



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11837**

Hearing Date: October 11, 2022

Decision Issued: November 2, 2022

**PROCEDURAL HISTORY**

On April 18, 2022, Grievant was issued a Step 3, Performance Warning, Formal Performance Improvement Counseling for unprofessional conduct in the workplace. Grievant was suspended for 40 hours.<sup>1</sup>

On May 12, 2022, Grievant timely filed a grievance to challenge the University's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On June 6, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 11, 2022, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
University Party Designee  
University Representative  
Witnesses

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<sup>1</sup> Medical Center Policy 701 is poorly written. It references suspension but does not specify any limit or provide guidance as to how the University is to determine the length of the suspension.

## **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 employs Grievant as a Technician Specialist in one of its departments. She has been employed by the University for approximately 27 years. No evidence of prior active disciplinary action was introduced during the hearing.

On March 16, 2022, Grievant's unit held a morning staff meeting using Webex video conferencing. The employees were located at the Facility in different rooms. Grievant was in Room 1. The discussion turned to techs rotating between locations. Grievant typed in the discussion section, "Why is there only one tech who doesn't rotate between both locations?"

Ms. P was seated in Ms. B's office participating in the video conference. Ms. P jumped up and yelled, "She is talking about me!" Ms. P forcefully pushed the chair she was sitting in across the room. She left the office while yelling and cursing.<sup>2</sup>

The audio on Grievant's computer was not working well so Grievant left Room 1 and walked to the Breakroom. Ms. N and Mr. F were in the breakroom using a computer to participate in the video conference. Grievant asked them if their computer had audio and if she could use the computer. Grievant talked during the meeting saying that the issue needed to be addressed. The Supervisor said, "If you would like to discuss this further then you can come to my office after the meeting."

Ms. P walked to the Breakroom, threw her phone on the table, and sat down. Ms. P said, "If you have a problem with me, come up to me and say it!" Grievant said she did not use Ms. P's name and was not trying to start anything with anyone. Ms. P stood up and stepped closer to Grievant. Ms. P yelled at Grievant and pointed her finger in Grievant's face. Grievant put up both of her hands and said, "whoa, whoa, whoa, there is no reason to get this mad, we're just talking." Ms. P said, "No, I am mad, it's clear who you are talking about." Grievant said, "I never mentioned your name." Ms. P said, "Oh come on, everybody on here know who you talking about." Ms. P resumed yelling at Grievant. Grievant was trying to talk to Ms. P but Grievant could not be heard over Ms. P's voice.

The Supervisor left her office to find Grievant.

As the Supervisor entered the Breakroom, Ms. P left the Breakroom and walked down the hallway but not out of the Department. She was cursing as she walked.

The Supervisor directed Grievant to come with her. They walked into the hallway. Grievant and the Supervisor began to talk. Grievant said that she was sorry but it needed to be addressed as to why some techs do not have to rotate to different doctors. Grievant said Dr. 1 brought up in the procedure room when was he going to get his own technician. The Supervisor said that Dr. 1 should not have said that and that there many reasons why Ms. P worked for Dr. 2 exclusively.

Ms. P walked in the hallway and was yelling. Ms. P said if Grievant had a problem with her, Grievant should have brought it to her. Grievant said she did not have a problem with Ms. P but wanted to know why Ms. P was being treated differently. Grievant and Ms. P were talking loudly in the hallway so the Supervisor moved both Grievant and Ms. P into the Exam Room.

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<sup>2</sup> Ms. B wrote, "I can't say specifically what she said, but I know she was using curse words." See, University Exhibit 5D-1.

While in the Exam Room, the Supervisor stood with her back to the examination table. Grievant was to her right and Ms. P was to her left.<sup>3</sup> They continued to argue loudly. Ms. P said, "Who is everybody? Who is talking about me? Why are you worried about me?" Grievant said, "I was trying not to use your name, but I have the right to ask the question and you were the one who got upset."

The Supervisor told them both to stop. They stopped. Ms. P sat down and Grievant moved to the counter. The Supervisor stood between them. The Supervisor explained that their priority should be for patient care and what is best for their care in addition to having the physician happy with trained staff. Grievant said that was not the point. The Supervisor said that if a request was made by a physician to have someone specially trained then she would accommodate that request. The Supervisor said as long as everyone was pulling their weight for the department, then it would not matter where they were located. Grievant said that everyone should be working with everyone and at both locations. Ms. P said she chooses to work at the hospital which no one likes and gives others the opportunity to work at another location.

When Grievant and Ms. P started arguing, they were approximately five feet apart. Grievant walked around the Supervisor towards Ms. P as Ms. P continued to yell at Grievant. Ms. P stood up as Grievant approached her. Grievant stood approximately a foot away from Ms. P. The Supervisor put her left arm out and between Grievant and Ms. P to ensure they remained separated and because she "didn't want anything to happen." The Supervisor said, "If you both don't stop, I'm going to write you both up." Grievant turned and walked back to the counter. The Supervisor asked Grievant if her concern was about fairness and what Grievant thought the Supervisor should do if a physician asked to have a tech specially trained to work with that physician. Grievant responded, "I can't do this. Maybe HR needs to get involved." Grievant walked out of the room.

Grievant, Ms. P, and the Supervisor had been in the Exam Room for approximately 15 minutes.

