

Issue: Step 4 Formal Performance Improvement Counseling Form with Termination (failure to follow policy); Hearing Date: 07/01/14; Decision Issued: 07/07/14; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10373; 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: 10373

Hearing Date: July 1, 2014

Decision Issued: July 7, 2014

PROCEDURAL HISTORY

On April 23, 2014, Grievant was issued a Step 4, Formal Performance Improvement Counseling Form with removal for multiple unauthorized accesses and one disclosure of a co-worker's medical records.

On May 5, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 21, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 1, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency's Representative
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?
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 RN Coordinator in one of its Clinics. She began working for the Agency in 2012. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency maintains an electronic medical record database containing protected health information regarding its patients. Grievant had a unique login identification and password to access the Agency's electronic medical record database. Grievant received training regarding the Agency's policies governing access to the Agency's confidential information.

Ms. J was an employee of the Agency and experienced medical difficulties requiring medical treatment. She was nervous about upcoming surgery and expressed her concern to her co-workers. Ms. J was emotionally upset. Ms. J asked Grievant to look at her electronic medical record because Grievant was the "cancer guru". Ms. J did not understand some of the abbreviations in her medical record and wanted an explanation from Grievant.

Ms. J was not a patient at the clinic in which Grievant worked. Ms. J was not a patient of Grievant but rather was a co-worker of Grievant.

On October 21, 2013, October 31, 2013, and November 4, 2013, Grievant used her log in identification and password to access the medical records of Ms. J.

Sometime in February 2014, Grievant and the LPN were involved in a conversation. Ms. J had informed the LPN that she believed she had cancer. Grievant and the LPN were discussing Ms. J's illness. Grievant told the LPN, "She doesn't have cancer. I looked at her scan and she did not have cancer." Grievant was referring to Ms. J's scan and medical condition.

The LPN should have reported Grievant's statements within 24 hours of hearing them. Instead, she reported the statements several months later.

CONCLUSIONS OF POLICY

Medical Center Human Resource Policy 707 governs 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 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." Corrective measures for Level 2 violations include "termination for multiple Level 2 Violations"

Section E(6)(c) specifies that a Level 3 violation, "occurs when an employee intentionally discloses Confidential Information without authorization." Examples of Level 3 violations include, "[u]nauthorized intentional Disclosure of a ... co-worker's ... PHI to any third party ... regardless of privacy setting." "Disciplinary action for Level 3

Violations involving PHI in most cases shall result in immediate termination of employment.”

Grievant engaged in multiple Level 2 violations. She accessed Ms. J’s PHI on October 21, 2013, October 31, 2013, and November 4, 2013. She did not have any business reason to access the information. Grievant engaged in a Level 3 violation. Grievant told the LPN that she had looked at Ms. J’s scan and Ms. J did not have cancer. The Agency has presented sufficient information to support its decision to remove Grievant from employment.

Although Ms. J asked Grievant to look at the medical records, Ms. J did not have the authority to circumvent the Agency’s policy prohibiting access to patient records.

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.

Grievant contends the disciplinary action should be mitigated because Ms. A received lesser disciplinary action. In 2012, Ms. A accessed the electronic records of her minor child. The Agency discovered this and took disciplinary action including a three workday suspension. The Agency later investigated its employees accessing their children’s’ medical records and realized that it had not fully trained its employees regarding the prohibition against accessing these records. The Agency decided to forgive Ms. A’s improper access of medical records.

Grievant’s behavior differed from Ms. A’s behavior and, thus, they are not similarly situated. Ms. A accessed patient records one time. Grievant had multiple accesses. Ms. A did not tell another employee about the contents of the medical records. Grievant told the LPN about the contents of Ms. J’s medical record. Grievant has not presented sufficient evidence to show that the Agency singled her out for disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

¹ Va. Code § 2.2-3005.

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. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.³

Grievant argued that she was retaliated against because she reported bullying by co-workers. The Agency took no action to end the bullying according to Grievant. Grievant's reporting of bullying would be a protected activity. Grievant suffered an adverse employment action because she received disciplinary action. Grievant has not established a connection between her protected activity and the disciplinary action. The Agency did not take disciplinary action against Grievant as a pretext to retaliation.⁴

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a 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

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 framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

⁴ It may have been the case that the LPN reported Grievant because she disliked Grievant or desired to see Grievant get in trouble. The LPN's motivation for reporting Grievant's behavior is independent of the Agency's decision to take disciplinary action. The LPN was not involved in the Agency's investigation and decision to take disciplinary action. Grievant not established that the Agency decided to take disciplinary action as a form of retaliation.

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.