



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11631

Hearing Date: March 16, 2021

Decision Issued: April 5, 2021

PROCEDURAL HISTORY

On October 9, 2020, Grievant was issued a Group I Written Notice of disciplinary action with removal for unsatisfactory performance. On October 9, 2020, Grievant was issued a Group II Written Notice of disciplinary action with removal for attendance/excessive tardiness.

Grievant timely filed a grievance to challenge the University's action. The matter advanced to hearing. On December 7, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 16, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Party Designee
University Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

2. Whether the behavior constituted misconduct?
3. Whether the University's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
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 employed Grievant as a Coordinator in one of its Units. She had been employed by the University since July 7, 2012. Her responsibilities included processing requests for medical image reviews. The images and reports she processed contained confidential medical information that could be shared only with the appropriate medical professionals and facilities.

Grievant had prior active disciplinary action. On December 17, 2019, Grievant received a Group I Written Notice for attendance/excessive tardiness. On January 24, 2020, Grievant received a Group I Written Notice for attendance/excessive tardiness.

On April 19, 2019, Grievant was placed on a Leave Monitoring Plan because of her unsatisfactory attendance. On April 6, 2020, Grievant was placed on another Leave Monitoring Plan because of her unsatisfactory attendance. She was advised she could not take leave until she had accrued a positive leave balance. Grievant was advised, "If you have an emergency or are ill and cannot report to work on a given day, you must call and/or text your supervisor on her cell phone one hour prior to your scheduled arrival time. *** Leave for personal emergencies after the fact will be granted only at a

supervisor's discretion. *** If you are in a negative leave balance, you will not be paid and subject to disciplinary action."¹

Grievant was responsible for placing orders in the University's Electronic Medical Records system known as EPIC. Grievant developed a pattern of making errors. She had a greater number of errors than the other employees in her unit.

The University received orders from Prison S. On August 18, 2020, Grievant incorrectly entered the orders with several access codes into EPIC using the Specialty Billing Code for Prison L.

The University received an order from Prison L. On August 19, 2020, Grievant incorrectly entered the order into Epic using the Specialty Billing Code for Prison S.

Grievant's errors placed the University at risk of violating HIPAA. Had the errors not been discovered, the University would have incorrectly billed its clients.

Grievant had a negative leave balance beginning in March 2020. As of August 27, 2020, Grievant had a leave balance of negative 20.63 hours.

On August 27, 2020, Grievant was scheduled to work an entire shift. She experienced double vision and left 2.5 hours before the end of her shift. She obtained a note from a medical provider indicating, "This patient needs to go to E.R."² Grievant was admitted to the hospital for a "stroke alert."

On August 27, 2020 at 7:22 p.m., Grievant sent a text message to a Supervisor indicating that she had been admitted to the hospital "for at least tonight. I will update when I have additional information." The Supervisor replied on August 28, 2020 at 8:11 a.m.:

Okay. Going forward please send me [an] email in the event of any absence and/or sharing any documentation. Keep us informed. Get better soon!³

Grievant did not report to work on August 28, 2020 and did not notify the Supervisor prior to her shift scheduled for August 28, 2020 that Grievant would not be reporting for work. On August 28, 2020 at 9:40 a.m., the Supervisor sent Grievant an email indicating that the Supervisor had not heard from Grievant and instructing Grievant to contact the Supervisor as soon as possible.

¹ Agency Exhibit 13, p. 7.

² Agency Exhibit 14, p. 4.

³ Agency Exhibit 14. P. 9.

Grievant presented the University with a note dated August 28, 2020 signed by a medical provider indicating Grievant needed to be absent from work from August 28, 2020 until September 2, 2020.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”⁴ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Group I Written Notice

“[U]nsatisfactory work performance” is a Group I offense.⁵ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant had a pattern of making more errors than the other employees in her unit. Grievant was expected to make entries in the EPIC system that accurately accounted for orders for images containing confidential patient information. On August 18, 2020 and August 19, 2020, Grievant incorrectly entered information into the EPIC system thereby justifying the University’s decision to take disciplinary action.

Grievant described her overall work performance as satisfactory. The evidence showed that Grievant had a pattern of making errors and the errors she made on August 18, 2020 and August 19, 2020 were significant.

Group II Written Notice

Poor attendance is a Group I offense. An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in the employee’s personnel file. Failure to follow a supervisor’s instructions is a Group II offense.

The University has presented sufficient evidence to support the issuance of a Group II Written Notice. Grievant had prior discipline for poor attendance. Grievant was on a Leave Monitoring Plan and she had a negative leave balance on August 27, 2020.

⁴ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁵ See Attachment A, DHRM Policy 1.60.

She did not complete her shift due to a medical emergency and did not have leave to cover her absence. The University was not obligated to grant her leave which made her absence unexcused. Grievant had been instructed to notify her supervisor if she would not be reporting for her shift. Grievant failed to do so. Grievant's behavior rose to the level of justifying the issuance of disciplinary action.

Grievant argued she had a medical emergency and had to leave work 2.5 hours before the end of her shift. Grievant's absence from work is understandable but Grievant was not disciplined for one absence, she was disciplined for a pattern of behavior that was confirmed when she had to leave work early on August 27, 2020. She added to her negative leave balance because her leave was not otherwise excused.

Grievant argued that her cell phone battery died while she was in the hospital and was unable to call the Supervisor. If Grievant was unable to call using her cell phone, she could have asked a hospital employee to call on her behalf or asked that she be provided a hospital telephone.

Accumulation of Disciplinary Action

Upon the accumulation of four active Group I Written Notices, an employee may be removed. Grievant has accumulated three active Group I and one Group II Written Notices. Accordingly, the Agency's decision to remove Grievant must be upheld.

Mitigation

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"⁶ 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

⁶ *Va. Code § 2.2-3005.*

For the reasons stated herein, the University's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. The University's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's 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.

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].

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer