

Issues: Step 4 Formal Performance Improvement Counseling Form (HIPAA violation), Step 4 Formal Performance Improvement Counseling Form (failure to comply with policy), and Termination; Hearing Date: 11/15/18; Decision Issued: 02/19/19; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 11268; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11268

Hearing Date: November 15, 2018

Decision Issued: February 19, 2019

PROCEDURAL HISTORY

On August 8, 2018, Grievant was issued a (First) Formal Performance Improvement Counseling Form, Step 4 Termination for intentional, unauthorized disclosure of a patient's Confidential Information. On August 8, 2018 Grievant was issued a (Second) Formal Performance Improvement Counseling Form, Step 4 Termination for failure to comply with the Corporate Compliance Agreement and the Corporate Code of Conduct.

On September 5, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 24, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On November 15, 2018, 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 Forms?

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 PCT Dialysis Tech at one of its Facilities. Grievant placed patients on dialysis and assisted with patient treatments. No evidence of prior active disciplinary action was introduced during the hearing.

Patients at the Facility usually visit the Facility three times per week. The Agency's patients live in and near the Locality where the Facility was located. Many of the patients have close relationships with each other, staff, and family members in the community. Grievant worked at the Facility.

Grievant had a Facebook page. Her name and picture appeared on the page. The contents of Grievant's Facebook page could be viewed by anyone with a Facebook account including people in the Local Community.

On June 19 at 2:15 p.m., Grievant wrote on her Facebook page:

Our 28-year-old patient who has an LVAD getting a heart and kidney transplant tomorrow [two clasped hand emojis]¹

¹ Agency Exhibit 2.

LVAD referred to a Left Ventricle Assist Device. Grievant's post included a map with the name of the Facility where Grievant worked.

On January 25, 2018, Grievant sent an email to the Assistant Nurse Manager stating:

This is just to inform you that I remove the entire post from Basement. I'm truly sorry and did not mean to break any rules/policy. I promise to never post again as I move forward with the company. Thanks!!

Grievant owned an Adult Care Facility that she recently began operating out of her house. Grievant informed the ANM that she had a private business taking care of clients. The ANM told Grievant that having her own business was great as long as it didn't interfere with her job.

On June 25, 2018, a Patient's Wife reported to the Assistant Nurse Manager that Grievant gave the Wife a business card regarding Grievant's personal business while the Wife was at the Facility.

On June 26, 2018 a predetermination meeting was held. Grievant admitted to giving her personal business card to the Wife. Grievant stated that the Wife solicited her and that Grievant was on break when she gave the card to the Wife. Grievant said the Wife knew Grievant owned a business because the Wife and Grievant's mother were friends. Grievant said that she thought that because she was on break her action would have been permitted.

On July 17, 2018 a second predetermination meeting was held. Grievant stated that she owned an adult care facility where she took care of elderly people and people with mental disability in the Locality. Grievant said that she was the business owner and had two staff members working for her, one of them being her mother. Grievant said that she had one patient and worked 40 hours a week in addition to her role as a PCT Dialysis Tech.

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.

First Step 4 Formal Performance Improvement Counseling Form

Medical Center Human Resources Policy Number 707 governs Violations of Confidentiality. Confidential Information includes:

any information in the custody of the Medical Center regardless of its form (oral, paper, electronic) or the storage media, that constitutes medical records or other Protected Health Information.

Protected Health Information (PHI) is defined as:

Protected Health Information consists of all individually identified health and billing/payment information about a patient regardless of its location or form.

Unauthorized access or Disclosure is defined as:

any Access to or Disclosure of Confidential Information that is not necessary to support treatment or business operations or that is otherwise authorized by law and Medical Center policy.

Level 3 Violations include:

A Level 3 Violation occurs when an employee makes an Unauthorized Disclosure of Confidential Information. Examples of Level 3 Violations include but are not limited to Posting PHI to a social network, regardless of privacy setting.²

Level 3 Violations involving PHI or other Confidential Information shall, in most instances, result in termination of employment.

On June 19, 2018, Grievant disclosed on her Facebook page the confidential and protected health information of a patient. She disclosed the Patient's age, treatment location, medical condition (LVAD), and diagnosis (getting a heart and kidney transplant tomorrow). Based on this information, the Patient could have been identified by staff at the Facility, other patients at the Facility, family members of the Patient and other patients visiting the Facility, and members of the community who knew the Patient's medical condition. The Agency has presented sufficient evidence to show the Grievant committed a Level 3 Violation of the Agency's policy thereby justifying the issuance of a Step 4, Formal Performance Improvement Counseling Form with removal.

Grievant asserted that she did not intend to violate the Agency's policies and had asked the opinions of other employees before posting information about

² Agency Exhibit 4.

the Patient. This reasoning is not sufficient to reduce or eliminate the disciplinary action.

Second Step 4 Formal Performance Improvement Counseling Form

The Agency alleged the Grievant should receive a Step 4 Termination Formal Performance Improvement Counseling Form for failed to comply with Corporate Compliance Agreement and the Corporate Code of Conduct.

The Agency has not presented sufficient facts upon which to conclude that Grievant's behavior was sufficiently material to support the issuance of disciplinary action. The Agency did not show that Grievant solicited the Wife.

The Wife did not testify at the hearing. It is unclear how frequently and extensive Grievant's contact was with the Wife. It is unclear what date Grievant provided the Wife with a business card. It is unclear where Grievant provided the Wife with a business card. It appears the Grievant gave the business card to the Wife while in the Facility's parking lot at the location but could have done so elsewhere. Grievant claimed she was taking a break from work when she gave the card to the Wife.

It is unclear the extent and degree of the alleged solicitation. A business card typically has contact information for an individual and the name of the individual's business. It is unclear whether (1) Grievant targeted the Wife, gave the Wife a business card, provided a discussion of her services, and sought future contact or (2) the Wife independently learned of Grievant's business, asked Grievant for a business card, and indicated she would contact Grievant later to discuss Grievant's services. The first example represents an active solicitation of business for an Outside Activity contrary to the Agency's policies. The second example is nothing more than a response to a request for contact information and not a solicitation. Giving someone a business card does not in itself result in financial gain but could lead later to financial gain. The second example would not be sufficiently material to justify the issuance of disciplinary action. The Agency has been unable to show that Grievant's behavior was closer to the first example than the second example. Accordingly the second Step 4 Formal Performance Improvement Counseling Form must be reversed.

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"³ 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

³ *Va. Code § 2.2-3005.*

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 further the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of the First Step 4 Formal Performance Improvement Counseling Form with removal **upheld**. The Agency's issuance to the Grievant of the Second Step 4, Formal Performance Improvement Counseling Form is **rescinded**.

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 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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