

Issue: Step 4 Formal Performance Improvement Counseling Form with Termination (accessing confidential patient information without authorization); Hearing Date: 10/23/17; Decision Issued: 10/25/17; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 11091; Outcome: No Relief – Agency Upheld.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11091**

Hearing Date: October 23, 2017  
Decision Issued: October 25, 2017

#### **PROCEDURAL HISTORY**

On August 28, 2017, Grievant was issued a Step 4, Formal Performance Improvement Counseling Form with removal for multiple level 2 violations.

On September 1, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 13, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On October 24, 2017, a hearing was held at the Agency's office. Grievant was advised of the hearing date, time, and location but did not appear at the hearing.

#### **APPEARANCES**

Agency Party Designee  
Agency Representative.

#### **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 Agency 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 Senior Access Associate. Grievant had prior active disciplinary action. She received a Step 1, Informal Counseling Memo on October 7, 2016.

The Agency maintained patient medical information using an electronic data base called EPIC. EPIC contained confidential patient information such as patient diagnoses and treatment. Only certain employees were given access to read and enter information into EPIC. The Agency had another electronic system called Mychart. Patients could review their medical information in Mychart.

Grievant received training regarding the importance of accessing EPIC only for business related needs. She was trained that she could not access EPIC regarding the records of family members. She was informed that the Agency has another system called Mychart which she could access for family members if she had authorization to do so from those family members.

Grievant was assigned to the phone room. Grievant was responsible for entering patient information into EPIC. She was obligated to enter information into EPIC in accordance with the Agency's policies. Grievant was obligated to read information in EPIC only for a business related need.

Grievant's Uncle was a patient at the Agency's Facility. The Agency learned that Grievant improperly entered information into her Uncle's electronic medical record. The Agency began an investigation. The Agency discovered that from July 17, 2017 to August 3, 2017, Grievant accessed her Uncle's electronic medical record 12 times without authorization and without a business need. Grievant's access included printing medical records. This duty was not part of Grievant's role.

## CONCLUSIONS OF POLICY

Policy 701 sets forth the Agency's Standards of Performance for its employees. Progressive performance improvement counseling steps include an information 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 that may result in termination without prior progressive performance improvement counseling.

Medical Center Human Resources Policy 707 governs Violations of Confidentiality. This policy defines Multiple Accesses:

Accessing the same record, including but not limited to a patient's records more than once regardless of the time frame within which the Access occurs.

A Level 2 violation occurs "when an employee deliberately Accesses Confidential Information without authorization ...."

Grievant deliberately accessed her Uncle's confidential medical records without authorization on multiple dates and times. Corrective action for multiple Level 2 violations "shall, in most instances, result in termination of employment." Accordingly, Grievant's removal must be upheld.

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 ...."<sup>1</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

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<sup>1</sup> Va. Code § 2.2-3005.

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

Please address your request to:

Office of Equal Employment and 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.

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>

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer