



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11545**

Hearing Date: September 4, 2020  
Decision Issued: September 23, 2020

**PROCEDURAL HISTORY**

On May 15, 2020, Grievant was issued a Step 4 Performance Improvement Counseling Form with removal for multiple violations of the University's confidential information policy.

On May 28, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On June 15, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 4, 2020, a hearing was held by audio conference. Grievant was advised of the hearing date and time but did not participate.

**APPEARANCES**

Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Performance Improvement Counseling Form?
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 Phlebotomist. She began working for the University in July 2019. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for "drawing patients' labs" in accordance with a physician's order. She was to view the Medical Center's Electronic Medical Records (EMR) to view her patient list for the day, select lab orders, and document the collection of labs. Grievant had no business reason to view records of patients' prior visits.

On March 27, 2020, Grievant used the EMR to view the charts of Patient A. Patient A was not one of Grievant's patients that day.

On March 27, 2020, Grievant used the EMR to view the charts of Patient B. Patient B was not one of Grievant's patients that day.

Grievant used the EMR to view Patient C's charts on March 27, 2020 and April 6, 2020. Patient C was not one of Grievant's patients those days.

Grievant used the EMR to view Patient D's charts on March 30, 2020, March 31, 2020, April 1, 2020, and April 5, 2020. Grievant did not have a business-related reason to access those records.

On March 31, 2020, Grievant used the EMR to view Patient E's chart. Grievant did not have a business-related need to access Patient E's chart on March 31, 2020.

On March 27, 2020, Grievant used the EMR to view Patient F's chart. Grievant did not have a business-related reason to access those records.

On March 27, 2020, Grievant used the EMR to access the medical records of Patient G. Grievant did not have business-related reason to view those records.

Grievant received training regarding keeping patient confidentiality and accessing EMR.

## **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 (PHI) consists of all individually identifiable health and billing/payment information about a patient regardless of its location. Under Policy 707, a Level 2 Violation occurs when an employee deliberately accesses confidential information without authorization. Unauthorized access of a Patient Health Information is a Level 2 violation. An employee violating his policy is subject to corrective action depending on the behavior. Multiple Level 2 violations involving PHI shall in most instances results in removal.

Grievant engaged in multiple Level 2 violations involving PHI. Each time she accessed the PHI of a patient she committed a Level 2 violation. Grievant used the EMR to access the medical records of seven different patients. Those records contained PHI. The University has presented sufficient evidence to support the issuance of a Performance Improvement Counseling Form Step 4 with removal.

Grievant did not participate in the hearing and, thus, did not present any evidence or advance any arguments in her defense.

*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 ..."<sup>1</sup> 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

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<sup>1</sup> Va. Code § 2.2-3005.

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 Performance Improvement Counseling Form Step 4 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer