

Issue: Step 4 Formal Performance Improvement Counseling Form with Termination (gross misconduct); Hearing Date: 04/10/17; Decision Issued: 04/11/17; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10965; Outcome: No Relief – Agency Upheld; **Administrative Review**: **EDR Ruling Request received 04/26/17; EDR Ruling No. 2017-4537 issued on 05/10/17; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10965

Hearing Date: April 10, 2017
Decision Issued: April 11, 2017

PROCEDURAL HISTORY

On January 4, 2017, Grievant was issued a Step 4, Performance Improvement Counseling Form with removal for gross misconduct. The Agency issued a revised Form on March 27, 2017.

On February 2, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 21, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer.

On February 24, 2017, Grievant and the Agency participated in a prehearing telephone conference with the Hearing Officer. The hearing was scheduled for April 10, 2017 at 9:30 a.m. On March 6, 2017, the Hearing Officer sent a letter to Grievant and the Agency confirming that the hearing would take place on April 10, 2017 at 9:30 a.m. On April 10, 2017, a hearing was held at the Agency's office. Grievant did not attend the hearing. After the hearing was over, Grievant contacted the Division of Hearings to indicate she was confused regarding the time the hearing was scheduled to start. Grievant was advised on two occasions of the 9:30 a.m. hearing start time. Her reason for failing to attend the hearing is not just cause sufficient to allow for the reopening of the hearing.

APPEARANCES

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 a Patient Care Technician. She began working for the Agency in 2015. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked in a Unit with patients recovering from surgery. The Agency adopted a system to prioritize tasks on the unit. Level 1 tasks were the highest priority. These tasks include assisting patients needing to use the restroom. Level 2 tasks were medium priority tasks such as assisting a patient with walking. Level 3 tasks were the lowest priority. These tasks included getting ice for patients.

Assisting a patient who needed to use the restroom usually required two employees – a nurse and a patient care assistant.

When patients needed assistance, they were to call the Unit Coordinator who then sent a text to a nurse and patient care assistant advising them of the services needed at a particular room where the patient was located. The patient care assistant was to reply to the text to advise if he or she could respond to the request. A nurse could also send a text to a patient care assistant seeking assistance.

On December 7, 2016, Unit Coordinator sent Grievant a text message asking that she assist with a patient needing bathroom assistance, a Level 1 request. Grievant responded “N” to indicate she could not respond to the call. A Nurse went to speak with Grievant to ask why she could not respond to the Level 1 text. Grievant said she was doing a blood sugar test for another patient. The Nurse recognized that a blood sugar test was not a Level 1 task and Grievant should have responded to the patient’s room to provide bathroom assistance. The Nurse reminded Grievant that bathroom assistance take priority over blood sugar tests.

Later in the day, the Nurse sent Grievant a text asking for assistance. Grievant received the text but did not reply. The Nurse requested assistance from another patient care technician because Grievant did not reply. The Nurse asked the Assistant Nurse Manager to speak with Grievant about her failure to respond. He indicated he would speak with Grievant if she repeated her behavior one more time.

Patient A required assistance and the Nurse sent Grievant a third text message asking for bathroom assistance, Level 1. Grievant did not reply. The Nurse obtained assistance from another employee. After finishing assisting Patient A, the Nurse located Grievant in the break room and observed Grievant eating and speaking on her personal cell phone. The Nurse spoke again with the Assistant Nurse Manager.

The Assistant Nurse Manager located Grievant in the break room and sat down to speak with her. The Assistant Nurse Manager calmly addressed his concerns about Grievant’s failure to respond to text messages. Grievant became annoyed and abruptly walked away from the Assistant Nurse Manager. As she passed the nursing station, Grievant tossed her badge on the counter and said, “I’m done.” Grievant left the Unit without providing “hand off” information regarding her patients to other nursing employees. Grievant’s work duties were reassigned to other staff which caused delays.

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.

“Gross misconduct refers to acts or omissions having a severe or profound impact on patient care or business operations.” This includes, "abuse and/or neglect of duty including, but not limited to, willful or negligent patient neglect or abuse.”¹

On December 7, 2016, Grievant received text messages to provide Level 1 priority assistance to one of her patients. She refused to reply to the texts and did not

¹ Agency Exhibit 3.

provide assistance to that patient. After her behavior was questioned, she left the Unit without providing “hand off” information to other employees to enable them to properly care for Grievant’s patients. Grievant neglected her duty to provide patient care thereby justifying the Agency’s decision to issuance of a Step 4, Formal Performance Improvement Counseling Form with removal.

Grievant challenged the Agency’s actions as being without just cause, without a factual basis, and based on an untrue statement. This argument is not persuasive. The Agency presented sufficient evidence to support its decision.

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
101 North 14th St., 12th Floor
Richmond, VA 23219

² *Va. Code § 2.2-3005.*

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.