



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11525

Hearing Date: July 7, 2020
Decision Issued: July 27, 2020

PROCEDURAL HISTORY

On March 12, 2020, Grievant was issued a Step 4 Formal Performance Improvement Counseling Form of disciplinary action for unauthorized disclosure of personal health information.

On April 10, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 27, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 7, 2020, a hearing was held by audio conference.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Formal Performance Improvement Counseling?
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 Therapy Tech. She had been employed by the Agency for approximately 10 years. Grievant had prior active disciplinary action. On October 14, 2019, Grievant received a Step 2 Formal Performance Improvement Counseling Form.

On November 21, 2019, Grievant used her cell phone to take a picture of a tall male Patient and two smaller co-workers who were assisting the Patient. Grievant sent the picture to seven employees. She wrote, "had to share, have to delete." On November 22, 2019, a physical therapist told Grievant that she should not take pictures of patients and that she should delete the picture from her cell phone. Grievant did not delete the picture.

On February 26, 2020, the Agency held a pre-disability determination meeting with Grievant. Grievant was asked if she had any pictures of patients on her cell phone. Grievant displayed a picture she had taken on July 19, 2019 of a female patient with a dog in her lap. Grievant was asked to produce the picture she had taken on November 21, 2019 and Grievant did so. Grievant was asked why she took the picture. Grievant said the picture showed teamwork because the two employees were short compared to the taller Patient. Grievant said she took the picture of the patient with her dog because

the patient asked her to do so. Grievant said she did not send a copy of the picture to the patient.¹

CONCLUSIONS OF POLICY

Policy 701 sets forth the Agency'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.

Medical Center Human Resources Policy 707 governs Violations of Confidentiality. Protected Health Information consists of all individually identifiable health and billing/payment information about a patient regardless of its location or form.

Disclosure includes revealing information which "would reasonably inform another person of a patient's identity."²

A Level 3 violation occurs when an employee makes an unauthorized disclosure of confidential information. Level 3 violations involving PHI or other Confidential Information shall, in most instances, result in termination of employment.³

Grievant took a picture of a tall patient and disclosed that image to other people. The picture was confidential information because it identified a patient. Grievant disclosed the identity of a patient without the Patient's or Agency's authorization. Grievant's action was a Level 3 violation thereby justifying the Agency's decision to issue a Step 4, Formal Performance Improvement Counseling Form with removal.

Grievant argued she took the picture of the tall Patient for training purposes. The evidence showed Grievant knew taking the picture was inappropriate and was informed she should delete the picture but did not do so. Grievant did not attempt to train any staff using the picture.

¹ The Agency presented evidence that Grievant allowed her son to have access to a computer in a physical therapy gym to print forms from the Department of Motor Vehicles. It is unnecessary to address these facts because the Agency has presented sufficient evidence to support the issuance of its disciplinary action. In addition, it is not clear that Grievant's son accessed any protected or confidential information or observed any patients in the gym.

² Medical Center Human Resource Policy 707.

³ Medical Center Human Resource Policy 707.

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”⁴ 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.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Step 4, Formal 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

⁴ Va. Code § 2.2-3005.

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 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

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