Issue: Step 4 Formal Performance Improvement Counseling Form with Termination (gross negligence/misconduct); Hearing Date: 02/06/17; Decision Issued: 02/08/17; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10926; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10926

Hearing Date: February 6, 2017
Decision Issued: February 8, 2017

PROCEDURAL HISTORY

On November 14, 2016, Grievant was issued a Step 4 Formal Performance Improvement Counseling Form with removal.

On November 18, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 13, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 6, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

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?

5. Whether the Agency retaliated against Grievant?

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:

The University of Virginia Medical Center employed Grievant as a Certified Hemodialysis Tech at one of its facilities. She began working for the Agency in April 2016.

One of Grievant's duties was to mix bicarbonate concentrate with water to create a mixture appropriate to treat dialysis patients. She was to remove the contents of a bicarbonate bag and mix it with water. After creating the mixture, Grievant was supposed to test the conductivity of the mixture to verify that the range was between 48 and 54. Only if the conductivity range was between 48 and 54 could Grievant use the mixture to treat patients. If the range was not between 48 and 54, the Agency's policies required that Grievant re-test the mixture. If the re-test did not show the mixture was within the proper range, Grievant was taught to "dump" the mixture and start over with new powder. Grievant did not receive training that she should add bicarbonate if the conductivity range was too low.

On November 1, 2016, Grievant reported to work at 4:53 a.m. She mixed the bicarbonate concentrate solution intended to be used to treat patients. She tested the mixture and realized that the conductivity of the mixture was below the acceptable conductivity range of 48. She obtained some additional bicarbonate concentrate and added it to the existing mixture to raise the conductivity level. She concluded the mixture was adequate to give to patients and began giving it to patients as they arrived in the morning. The Facility had at least ten patients on November 1, 2016.

Later in the day Grievant advised the Assistant Nurse Manager that there had been an issue earlier that morning with the mixed bicarbonate concentrate not reaching the acceptable conductivity level. Grievant said she had to "add a little more bicarb powder to the solution." During this conversation, Grievant reported that on October 25, 2016 she assisted another employee by adding extra bicarbonate powder to the solution in order to bring the conductivity into the acceptable range.

By adding additional bicarbonate, Grievant changed the acid base balance of the bicarbonate solution. This changed the acid base balance of the final dialysate delivered to the patients. This also changed the acid base balance (pH) of the final dialysate solution delivered to patients and could potentially cause harm including death because the dialysate must have a pH level close to the pH of the blood.

Because of Grievant's incorrect bicarbonate mix, the dialysis machines "alerted" to indicate that bicarbonate mixing ratio was in error. Patients were taken off of the bicarbonate mix and placed on "solcarts" to prevent harm to patients.

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.

Gross misconduct refers to acts or omissions having a severe or profound impact on patient care or business operations. This includes willful violation or neglect of safety/security rules. Gross misconduct generally will result in removal.

Grievant engaged in gross misconduct by adding additional bicarbonate to the bicarbonate mix given to patients at the Facility. By doing so, she placed the patients at risk of injury. The Agency had to place patients on solcarts to avoid harm to patients. Harming the Agency's patients could have had a several impact on patient care as well as its business operations. The Agency has presented sufficient evidence to support the issuance of a Step 4 Formal Performance Improvement Counseling Form with removal.

Grievant argued that she did not realize she was doing anything wrong. She argued that one incident should not be sufficient to remove her from employment. It is not necessary for the Agency to show that Grievant intended to harm patients or knew she was doing something wrong. The Agency set forth procedures for making the bicarbonate mix and Grievant knew those procedures. She had been trained regarding how to properly make the mixture. Grievant had not been trained or otherwise informed

that adding additional bicarbonate was an appropriate procedure. Grievant should have realized she was acting contrary to the Agency's procedures. The Agency has presented sufficient evidence to support the issuance of its disciplinary action against Grievant. Once the Agency met its burden of proof, the Hearing Officer is not authorized to change the outcome of the disciplinary action unless mitigating circumstances exist.

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 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.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[2] (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Ultimately, to support a finding of retaliation, the Hearing Officer must find that the protected activity was a "but-for"[3] cause of the alleged adverse action by the employer.[4]

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[1] Va. Code § 2.2-3005.

[2] See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[3] This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

[4] *See,* Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).

Grievant argued the Agency retaliated against her because she complained that the Co-Worker was creating a hostile work environment by making offensive statements such as that Grievant was beneath the Co-Worker. The evidence showed that Grievant perceived the Co-Worker as abrasive and confrontational and that several other employees agreed. Although Grievant complained about the Co-Worker to Agency managers it is clear that the disciplinary action arose because of Grievant's behavior and not because she complained about the Co-Worker. The Agency did not retaliated against Grievant for engaging in protected activity.

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 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 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
   Richmond, VA 23219

   or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

   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 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 provide a copy of all of your appeals to the other party, EDR, 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.

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.[5]

[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

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