



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11675

Hearing Date: June 29, 2021

Decision Issued: June 30, 2021

PROCEDURAL HISTORY

On January 27, 2021, Grievant was issued a Step 4 Formal Performance Improvement Counseling Form with removal for having an eighth unscheduled absence.

On February 24, 2021, Grievant timely filed a grievance to challenge the University's action. The matter advanced to hearing. On March 22, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 29, 2021, a hearing was held by remote conference. Grievant was advised of the date and time of the hearing but did not participate.

APPEARANCES

University Party Designee
University 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 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 Patient Care Technician. She began working for the University on September 23, 2019.

Grievant had prior active disciplinary action. On September 10, 2020, Grievant received a Step 1 – Informal Counseling for having five unscheduled absences. On October 19, 2020, Grievant received a Step 2 – Formal Counseling for having six unscheduled absences. On October 29, 2020, Grievant received a Step 3 Formal Counseling with Performance Warning for having seven unscheduled absences.

On January 10, 2021, Grievant was scheduled to work. She did not report for work that day. During a disciplinary predetermination meeting held on January 14, 2021, Grievant explained that she did not report to work because she was unable to "get herself together" due to personal stressors outside of work.

Grievant had unscheduled absences on January 30, 2020, February 27, 2020, March 7, 2020, May 2, 2020, September 9, 2020, September 29, 2020, October 20, 2020 through October 22, 2020, and January 10, 2021.

CONCLUSIONS OF POLICY

Policy 701 sets forth the University'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 sets forth the University's Attendance policy. This policy explains that regular and timely attendance is expected of University employees. An Unscheduled Absence is:

An absence from work in which the employee does not report for or remain at work without advance supervisory approval, but where the employee has given proper notification of his/her absence to the supervisor or designee. Unless an exception is set forth in this Policy, an Unscheduled Absence counts as an Occurrence."

An Occurrence is:

An Unscheduled Absence that does not qualify as leave under Medical Center Human Resources Policy 600 "Leaves of Absence", Medical Center Human Resources Policy No. 512 "Workers Compensation" is excused pursuant to Medical Center Human Resources Policy No. 510 "Emergency Event Declaration" or is not otherwise excused pursuant to this Policy.

Upon the accumulation of eight occurrences, an employee may be removed from employment under the Agency's Policy 704. Grievant has accumulated eight occurrences thereby justifying the University's issuance of a Step 4 Formal Performance Improvement Counseling Form. Upon the issuance of a Step 4 Formal Performance Improvement Counseling Form, the University may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant wrote in her grievance that she had been denied eligibility to be rehired. The University presented evidence during the hearing showing that Grievant's rehire status had been changed so that she was eligible to be rehired by the University although not in the unit where she had been working.

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 ..."¹ 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

¹ Va. Code § 2.2-3005.

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 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]

^[1] Agencies must request and receive prior approval from EDR 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 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