Ms. N was outside of the Exam Room and could hear some of the conversation between the Supervisor, Grievant, and Ms. P. She heard the Supervisor say, "Physicians come to me with request and I try to accommodate that. Ms. N heard Grievant say, "you're known to be the bully of the department but I'm not scared of you and I won't back down." Ms. N did not hear Grievant speaking after that statement because Grievant's voice was not loud and because Ms. P was yelling and cursing. Ms. P's voice could be heard throughout the Department. Ms. N wrote, "[t]his screaming match went on for a good 15-20 min before all 3 employees came out very upset."<sup>4</sup>

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<sup>3</sup> The Supervisor's testimony regarding the location of Grievant and Ms. P. differed from the University's exhibit showing their placement. It appears that the Supervisor was closer to the examination table, Ms. P was closer to the chair, and Grievant was closer to the counter/sink area.

<sup>4</sup> University Exhibit 5B-1.

Grievant did not use profanity during her interaction with Ms. P. Ms. P repeatedly and frequently used profanity during her interaction with Grievant.<sup>5</sup>

Approximately five minutes after the incident, Grievant went to the Supervisor's office to apologize and said she wanted to report the incident to human resources staff. Grievant also apologized to Ms. P but Ms. P said she did not want to hear what Grievant had to say.

## **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 701 provides:

All Medical Center employees shall: treat others with respect, courtesy and dignity, and shall conduct themselves in a professional and cooperative manner.

Serious Misconduct includes: Use of profanity or offensive language in the workplace whether verbally, through gestures, or in writing.

Policy MCP-0238 governs Behavioral Code of Conduct. Under this policy, employees are expected to:

Treat each other ... with fairness, courtesy, respect and consideration.

The University argued Grievant should receive a Step 3 Formal Improvement Counseling Form with performance warning and 40 hour suspension because according to the Manager, (1) the situation could have been avoided if Grievant had followed direction of the Supervisor to "taken it off line" and (2) Grievant moved towards Ms. P causing the Supervisor to put her arm out to separate the employees.

Serious misconduct can be a Step 2 Formal Performance Improvement Counseling or a Step 3 Formal Performance Improvement Counseling with performance

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<sup>5</sup> The Supervisor did not recall many of the statements made by Grievant and Ms. P in the Exam Room. She did not recall Ms. P cursing but the Hearing Officer believes Ms. P was likely cursing during that meeting and throughout her interaction with Grievant. Ms. N heard Ms. P yelling and cursing in the Exam Room.

warning and suspension. The University has established that Grievant's behavior constituted a Step 2 but not a Step 3 Formal Performance Improvement Counseling.

Grievant raised her voice and continued to argue with Ms. P. She created a distraction in the workplace. There exists a basis for some corrective action.

The level of disciplinary action does not rise to a Step 3 Formal Performance Improvement Counseling for several reasons. First, Grievant established that the staff meeting was a forum to freely discuss staff concerns including rotating of techs. For example, the Supervisor testified the floor was open for staff to discuss issues. When told by the Supervisor to come to the Supervisor's office to discuss the issue, Grievant briefly continued her request to discuss the issue. Grievant was attempting to resolve a workplace concern and her behavior was protected from disciplinary action.<sup>6</sup> Grievant's behavior was not sufficient to constitute disregard of a supervisor's instructions.<sup>7</sup> Second, Grievant's behavior was in reaction to Ms. P's more animated, aggressive, and loud behavior. Indeed, Ms. P sought an in-person conflict with Grievant. Third, the Supervisor created a platform for conflict. Grievant and Ms. P had materially different and strongly held views. The Supervisor should have separated them and addressed them separately. Instead, the Supervisor moved Grievant and Ms. P into the Exam Room and allowed them to continue the conflict. Fourth, the Supervisor failed to stop Ms. P's provoking behavior. While in the Exam Room, only a few of Grievant's statements could be heard outside of the Exam Room, while many of Ms. P's statements could be heard. Grievant did not curse while in the Exam Room (or any other time), but Ms. N could hear Ms. P cursing while Ms. P was speaking to Grievant in the Exam Room. Fifth, the Supervisor allowed Grievant and Ms. P to remain in the Exam Room for approximately 15 minutes allowing their argument to intensify. Sixth, the Supervisor put her arm between Grievant and Ms. P because the Supervisor did not want anything to happen. The Hearing Officer does not believe anything would have happened had the Supervisor not extended her arm. Grievant asserted the Supervisor was between Grievant and Ms. P and Grievant was attempting to get around the Supervisor to look at Ms. P as she talked. Grievant may have been speaking with a raised voice, but she was not pointing or gesturing with her hands, cursing, or otherwise behaving in a manner suggesting she intended to fight Ms. P.

A Step 2 Formal Performance Warning does not support a Performance Warning or suspension. The University's decision to issue a Performance Warning and suspension must be reversed.

*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

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<sup>6</sup> See, *Va. Code § 2.2-3000*, "To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management."

<sup>7</sup> Grievant shifted her focus to debating what could be discussed in the meeting which is a separate issue from the original issue of whether techs should rotate.

....”<sup>8</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 further the disciplinary action.

## DECISION

For the reasons stated herein, the University’s issuance to the Grievant of a Step 3, Formal Performance Improvement Counseling with Performance Warning and 40 hour suspension is **reduced** to a Step 2, Formal Performance Improvement Counseling. The University is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

## 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 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 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.

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<sup>8</sup> Va. Code § 2.2-3005.

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.<sup>[1]</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>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.