

Issue: Step 3 Formal Performance Improvement Counseling Form with Suspension (patient neglect); Hearing Date: 05/08/17; Decision Issued: 05/09/17; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10980; 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: 10980**

Hearing Date: May 8, 2017

Decision Issued: May 9, 2017

#### **PROCEDURAL HISTORY**

On December 28, 2016, Grievant was issued a Step 3, Formal Performance Improvement Counseling Form with a Performance Warning and 24 hour suspension for patient neglect.

On December 28, 2016, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On March 20, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 8, 2017, 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 Patient Care Technician. She began working for the Agency in 2016. No evidence of prior active disciplinary action was introduced during the hearing.<sup>1</sup>

The Patient was in fragile condition following an organ transplant operation. The Patient was likely to fall if she stood up without assistance from an employee. She had fallen on December 20, 2016.

When a patient who is a high fall risk needs to "use the restroom", the Agency places a portable toilet in the patient's room next to the patient's bed so the patient can easily transfer from the bed to the toilet. The toilet has a privacy screen. Because the patient is at risk of falling, the Agency requires an employee to remain in the room while the patient uses the toilet and to help the patient return to the patient's bed.

On December 21, 2016, Grievant was assigned responsibility for the Patient. During a staff meeting (called a "huddle") at the beginning of her shift, Grievant was informed that the Patient was at high risk of falling and that she should remain with the Patient when the Patient was using the bedside toilet.

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<sup>1</sup> The Agency offered examples of information counseling. The Hearing Officer rejected these documents because the Agency failed to properly notify Grievant that she was receiving a Step 1 Informal Counseling.

The Patient needed to use the bed side toilet. Initially, Grievant was with the Patient but left before the Patient had finished. Grievant left to take the vital signs of other patients. When the Registered Nurse learned that Grievant had left the Patient alone, she told Grievant that Grievant could not leave the Patient alone while the Patient was using the bedside toilet. The Unit Manager also told Grievant she could not leave the Patient alone while the Patient was using the bedside toilet.

Later in the morning, the Patient needed to use the bedside toilet. Grievant assisted the Patient to use the bedside toilet, but left the room while the Patient was using the toilet. The Patient's Father became upset and walked down the hallway to speak with the Unit Manager. The Father said Grievant "did it again," referring to leaving the Patient's room before the Patient had finished using the toilet.

### **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 includes:

Abuse and/or neglect of duty including, but not limited to, willful or negligent patient neglect or abuse.

Grievant knew that the Patient was a high fall risk patient requiring that she remain in the room while the Patient was using the bedside toilet. After the first time Grievant left the Patient's room before the Patient had finished using the toilet, Grievant was reminded that she had to remain in the room while the Patient used the bedside toilet. Grievant left the Patient a second time while the Patient was using the bedside toilet. Grievant was obligated to provide services to the Patient including remaining available to the Patient during times the Patient was at risk of falling. When Grievant left the Patient's room twice, she failed to provide those services. Grievant neglected the Patient thereby justifying the issuance of disciplinary action.

Gross misconduct is a Step 4 offense. In this case, the Agency issued a Step 3 Formal Counseling with a Performance Warning and Suspension of 24 hours. The Agency's disciplinary action must be upheld.

Grievant argued that the level of disciplinary action was excessive. The evidence showed that the Agency's disciplinary action was consistent with its Standards of

Conduct. Grievant was advised of her mistake and then several hours later repeated the mistake. The Agency could have issued Grievant a Step 4 Formal Performance Improvement Counseling but chose to issue a lesser level of disciplinary action. The level of discipline issued to Grievant was not excessive.

*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 ....”<sup>2</sup> 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 3 Formal Performance Improvement Counseling with a Performance Warning and a 24 hour suspension 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

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<sup>2</sup> Va. Code § 2.2-3005.

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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>3</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>3</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.