated to proactively diagnose and resolve problems.
 - c. Change is met with positive, supportive behavior.
4. Participates as a team member and is accountable for own work responsibilities.
- a. Time off scheduled to avoid disrupting workflow.
 - b. Help is offered to others to solve problems and complete tasks to facilitate communication and positive team dynamics.
 - c. Productive work habits are consistently displayed
 - d. Accountability for actions and decisions is demonstrated in daily work.
 - e. Feedback is solicited and accepted in a positive manner.

f. Constructive input is offered to support the work unit.

AE 3.

3. Concerning attendance, HR Policy No. 105 (AE 9), which applies to the Grievant as an Assistant Nurse Manager, does not apply progressive discipline in the manner of HR Policy No. 704, to which the Grievant was subject before she became a manager.
4. The Grievant was hired as the Assistant Nurse Manager for the Clinic in July 2014. The Grievant admits that in 2014 she had 5 unexcused absences and 2 unexcused tardies. GE A-2
5. On December 17, 2014, the Grievant's immediate supervisor, the Manager of Ambulatory Care Services, (the "Supervisor") who supervises 5 clinics and approximately 60 people, warned the Grievant that she needed to correct her attendance deficiencies. AE 2-1 & 7-1.
6. In 2015, the Grievant had unexcused absences from the Clinic which she manages and for which one of her job duties includes providing direct patient care when needed, on January 14 and 26, February 17 and 27, and March 5 and 6. The Grievant admits she had 5 unexcused absences in 2015 through the effective date of her termination on March 27, 2015. GE A-4.
7. The Grievant also admits 6 unexcused tardies through March 27, 2015. GE A-4.
8. While the Grievant asserts that these unexcused absences and tardies in 2015 were mostly due to inclement weather, by policy, the Grievant is a designated employee and must attend the Clinic unless otherwise authorized by her superiors, which authorizations did not occur. All employees who work in the Clinic are designated employees, not just managers.
9. In the event of bad weather, the Agency provides free housing and food to the designated employees so that they can fulfill their duties.
10. On January 21, 2015, the Supervisor cautioned the Grievant specifically, that she "needs to have alternate arrangements during bad weather. It is not acceptable to come in half days." AE 7-3
11. On January 27, 2015, the Grievant was again warned by the Supervisor that her attendance deficiencies required correction and that as a manager she was not setting a good example for the staff. On January 27, 2015, the Grievant was provided a copy of HR Policy No. 105 and the Supervisor stressed that, as a Manger, the Grievant was not entitled to progressive performance counseling and

that the Grievant's attendance deficiencies were potential just cause for termination of her appointment. AE 2-1 and AE 7-4.

12. Despite these specific warnings, the Grievant had subsequent unexcused absences on February 17 and 27, 2015 and on March 5 and 6, 2015.
13. On March 24, 2015, Management issued to the Grievant its Notice of Just Cause Appointment Cessation as follows:

This letter serves as written notice of the cessation of your appointment as Assistant Nurse Manager, effective March 27, 2015, in accordance with University of Virginia Medical Center Human Resources Policy No. 105: Management Conditions of Appointment (attached). Should you wish to discuss this action further, you may do so by making an appointment to meet with me within three (3) business days.

You are being removed for "Just Cause" as that term is defined in HR Policy No. 105. You should note the following information which is provided to you pursuant to HR Policy No. 105:

- (i) The Intended Action is Removal for Just Cause in accordance with the procedures set forth in HR Policy No. 105. Just Cause, in this instance, includes the failure to correct unacceptable performance. Specifically, attendance issues which have negatively impacted Medical Center operations. On December 17, 2014, you were warned that you needed to correct attendance deficiencies. Again on January 21, 2015, you were warned that you needed to correct attendance deficiencies. Specifically, you were informed that working half-days was unacceptable. On January 7, 2015 you were again warned that your attendance deficiencies required correction and that, as a manager you were not setting a good example for the staff. Also on January 27th, you were provided a copy of HR Policy Number 105 and it was explained to you that, as a manager, you are not entitled to progressive performance counseling and your attendance deficiencies were just cause for termination of your appointment. Setting aside your documented attendance deficiencies for 2014, your performance in 2015 falls well below the standard for a member of management. In 2015 you have been absent without prior approval on January 14th and 26th, February 17th and 27th, as well as March 5th and 6th. In addition, you arrived late or left early on the following days in 2015: January 6th, 7th, 12th, 16th, and 27th and February 3rd, 16th, 18th, and 26th. Due to your attendance issues negatively impacting operations, the Medical Center intends to terminate your appointment as Assistant Nurse Manager effective March 27, 2015.

AE 2.

