



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11842

Hearing Date: August 15, 2022
Decision Issued: September 1, 2022

PROCEDURAL HISTORY

On May 16, 2022, Grievant was issued a Step 4 Performance Improvement Counseling Form with removal for accumulating at least eight unscheduled absences in a 12-month period. On May 16, 2022, Grievant was issued a second Step 4 Performance Improvement Counseling Form with removal for "No Call / No Show."

On May 31, 2022, Grievant timely filed a grievance to challenge the Agency's actions. The matter advanced to hearing. On June 13, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 15, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Representative
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 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 Medical Center employed Grievant as a Surgical Support Technician. He had been employed by the University since June 13, 2011.

Grievant was scheduled to work but failed to report to work without excuse on May 4, 2021, June 22, 2021, July 30, 2021, August 3, 2021, September 13, 2021, December 2, 2021, January 4, 2022, and April 7, 2022. The University considered these dates to be unscheduled absences.

On September 14, 2021, Grievant received a Step 1 Formal Performance Improvement Counseling for accumulating five unscheduled absences.

On December 7, 2021, Grievant received a Step 2 Formal Performance Improvement Counseling for accumulating six unscheduled absences.

On January 12, 2022, Grievant received a Step 3 Formal Performance Improvement Counseling with a Performance Warning from January 12, 2022 to April 11, 2022 for accumulating seven unscheduled absences.

On April 18, 2022, Grievant was scheduled to report to work. He did not report to work because he had a migraine headache and was experiencing sinus discomfort due to seasonal allergies. He felt he was not able to work so he did not report for work.¹

Grievant provided the University with his home telephone number to contact him in the event he was needed to report to work. On May 5, 2022, Grievant was “on-call” meaning he was to report to work if his attendance was needed. He was on-call from 7 p.m. until 7 a.m. the following morning. Grievant was aware he was obligated to check his voice mail system periodically while he was on-call. The Medical Center began running a sufficient number of Operating Rooms to require additional staffing. At 4 p.m., the Health Unit Coordinator called Grievant at the telephone number Grievant provided. Grievant did not answer and the employee left a message for Grievant to come to work. Grievant did not call the University or report to work. The OR Nurse also called Grievant at the telephone number Grievant wrote on his contact sheet but Grievant did not answer the telephone call. The University considered Grievant’s inaction to be “No Call / No Show.”

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.

Policy 704 governs Attendance. This policy provides:

No Call / No Show – An absence from work in which the employee has failed to report to work and failed to provide notification to a supervisor, or designee, of an unscheduled absence as required by a Department’s addendum. An employee shall not be compensated for No Call / No Show absences.

Unscheduled Absence – An absence from work in which the employee does not report for or remain at work without advanced supervisory approval, but where the employee has given proper notification of his/her absence to the

¹ Grievant did not present evidence sufficient to show that the University should have mitigated his absence under its “no fault” attendance policy.

supervisor, or designee. Unless an exception is set forth in this Policy, an Unscheduled Absence counts as an Occurrence.

A No Call / No Show absence is Serious Misconduct. The first instance of a No Call / No Show absence shall result in a Step 3 Performance Warning. In most cases, a consecutive or a subsequent No Call / No Show absence will be considered job abandonment, resulting in termination of employment.

If the employee has already begun the formal disciplinary process (i.e. Formal Counseling or Performance Warning) for attendance when a No Call / No Show absence occurs, the disciplinary process shall be accelerated to termination of employment.

Upon the accumulation of eight unscheduled absences, an employee may be terminated under Policy 704.

On April 18, 2022, Grievant was scheduled to work but did not report to work. His absence was unscheduled. Grievant accumulated nine unscheduled absences in a 12 month period thereby justifying the University's decision to issue Grievant a Step 4 Formal Performance Improvement Counseling with removal. Grievant did not present evidence showing his absence on April 18, 2022 was otherwise excused.

On May 5, 2022, Grievant was on-call to report to work if needed. A University employee called Grievant and left a voice message for him to come to work. Grievant did not call the University and did not report to work. The University has presented sufficient evidence to support its decision to issue a Step 4 Formal Performance Improvement Counseling Forma with removal for No Call / No Show.

Grievant argued that the Supervisor had Grievant's cell phone number and could have provided that number to the University employees responsible for calling employees who were on-call. The University showed that it had instructed Grievant to update the University's information system to include his cell phone number if he wanted to be called using his cell phone. Grievant did not update the University's information and the University employee called Grievant using the home telephone number Grievant provided.

Grievant argued that the University displayed toxicity, favoritism, and engaged in racial discrimination. Grievant did not present sufficient evidence to show that these allegations related to the disciplinary actions against him. The Hearing Officer does not believe that the University took disciplinary action against Grievant out of toxicity, a hostile work environment, favoritism or racism.

Grievant argued that he was falsely accused of being disruptive while at work on May 10, 2022. The Hearing Officer can assume for the sake argument that Grievant was "mild-mannered" and falsely accused of being disruptive. This assumption does not affect

the outcome of this case because Grievant was not disciplined for being disruptive and the University did not use the discipline it issued as a pre-text to discipline him for the incident on May 10, 2022.

Grievant objected to the University's decision to make him ineligible for rehire. Medical Center Policy 405 governs Separation from Employment. Section D(3) provides:

At the time of separation, employees may be determined to be ineligible for rehire by the Medical Center for reasons that include, but are not limited to:

Separation from employment due to serious misconduct, gross misconduct, or violation of policy.

Grievant was disciplined for serious misconduct and violation of policy and, thus, the University was authorized to consider him ineligible for rehire.

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 University's issuance to the Grievant of a Step 4 Formal Performance Improvement Counseling Form with removal for accumulating more than eight unscheduled absences in a 12-month period is **upheld**. The University's issuance to the Grievant of a Step 4 Formal Performance Improvement Counseling for No Call / No Show is **upheld**. The University's decision to make Grievant ineligible for rehire is **upheld**.

² *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.