



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11760

Hearing Date: March 18, 2022
Decision Issued: April 7, 2022

PROCEDURAL HISTORY

On October 1, 2021, Grievant was issued a Group Step 4 Formal Performance Improvement Form with removal for neglect of duty.

On October 31, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 15, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 18, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
University 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 University to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 an Acute Dialysis RN. No evidence of prior active disciplinary action was introduced during the hearing.

Apheresis is the process of pulling blood from the body and sending it through a centrifuge to separate the different components (red blood cells, white blood cells, plasma, platelets, etc.) to target and remove a defective component. The defective component is then replaced with a non-problematic product.

Thrombotic thrombocytopenic purpura (TTP) is a life-threatening condition which may be fatal unless promptly recognized and treated rapidly with apheresis. Mortality in untreated cases can be as high as 90%. Apheresis can drop the mortality rate to 10% to 20% when timely used.

Grievant received training on apheresis. She was taught how to set up the apheresis machine and complete the treatment. When Grievant expressed her reservations about performing the treatment, the University provided her with additional training. From January 20, 2021 through February 11, 2021, Grievant participated in ten Therapeutic Plasma Exchange apheresis treatments. Grievant completed her training in February 2021. Following her training, Grievant participated in at least four apheresis treatments. She completed one treatment from start to finish on July 7, 2021.

The Manager is “on-call” even when not working at the Hospital. Grievant had the authorization to call the Manager when she was working and needed assistance.

Grievant reported to work on the night shift beginning on September 1, 2021. She was the only RN trained to perform apheresis.

On September 1, 2021 at approximately 11:15 p.m., a Doctor informed Grievant that a patient had TTP and was in urgent need of apheresis. Grievant told the Doctor she was not fully comfortable starting an apheresis treatment alone and she did not feel it was the safest option due to her lack of experience. The Doctor asked Grievant if the Manager would be able to assist her. Grievant told the Doctor that the Manager was not apheresis trained or available. The Doctor advised Grievant that the patient needed apheresis as soon as possible. Grievant reviewed the manuals for the apheresis machine and attempted to set it up but she became anxious and was unsuccessful. Grievant contacted the Charge Nurse in another unit and asked if anyone was available to assist her. No other employees were working who could assist Grievant.

Grievant knew that she could call her Manager for assistance but she failed to do so. Grievant knew she could call the Manufacturer of the machine but she failed to do so.

Grievant attempted to set up the apheresis machine several more times but was unsuccessful. Grievant called the Doctor and told him that she could not complete the apheresis treatment and that no one else in the Hospital was able to perform the treatment for her. Grievant told the Doctor the day shift Registered Nurse could perform the treatment when she arrived to work. Grievant told the Resident that she could not perform the treatment but that the day shift RN could perform the treatment. The Doctor believed there was no choice but to wait until the day shift RN arrived to have the treatment completed.

The day shift RN began the apheresis treatment for the patient at 7:45 a.m. on September 2, 2021.

At the end of Grievant’s shift in the morning of September 2, 2021, Grievant told the Manager that she never wanted to do apheresis and the expectation of having her perform this treatment was too stressful.

CONCLUSIONS OF POLICY

Policy 701 sets forth the Agency’s Standards of Performance for its employees. Progressive performance improvement counseling steps include an informal 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 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. “[N]eglect of duty” is an example of Gross Misconduct.¹ If an employee’s misconduct has a significant or severe impact on patient care or Medical Center operations, termination may be the appropriate course of action.

On September 1, 2021, Grievant engaged in neglect of duty for three reasons. First, Grievant was obligated to provide apheresis treatment to a patient but she failed to do so. Grievant received adequate training to set up the apheresis machine and perform the treatment from start to finish. Second, once Grievant realized she was unable to complete the apheresis, she failed to call the Manager to ask for assistance. The Manager would have been able to contact another staff to report immediately to the Hospital to perform the treatment. Instead, she told the Doctor and Resident that the Manager was not available and the patient would have to wait until the day shift RN arrived. Third, once Grievant realized she could not perform the apheresis treatment, she failed to call the Manufacturer for assistance. The Manufacturer provided 24 hour telephone assistance and Grievant knew how to contact the Manufacturer. The University has presented sufficient evidence to support the issuance of Step 4, Formal Performance Improvement Counseling Form with removal.

The University made Grievant ineligible for rehire. The University’s decision was authorized by Medical Center Human Resource Policy 405 governing Separation from Employment. This policy allows the University to make ineligible for rehire any employee who has been separated from employment due to gross misconduct. Grievant was separated from employment due to gross misconduct.

Grievant argued that she suffered from PTSD and anxiety. Grievant presented evidence of a certificate issued on August 5, 2021 regarding treatment for her anxiety. Although her medical conditions may have explained her response to the request to perform the treatment, her medical conditions did not excuse her failure to do so. Grievant was adequately trained to perform the treatment. She was adequately trained regarding her authority to contact the Manager or the Manufacturer for assistance. She failed to do so.

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

¹ University Exhibit p. 13.

² Va. Code § 2.2-3005.

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 request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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]

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

[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