14. The Grievant's attendance issues did negatively impact the Agency's operations. For example, the physician who is the Medical Director of the Clinic (the "Medical Director") credibly testified that because of the Grievant's attendance deficiencies, the Medical Director could not depend on the Grievant as much as she wanted and would, accordingly, take on more responsibilities herself. Similarly, patient care and supervision suffered because of the Grievant's unwarranted absences. The Grievant also provided a poor example to the designated employees under her supervision who were required to and did attend to the Clinic even in inclement weather.
15. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.
16. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
17. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
18. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. Code § 2.2-3000(A) 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.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The operative Agency standards of conduct (the "SOC") are contained in Agency Human Resources Policy No. 105. AE 9. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The SOC provides in part as follows:

....

(4) Removal for Just Cause

Members of Management may be removed for Just Cause. Just Cause may include, but is not limited to, professional incompetence, multiple instances of unacceptable performance, unethical conduct, misconduct that interferes with the capacity of the Member of Management to perform effectively the requirements of his/her position, being listed on the Department of Health and Human Services Office of the Inspector General's List of Excluded Individuals/Entities or the General Services Administration List of Parties Excluded from Federal Procurement and Non-Procurement Programs, or the falsification of credentials, education, qualifications or experience. Members of Management removed for Just Cause are ineligible for severance payments made pursuant to the Notice of Appointment Cessation or otherwise.

AE 9-3

The Grievant argues that the Agency has misapplied policy and acted unjustly. However, the hearing officer agrees with the Agency's advocate that in and of themselves, each of the Grievant's infractions concerning her unexcused absences in 2015, particularly, after the meeting with her Supervisor on January 27, 2015, could in and of themselves constitute a terminable offense because the Grievant's serious misconduct was having a significant or severe impact on Medical Center operations, as described above.

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated Policy No. 105 and that the violations rose to the level of "removal for just cause."

The Grievant has alleged retaliation but has failed to carry her burden of proof in this regard. An agency may not retaliate against its employees. To establish retaliation, a grievant must show he or she (1) engaged in a protected activity; *See Va. Code § 2.2-3004(A)(v) and (vi)* (2) suffered a materially adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the grievant's evidence shows by a preponderance of the evidence that the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See, EDR Ruling No. 2007-1530, page 5 (Feb. 2, 2007)* and *EDR Ruling No. 2007-1561 and 1587, page 5 (June 25, 2007)*. This is addressed in greater detail below.

The Grievant has shown that she engaged in a protected activity, namely applying for other jobs while she was Assistant Nurse Manager. The Grievant has also shown that she suffered a materially adverse employment action, namely the termination. However, the hearing officer finds and decides that the Grievant has not borne her burden of proving that a causal link exists between the termination and the protected activity.

The Grievant also raised the affirmative defense of discrimination. However, neither this nor any other affirmative defenses were fully developed at the hearing and, in any event, the hearing officer finds there is insufficient evidence in the record to even begin to decide that the Grievant has met her evidentiary burden of proof in this regard. For example, the Agency assumed that the type of discrimination raised by the Grievant was racial discrimination. The Supervisor and advocate are black and the Grievant is white, but even the type of discrimination alleged was not clearly delineated by the Grievant. Similarly, the Grievant conceded on cross-examination that the Grievant merely assumed that the Supervisor knew that the Grievant had applied for other jobs but never presented any evidence to show this.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings, § VI; DeJarnette v. Corning, 133 F.3d 293, 299 (4th Cir. 1988)*.

The Grievant asserts that the discipline is too harsh. The Agency did consider mitigating factors, including the Grievant's past good service to the Agency. However, the Agency reasonably concluded that managers must be accountable to show up for work at clinics when expected and must set a positive example in this regard to those persons whom they supervise. As a manager, the Grievant is held to a higher standard. *See, EDR Case No. 9872*.

EDR's Rules for Conducting Grievance Hearings provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that

would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant.

The Grievant has specifically raised mitigation as an issue in the hearing. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Form A and all of those listed below in her analysis:

1. the Grievant's past good service to the Agency;
2. the often difficult and stressful circumstances of the Grievant's work environment;
3. the fact that the Grievant has no prior formal discipline;
4. the Grievant's good performance evaluations, including that at GE E;
5. the fact that many of the Grievant's unexcused absences occurred during bad snow storms;
6. the distance to the Grievant's home from the Clinic;
7. the many demands of the Grievant's job; and
8. the expressed reluctance or refusal of some witnesses to testify because they feared retaliation by Management.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was very serious. Of course, there were also aggravating factors in play including the warnings to the Grievant by the Supervisor concerning attendance infractions and the fact that the Grievant was a member of Management. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management.

In this proceeding, the Agency's actions were consistent with law and policy. The Agency appropriately determined that the Grievant's violations of Agency policies concerning attendance warranted a termination under the circumstances. Accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

The hearing officer decides for the offenses specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to two types of administrative review, depending upon the nature of the alleged defect of the decision:

- 1. A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 or e-mailed.
- 2. A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However,

the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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 EDR or 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 EDR before filing a notice of appeal.

ENTER: 7/08/2015


John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail and/or facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).