

**COMMONWEALTH OF VIRGINIA
Department of Human Resource Management**

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

**In re:
Case Number: 11528**

Hearing Date: August 13, 2020
Decision Issued: August 19, 2020

PROCEDURAL HISTORY

On March 12, 2020, Grievant received a Step 4-Termination issued on the Formal Performance Improvement Counseling Form. The form set out that the Grievant's employment was terminated for falsification of patient records and neglect of duty in violation of Medical Center Human Resources Policy No. 701 and Dialysis Policy DP542-Pre-Dialysis Triage, specifically alleging that the Grievant recorded that the Grievant had personally examined the Grievant's patients chairside when the Grievant had not.

The Step 4-Termination Form also stated that the Grievant on January 10, 2020 received a Step 3-Performance Warning and Suspension with the warning period running through April 12, 2020 and that any violation of Policy No. 701 may result in termination if it occurs during the Warning period.

Grievant timely filed Grievance Form A to challenge the Agency's action. The Hearing Officer in this matter was appointed effective April 22, 2020, conducted a telephone conference with the Grievant and the Agency Representative and set a hearing date of July 14, 2020. The Grievant had a family emergency and requested that the hearing be postponed. As a result, and by agreement of the parties, the hearing was rescheduled and was conducted on Thursday, August 13, 2020.

APPEARANCES

Grievant

Agency Party Designee
Agency's Representative

ISSUES

1. Whether Grievant engaged in the behavior alleged, namely falsification of patient records and neglect of duty, described in the Step 4-Termination form?
2. Whether the behavior was a violation of Medical Center Human Resources Policy No. 701 and Dialysis Policy DP542-Pre-Dialysis Triage?
3. Whether the Agency's termination of the Grievant's employment was consistent with law and policy?
4. Whether there were mitigating circumstances justifying a reduction or removal of any 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 Grievant 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) section 5.8. a preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM section 9.

EXHIBITS

The Agency Exhibits admitted into evidence are contained in one notebook with the following contents:

1. Termination Form
2. Grievant's Form A
3. Policies
4. Predetermination meeting notes
5. Statements from witnesses
6. Supporting documentation
7. Previous Documentation of Concerns and Expectations
8. Performance Appraisals

Grievant did not offer any Exhibits.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witnesses, the Hearing Officer makes the following findings of fact:

The Agency employed Grievant as the RN Administrative Coordinator for the Kidney Center Dialysis Program. In that capacity, the Grievant was to ensure that all clinical team members adhere to policy, was to monitor the delivery of patient care and foster an environment of safe care delivery. In addition, during times of staffing need, the Grievant filled the role of Charge Nurse.

The Agency's first witness was the Grievant's direct supervisor. The witness testified that on January 9, 2020, the Grievant was serving as an RN with direct patient care. In that capacity, the Grievant was responsible for conducting triage "chairside" with the patients. The witness testified that all nurses, including the Grievant, are trained in accordance with Pre-Dialysis Triage Policy No. DP542 (Agency Exhibit 3-8). In order to verify that a patient is safe to dialyze, triage is to be conducted by the RN at the patient's chair. The witness testified that it is a falsification of records to enter "findings" in a patient's record without physically being present "chairside" to observe and interview the patient. The witness further testified that an RN cannot rely on anyone else's assessment.

The Agency's second witness, is the current Assistant Nurse Manager, and was formerly the Dialysis Program Nurse Educator. The witness testified that the RN does a triage assessment on each patient, including questioning the patient. The witness testified that an RN should never document that the RN "assessed" a patient when depending on second hand information from other nurses. The witness testified that all of the RN's are trained to conduct the patient assessment "chairside" without exception. (Agency Exhibit 5-2)

The Agency's third witness testified by telephone. The witness stated that on January 9, 2020 the Grievant was responsible for conducting triage on five different patients and did not conduct a chairside assessment of any of the five before clearing the patients for dialysis. The witness also stated that the Grievant had acted in this way with "many, many, others...before and after January 9, 2020." (Agency Exhibit 5-1)

The Agency Exhibits 6-1 through 6-10 indicated that the Grievant had the training, clinical experience and competency to properly carry out the duties of the triage nurse.

The Grievant testified that the Grievant never falsified records. The Agency Advocate represented to the Hearing Officer that specific patient records were not provided as exhibits due to patient confidentiality. The Grievant set out in Grievant's Form A "I always conferred with the LPN, who according to policy, is clearly permitted to conduct a pre-treatment physical assessment within the scope of their practice." The Grievant argues in Grievant's Form A that because the Grievant "continued to operate in the same way" between the date of the incident on January 9, 2020 and the date of the predetermination hearing on February 12, 2020, this cannot be a matter of patient safety. The Grievant stated "I conceded that this was where I entered the information (the nurse's station) but that I never misrepresented the patient's condition."

Agency Exhibit 3-1 Policy No. 701 provides at C.2.A. Serious Misconduct refers to acts or admissions having a significant impact on patient care or business operations. And at C.2.b. Gross Misconduct refers to acts or admissions having a severe or profound impact on patient care or business operations. Policy No. 701 further provides at D.1.d. Termination that employment may be terminated without resorting to Steps 1 through 3 if the employee's Serious or Gross Misconduct is a significant or severe impact on patient care or Medical Center operations.

CONCLUSIONS

The Commonwealth of Virginia provides certain protections to employees Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary action. The Department of Equal Employment and Dispute Resolution has developed Grievance Procedure Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the Agency has the burden of going forth with the evidence. It also has the burden of proving, by preponderance of the evidence that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules For Conducting Grievance Hearings*. These Rules state that on a disciplinary grievance a Hearing Officer shall review the facts *de novo* and determine:

- A. Whether the employee engaged in the behavior described in the written notice;
- B. Whether the behavior constituted misconduct;
- C. Whether the discipline was consistent with law and policy; and
- D. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

At the time of the predetermination meeting held on February 12, 2020, a warning period was in place which ran from January 10, 2020 through April 12, 2020. The specific behavior in question occurred on January 9, 2020, although there is evidence that the behavior occurred on multiple occasions prior to January 9, 2020 and during the period between January 9, 2020 and February 12, 2020.

The Agency's evidence, even in light of the Grievant's testimony and assertions contained in Grievant's Form A, establishes by a preponderance of the evidence that the Grievant was guilty of serious or gross misconduct when he failed to follow the pre-dialysis triage to ensure that a patient could safely receive dialysis.

Virginia Code Section 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 Resources Management

...”. Under the rules for Conducting Grievance Hearings “[a] hearing officer must give deference to the agency’s consideration in the 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 the standards set forth in Rules, the Hearing Officer finds no mitigating circumstances which exist to further reduce the disciplinary action imposed by the Agency.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Step 4-Termination is upheld.

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 Resources 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.

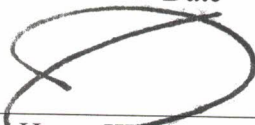
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer’s **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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].

ENTERED: 8/19/2020
Date



John R. Hooe, III
Hearing Officer

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