



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11418

Hearing Date: November 15, 2019

Decision Issued: December 5, 2019

PROCEDURAL HISTORY

On August 15, 2019, Grievant was issued a Step 4, Formal Performance Improvement Counseling Form with removal for gross misconduct.

On August 16, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 8, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 15, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Formal 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 Patient Care Tech. Grievant had prior active disciplinary action. On July 8, 2015, Grievant received a Step 2 Formal Counseling. On September 16, 2016, Grievant received a Step 3 Performance Warning

A dialysis machine has settings allowing removal of fluids from a patient's body. The rate of fluid removal can be different for each patient based on that patient's weight and other unique physical characteristics of the patient. If the rate of fluid removal is changed to remove fluid more rapidly than prescribed by the physician, a patient may suffer low blood pressure, organ failure, and/or cardiac arrest.

A physician must prescribe the rate that fluid is removed from a patient during the dialysis process. Once the rate of fluid removal is set, how long the patient remains on dialysis treatment for the day can be determined. In other words, the prescribed treatment time is a function of the rate at which fluid is removed. The University sets each patient's schedule based on the physician's prescription.

A dialysis machine may be used by more than one patient in a day while the Facility is open. It is not unusual to have a patient scheduled in the morning and one scheduled shortly after that patient's treatment has ended. If a patient came in late to a scheduled dialysis treatment, the Technician was expected to check with the Charge Nurse to determine how to proceed. The Charge Nurse would then determine whether

to allow the late patient to continue treatment or reschedule to another day to avoid delaying a patient arriving later in the day.¹

Patient A had a doctor's order authorizing dialysis and establishing the nature of Patient A's treatment. Patient A was scheduled for dialysis from 8 a.m. to noon on July 26, 2019. Patient A reported late to the Dialysis Facility at approximately 8:30 a.m. If Patient A received the full treatment at the rate of fluid removal set by the physician, then Patient A would be finished after the regularly scheduled noon stop time. In order to allow Patient A to leave at noon, Grievant changed the settings on the dialysis machine to increase the ultrafiltration rate. This reduced the treatment time from four hours to approximately three hours and forty-five minutes. The change resulted in more fluid being removed from Patient A than would have been removed under the settings prescribed by Patient A's physician. Patient A experienced a drop in blood pressure and pain as a result of Grievant's action. Grievant did not ask the Charge Nurse about how to proceed prior to changing the settings of the dialysis machine used by Patient A.

The RN observed Patient A and questioned Grievant about his actions. Grievant admitted he had changed the treatment time for Patient A. The RN told Grievant the treatment time could not be decreased because it created a safety risk for patients.

Patient B was scheduled for dialysis from 12:50 p.m. until 4:20 p.m. Patient B arrived late and began treatment at approximately 1:25 p.m. Grievant initiated the treatment and recorded his activities. Grievant was supposed to observe Patient B every hour and record his observations. The Charge Nurse noticed Patient B becoming sick. The Charge Nurse observed that the dialysis machine settings for Patient B were set for a two hour and fifty five minute treatment instead of the three and a half hour treatment that Patient B was supposed to receive.

CONCLUSIONS OF POLICY

Policy 701 sets forth the Agency's Standards of Performance for its employees. Progressive performance improvement counseling steps include an information 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 that may result in termination without prior progressive performance improvement counseling.

Gross misconduct refers to acts or omissions having a severe or profound impact on patient care or business operations. Gross misconduct includes "[a]buse and/or neglect of duty including, but not limited to , willful or negligent patient neglect or abuse." Gross misconduct "generally will result in termination."²

¹ The Charge Nurse could also contact the patient's medical provider and obtain permission to alter the patient's treatment time so that the patient could have a shorter treatment time.

² See, Policy 701.

Grievant adjusted the treatment time for Patient A and Patient B which resulted in the treatment received by these patients to differ from the treatment prescribed by their medical providers. Patient A and Patient B suffered adverse health consequences because of Grievant's actions. Grievant made these decisions without first consulting with the Charge Nurse. The Agency has presented sufficient evidence to support the issuance of a Step 4 Formal Performance Improvement Counseling Form with removal.

Grievant argued it was routine practice for Techs to change treatment times for patients arriving late. The evidence did not support this conclusion. Agency managers investigated the allegation and found no evidence that Techs were changing treatment times. Witness testimony during the hearing did not support this conclusion.

Grievant denied changing the settings for Patient B. Even if the Hearing Officer assumes for the sake of argument that Grievant did not change the machine settings for Patient B, Grievant admitted to changing the settings for Patient A and that admission is enough to support the disciplinary action.

Grievant argued that he was singled out for being a "whistle blower". Grievant did not testify or present sufficient other evidence to support his assertion.

Grievant argued that other Techs took patients off of dialysis early yet were not disciplined. Grievant was not disciplined for taking patients off of dialysis a few minutes early. He was disciplined for adjusting the ultrafiltration rates on dialysis machines contrary to physician orders.

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"³ 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 Performance Improvement Plan with removal is **upheld**.

³ Va. Code § 2.2-3005.

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 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.