



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11807

Hearing Date: July 6, 2022
Decision Issued: July 26, 2022

PROCEDURAL HISTORY

On December 21, 2021, Grievant was issued a Step 4 Formal Performance Improvement Counseling Form with termination for gross misconduct of physical abuse and disrespectful conduct.

On February 9, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 28, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 6, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
University Party Designee
University's Counsel
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 University'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 Physical Therapist. He had been employed by the University for approximately 35 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked in the Annex. Over 100 employees worked in the Annex including Ms. P and Ms. M. Grievant attempted to avoid Ms. P when they were working because they had had conflict several years prior to December 21, 2021. Ms. M did not know Grievant.

The Annex hallways were narrow and sometimes difficult to pass if employees were meeting in the hallway. Employee work spaces had walls that were approximately five feet high. The hallways were bounded by these walls with gaps where employees could enter and exit their work spaces.

In the morning, on December 21, 2021, Ms. M and Ms. P were standing in the hallway talking about patient care for the day. Ms. M was leaning against the wall. Her left shoulder was resting against the corner of the wall where the wall allowed an opening into her workspace. The tip of Ms. M's left shoe was in the hallway approximately one to one and a half feet away from the base of the wall. When Ms. W was talking to Ms. P, Ms. W's peripheral vision enabled her to see someone walking in the hallway and approaching from Ms. W's left side.

Ms. P was standing in the hallway. The tip of her right shoe was less than a foot and a half from the tip of Ms. M's left shoe. Ms. P was standing with her right shoulder closer to Ms. M and her left shoulder farther away from Ms. M. When Ms. P was talking to Ms. M, Ms. P's peripheral vision did not enable her to see someone walking in the hallway and approaching from Ms. P's right side.

In the hallway was a large stand-alone printer. The printer was against the wall on side of the hallway where Ms. P was standing. The printer was located approximately a foot and a half from Ms. P. Ms. P could not see the printer while she was talking to Ms. M because the printer was not within Ms. P's peripheral vision.

Grievant walked out of his workspace. He was "running late" to see a patient and he intended to leave the building. He had attempted to print his patient list but the printer was malfunctioning. Grievant was holding a clipboard with papers in his left hand and a lab coat with his arm. He wanted to check to see if he had any papers at the printer. He walked down the hallway towards the printer and towards Ms. P and Ms. M. Grievant could see that Ms. P and Ms. M were standing in the hallway talking. As he passed the printer, he glanced at the printer to see if any of his documents had been printed. He saw nothing in the printer so he did not stop. He continued walking towards Ms. P and Ms. M. He did not say "excuse me" or otherwise inform them that he was going to walk between them. Ms. M could see with her peripheral vision someone approaching to her left. Grievant turned his body slightly and walked between Ms. P and Ms. M at a "quick rate of speed." Because his body was wider than the gap between Ms. P and Ms. M, the left side of Grievant's body hit the back right shoulder of Ms. P causing her body to move from her right to her left in the direction Grievant was walking.

Ms. P was startled by Grievant's bumping into her. She did not see or hear him approaching her. She did not preemptively move backwards because she was unaware of Grievant's approach. Grievant caused Ms. P's body to move and to lose balance, but she did not fall over or to the ground. Ms. P described it as a "hard impact. It moved me." Ms. P was not bruised.

As Grievant passed Ms. P, Ms. M exclaimed to Ms. P, "He could have said 'excuse me.' He just rammed right into you." Grievant ignored Ms. M and continued walking down the hall towards the building exit. Ms. M asked Ms. P if she was okay.

On December 21, 2021, Ms. P reported Grievant's behavior to the unit Director.

During the University's pre-determination disciplinary meeting, Grievant did not apologize or show remorse. He suggested the two employees should have moved apart to let him pass. Grievant said he attempted to "make himself small" in order to pass between the two employees.

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.

Section D of Policy 701 provides, "[a]ll Medical Center employees shall treat others with respect, courtesy, and dignity, and shall conduct themselves in a professional and cooperative manner."

Policy 701 provides that Gross Misconduct includes but is not limited to, "physical abuse of a ... fellow employee" and "causing physical harm to a patient, employee, or visitor." Section E(4) provides:

[I]f the employee's Serious or Gross Misconduct has a significant or severe impact on patient care or 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 patient care or Medical Center operations, employment may be terminated without resorting to Steps 1 through 3.

Grievant made physical contact with Ms. P startling her and causing her to lose her balance. Grievant's behavior is consistent with the definition of Gross Misconduct. Grievant affected Medical Center operations because he upset two employees. His behavior led to a complaint to University managers resulting in an investigation.

Grievant argued that he did not intentionally or negligently make contact with Ms. P. Grievant argued that he did not bump Ms. P but possibly his lab coat brushed against her. The evidence showed Grievant had a clear view of Ms. M and Ms. P as he walked through the hallway. He could have said "excuse me" to let the two women know he intended to pass between them and allow them a chance to move backward, but he did not do so. Instead, he bumped into Ms. P while passing between Ms. P and Ms. M. Grievant's body hit Ms. P and not simply his lab coat as Grievant claimed.

Although Ms. P and Ms. M's testimony did not reflect a perfect recollection of the events, their testimony was credible and sufficient to show that Grievant intentionally bumped into Ms. P.

Grievant argued that his failure to apologize did not rise to the level of disciplinary action. Grievant's failure to apologize is not in itself a basis for discipline. However, it shows that Grievant's behavior of bumping into the Ms. P was intentional. If he had bumped into Ms. P accidentally, he may have apologized after hearing Ms. M say "[h]e could have said 'excuse me.'"

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 ..."¹ 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.

Grievant contends the disciplinary action should be mitigated based on his 35 years of service with the University. The University considered Grievant's length of service and it could have mitigated the disciplinary action to less than removal while adequately addressing Grievant's behavior. The standard for mitigation by the Hearing Officer is significantly more restricted -- the discipline must exceed the limits of reasonableness. Although the Rules allow length of service to be a mitigating factor, the OEDR has yet to identify any instance where an employee's length of service standing alone was a sufficient basis for mitigation. In light of the standard set forth in the Rules, 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.

¹ Va. Code § 2.2-3005.

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.