

Issue: Group II Written Notice with Suspension (failure to follow instructions/policy);
Hearing Date: 06/20/14; Decision Issued: 07/10/14; Agency: UVA; AHO: Carl
Wilson Schmidt, Esq.; Case No. 10352; Outcome: Partial Relief; **Administrative
Review: DHRM Ruling Request received 07/23/14; DHRM Ruling issued 08/11/14;
Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10352

Hearing Date: June 20, 2014

Decision Issued: July 10, 2014

PROCEDURAL HISTORY

On March 14, 2014, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow instruction and/or policy.

On March 20, 2014, 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 May 5, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 20, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency'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 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 employs Grievant as a clinical Research Intermediate, Non-Licensed. Grievant worked as a clinical research coordinator. She assisted patients who were ill and involved in clinical research with the Agency's medical professionals.

Grievant had prior active disciplinary action. On January 6, 2014, Grievant was issued a Group I Written Notice for accessing her daughter's electronic medical record contrary to Agency policy.

The Patient participated in one of the Agency's research studies. Grievant was responsible for coordinating the services received by the Patient including ensuring that the Patient received essential and unique, but costly medication. The cost of the medication was supposed to be paid by the study's sponsor. If the descriptive information for the medication was not entered properly into the Agency's computer database, the Patient might not receive the correct medication without cost as the Agency intended.

On February 25, 2014, Grievant spoke with the Patient's Doctor about the Patient's lab results. The Doctor recommended that the Patient be placed on a drug. The drug was injectable but could not be shipped. This meant the Patient would have to drive approximately two hours to come to the Agency's Specialty Pharmacy to obtain the medication. The Doctor notified the Pharmacy to provide the drug to the Patient but

the Doctor provided incorrect information about the drug. Grievant learned that the Pharmacy's information about the drug was incorrect and began the process to correct the error.

Several members of Grievant's family became ill. She cared for them but approximately 12 hours later began exhibiting some signs of illness. Meanwhile Grievant's 17 year old son became ill and told her he needed to be taken to the emergency room.

On February 26, 2014 in the early morning, Grievant brought her 17 year old son to the Emergency Room and checked him in for evaluation and treatment. At some point, Grievant's son became sleepy. Grievant knew that the Patient was likely on his way from his home to the Agency's Pharmacy to obtain the drug. She also knew that the Pharmacy had not yet received all of the necessary information to ensure that the Patient received the right drug and without cost to him. If Grievant could go to her office, she would be able to enter the correct information into the Agency's computer database to ensure the matter was handled properly. Grievant asked her son if it would be ok for her to step away and go to her office. The son said it was ok. Grievant believed it would be all right for her to leave her son's bedside for a short time to walk for ten minutes to her office.

Grievant began working in her office and accessed the electronic medical record for the Patient. She remained concerned about her son. She "hovered" her computer mouse over the ER roster to see her son's status. She expected the screen to read "waiting for mom to return to ER." Instead, the screen read, "discharged." She was surprised at what she read. Her son's electronic medical record opened although Grievant did not intend to open it. She must have clicked her mouse to open her son's record. Grievant recognized that she had improperly accessed her son's electronic medical record.

Grievant called Corporate Compliance and reported that she had accessed her son's electronic medical record.

CONCLUSIONS OF POLICY

Medical Center Human Resource Policy 707 governs¹ Violations of Confidentiality. Section C of this policy provides, in part:

The University of Virginia Medical Center strictly maintains the privacy and confidentiality of certain data pertaining to patients, employees and business information ("Confidential Information"). All Medical Center employees are held to the same performance expectations concerning

¹ Grievant received training regarding the confidentiality of records. She did not object to the applicability to her of the Medical Center's policies.

Confidential Information and are subject to corrective measures for violating those expectations.

Confidential Information includes Protected Health Information. Section D defines "Protected Health Information (PHI) as:

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

Violation of Confidentiality is defined as:

Access to, or use or Disclosure of, Confidential Information for purposes other than those for which an individual is authorized.

The Policy sets forth different corrective measures depending on whether the violation is a Level 1, Level 2, or Level 3. Section E(6)(b) specifies that a Level 2 violation occurs, "when an employee intentionally Accesses Confidential Information without authorization."

Agency Policy 1.431 governs Violations of Confidentiality with respect to PHI. "Access" under this policy is, "A Single Access is Accessing a single patient's record within a single twenty-four hour period." A Level 2 violation under this policy "shall be considered acts of serious misconduct that constitute a serious violation of this policy. Examples of Level 2 Violations include ... [i]ntentional, unauthorized Accessing of a friend's, relative's (including minor child's ...) ... PHI."

Grievant acted contrary to the Agency's policies when she accessed her son's electronic medical record. She intentionally placed her computer's mouse over her son's medical record and assumed it would not open. The record opened because she likely clicked her mouse and caused the record to open. Grievant's behavior was intentional because she intentionally placed the computer mouse over her son's record. She assumed the risk that the record would open and it did thereby resulting in Grievant's violation of policy. The Agency has presented sufficient evidence to support the issuance of disciplinary action.

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"² 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

² Va. Code § 2.2-3005.

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.

Mitigating circumstances exist in this case. Grievant left her sick son in the Emergency Room to attend to her work duties. She checked on her son in order to determine whether she could continue performing her work duties. Grievant was tired and becoming ill. Completing her work duties on a timely basis was essential for the Patient to receive his medication timely and without cost. Grievant placed her job responsibilities ahead of monitoring her son’s medical condition. She mistakenly accessed her son’s electronic medical record and reported her violation of policy promptly. It is appropriate to reduce the disciplinary action from a Group II Written Notice to a Group I Written Notice. Suspension is not appropriate for a Group I Written Notice in this case.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is reduced to a Group I Written Notice. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

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.³

[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

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.