



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11799

Hearing Date: June 8, 2022
Decision Issued: June 28, 2022

PROCEDURAL HISTORY

On December 17, 2021, Grievant was issued a Step 4, Formal Performance Improvement Counseling Form with removal for falsifying timesheets.

On January 15, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 7, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 8, 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 Plan?
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 Health System employed Grievant as a Radiologic Technologist. She had been employed by the University for approximately 18 years.

On November 26, 2018, Grievant received a Step 1 Counseling for being tardy. On March 21, 2019, Grievant received a Step 2 Counseling for unauthorized absence from her assigned work area.

Grievant's work schedule was from 7 a.m. until 5:30 p.m. If she reported to work at 7:01 a.m., she was considered tardy. Her primary work location was in B-Building. Grievant could walk from W-Building lobby to B-Building in approximately five to ten minutes.

The Agency used a time and attendance system known as Kronos to track when employees began and ended their shifts. Employees were expected to "clock in" at the Kronos terminal the moment they entered the building where they worked. Employees were not permitted to clock in from a remote location.

Grievant knew she was supposed to clock in on the second floor of B-Building near her work area.

Grievant would sometimes park her vehicle near K-Building and walk into the W-Building lobby to clock in at the Kronos terminal in the lobby. Grievant did so in order to avoid being tardy.

Grievant clocked in at the Kronos terminal in K-Building on: July 6, 2021, July 20, 2021, July 22, 2021, August 26, 2021, August 27, 2021, August 30, 2021, September 13, 2021, September 16, 2021, September 20, 2021, September 23, 2021, September 30, 2021, October 4, 2021, October 7, 2021, October 11, 2021, October 21, 2021, and October 25, 2021. She clocked in before her scheduled shift and reported to B-Building to work after her shift began.

The University estimated that it took Grievant approximately ten to twenty minutes to park her vehicle, clock in at W-Building lobby and then reach B-building where she worked.

Grievant submitted letters of recommendation showing that she performed her work duties very well. Grievant was not disciplined for the quality of her work.

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.

Serious misconduct includes, "[f]alsifying ... records, including vouchers, leave records, pay records, or attendance records. *** If the employee's ... misconduct has a significant or severe impact on ... 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 ... Medical Center operations, employment may be terminated without resorting to Steps 1 through 3."¹

The Attendance Policy Addendum provided, "[a]ll clocking transactions are to be done from within your work areas."²

Grievant had to be present in the building where she worked to perform her work duties. She knew she was supposed to clock in at B-Building. From July 6, 2021 through October 25, 2021, Grievant clocked in at the W-Building lobby 16 times when she was

¹ University Exhibit 3A-1.

² University Exhibit 3C-3.

not in her work building. Grievant knew she was not working when she clocked in and knew that it would appear to the University that she was working from the time she clocked in. Grievant represented she was working when she was not actually working. The University has presented sufficient evidence to show that Grievant falsified her time records and pay records. Grievant engaged in serious misconduct. In the University's opinion Grievant's misconduct had a significant or severe impact on Medical Center operations. The evidence is sufficient to support the University's opinion because deception always undermines an agency's operations, Grievant demonstrated a pattern of behavior, and the University paid for approximately 2.6 to 5.3 hours of work that was not performed. The University has presented sufficient evidence to support the issuance of a Step 4, Formal Performance Improvement Counseling Form with removal.

Grievant asserted she had not been instructed to clock in at B-Building. If the Hearing Officer assumes this allegation is true, it does not affect the outcome of the case. When Grievant clocked in she was attempting to show she was working even though she was not actually working. Her actions were deceptive regardless of the location she used to clock in.

Grievant asserted that she did not know she could be fired for failing to clock in at the B-Building. She described her actions as resulting from several personal challenges.

Grievant had adequate notice of the University's policies. Grievant's personal challenges may have explained her actions but they did not excuse them.

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"³ 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**.

³ *Va. Code § 2.2-3005.*

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]

[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

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