

Issue: Disciplinary action involving termination (serious misconduct); Hearing Date: 12/15/04; Decision Issued: 12/16/04; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 7921



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7921

Hearing Date: December 15, 2004
Decision Issued: December 16, 2004

PROCEDURAL HISTORY

On October 18, 2004, Grievant was mailed a Formal Performance Improvement Counseling Form removing her from employment for:

[Grievant] was counseled about inappropriate use of patient parking stickers and inappropriate use of patient parking garage. This was associated with the dates of 8/25, 8/27 and 8/30. There were 2 previous events where she had [to] be counseled and suspended – 7/23/03 for 8 hours and Nov. 10, 2003 for 24 hours.¹

On September 30, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On November 17, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 15, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

¹ Agency Exhibit 5.

Grievant
Grievant's Representative
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive disciplinary action with removal for serious misconduct.

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. 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:

Grievant was employed by the University of Virginia Health Systems. She provides medical services to patients at various University facilities. Her work performance evaluations were favorable and she was a well-regarded employee.

Parking at the University is in short supply. In order to make sure that patients have places to park, the University prohibits employees from using patient parking without cost.² Patients with appointments at the UVA Health System Facilities may park in a patient parking garage. Once inside the Facility, a patient may obtain a label validating the patient's parking cost. The patient places the label on his or her parking receipt enabling the patient to leave the parking garage without having to pay for parking. An employee may park in the patient garage and use parking labels only when the employee is a patient at one of the University's facilities. The employee may leave his or her vehicle in the patient parking garage only for a length of time necessary for the medical appointment.

On January 10, 2002, June 26, 2002, July 1, 2002 and July 2, 2002, Grievant parked in the patient parking area all day and used patient labels to pay for parking.

² Employees may pay on a monthly basis for parking in designated lots. Grievant testified that she did not obtain this parking because she could not afford to pay the cost.

She received a Formal Performance Improvement Counseling Form on July 10, 2002 suspending her for eight hours.³ Grievant did not have medical appointments on those days. She parked in the patient parking garage for her convenience.

On September 26, 2003 and October 21, 2003, Grievant parked her vehicle in the patient parking garage all day and used patient labels to pay for parking. She did not have medical appointments on those days. Grievant's Sister had a friend who was a patient at the University. Grievant's Sister drove herself and Grievant in Grievant's vehicle to the patient parking garage. While Grievant began her work shift, Grievant's Sister visited her friend at the Facility. After Grievant finished her shift and the Sister finished her visit, they went to the parking garage and exited to go home. As they exited, the Sister used a patient label to obtain parking without cost.

After learning Grievant's vehicle was in the patient parking garage, Grievant's Supervisor asked Grievant for an explanation. Grievant stated that her Sister drove the vehicle and parked in patient parking while the Sister visited a patient at the Facility. Grievant's Supervisor rejected this explanation and stated, "Don't let your sister drive your car any more." On November 3, 2003, Grievant received a Formal Performance Improvement Counseling Form informing Grievant that "use of [patient] parking sticker is for her only when she has her own [appointment] outside of regular work time, effective immediately." Grievant was suspended for 24 hours and informed that, "In the event of another instance of inappropriate use of [patient] validation sticker or improper use of [patient] garage, it will result in immediate termination."⁴

On August 25, 27th and 30th, 2004, Grievant's Sister drove herself and Grievant in Grievant's vehicle to the patient parking garage. Grievant's Sister visited a friend who was a patient at the Facility while Grievant was at work. The Sister did not spend the entire day at the Facility. She sometimes left to walk to areas near the Facility. After Grievant finished her shift and the Sister finished her visit, they went to the parking garage and exited to go home. As they exited, the Sister used a patient label to obtain parking without cost.

Upon learning that Grievant had parked in the patient parking garage again, University administrators decided to remove her from employment. On September 3, 2004, Grievant was informed by the Manager that her employment was ended. On October 18, 2004, the University mailed to Grievant a Formal Performance Improvement Counseling Form.⁵

CONCLUSIONS OF POLICY

³ Agency Exhibit 2.

⁴ Agency Exhibit 4.

⁵ Agency Exhibit 5.

“Falsification or misuse of UVA parking permits or stickers” constitutes “Serious Misconduct” under the University’s Standards of Conduct.⁶ “In cases of serious misconduct ... employment may be terminated.”⁷

In July 2002, Grievant was informed that she should not park in the patient parking garage for her convenience. In November 2003, Grievant was again notified she should not use the patient parking garage without cost for her convenience. Grievant raised as a defense that it was her Sister who was using the vehicle and that Grievant merely accompanied her Sister. Grievant’s Supervisor informed Grievant that that excuse was not acceptable and that Grievant should not let her sister drive her vehicle to the University. Grievant received written notification that if she engaged in similar behavior a third time, she would be removed from employment. Grievant chose to disregard the Supervisor’s warning and again used the patient parking without cost contrary to the University’s expectations.

The University has placed Grievant on notice that it interprets misuse of parking stickers to include an instance when Grievant’s vehicle is driven by her Sister and parked in the patient parking garage. Although Grievant argues the Sister’s desire to visit a friend was the motivating factor in the decision to park in the patient parking garage, it is clear that Grievant directly benefited from that decision. It is likely that the Sister arranged her visit to coincide with Grievant’s work schedule. Grievant benefited from the Sister’s decision. Grievant’s actions constitute misuse of UVA parking stickers thereby justifying the issuance of disciplinary action including removal.

Grievant argues that she was not given proper procedural due process prior to her removal from employment. She argues that the University administrators did not properly consider her work performance before telling her she was removed from employment. Grievant’s concern is moot. To the extent the University failed to permit Grievant to respond to the allegations, Grievant had every opportunity to submit her explanations and evidence during the grievance step process and at the grievance hearing.

Grievant contends she suffers from significant medical problems that would have justified the issuance of a handicapped parking pass that would have enabled her to park in the patient parking garage even though she was an employee. She argues she is being denied her rights under the American’s with Disabilities Act. Assuming for the sake of argument that the University breached some provision of the ADA, Grievant has not established a connection between such breach and her decision to use a patient parking sticker. Grievant testified she was in the process of making a request through the University’s parking services to enable her to obtain a handicapped parking pass. Thus, Grievant acted independently to seek a parking pass independently of any

⁶ Policy 701(3).

⁷ Policy 701(4)(E).

alleged failure by the University under the ADA. Grievant should have waited until her parking pass was approved prior to violating the University's parking restrictions.

Grievant contends the disciplinary action should be mitigated. Her work performance was favorable to the University. She has suffered real and significant financial hardship following her removal from employment. *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 Employment Dispute Resolution..."⁸ Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." 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 Formal Performance Improvement Counseling Form with removal **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor

⁸ *Va. Code § 2.2-3005.*

Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

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.⁹

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.