



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11437

Hearing Date: January 21, 2020

Decision Issued: January 29, 2020

PROCEDURAL HISTORY

On August 23, 2019, Grievant was issued a Step 4 Formal Performance Improvement Counseling Form with removal for a third instance of No Call/No Show.

On September 30, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 15, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 21, 2020, 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 BI Analyst/Consultant. She began working for the University in February 2018.

Grievant had prior active disciplinary action. On September 24, 2018, Grievant received a Step 2 Formal Performance Improvement Counseling Form for failing to report to work as scheduled and failing to call to say she would not be reporting to work (No Call/No Show). Grievant was informed:

[Grievant] is expected to report to work as scheduled and notify leadership if she will not be coming in to work before the start of her scheduled shift.¹

On March 11, 2019, Grievant received a Step 3 Performance Warning for not reporting to work as scheduled and not calling to say she would not be reporting to work (No Call/No Show). Grievant was informed:

[Grievant] is expected to report to work as scheduled and will notify her supervisor prior to the start of her shift if she is unable to report to work as scheduled. Subsequent conduct may result in further disciplinary action up to and including termination of employment.²

¹ Agency Exhibit 6.

² Agency Exhibit 6.

The Unit's practice was for employees seeking Paid Time Off (PTO) to enter their leave request into Kronos³ before the scheduled leave date and to send an email to their supervisors. If an employee did not have an adequate PTO balance, then the employee was to send an email to the supervisor seeking leave approval.

Grievant was moving her residence. She had some unexpected scheduling problems and needed to take off from work on August 2, 2019. Grievant knew she did not have a sufficient Paid Time Off leave balance to cover her absence on August 2, 2019.

Grievant was scheduled to work an eight hour shift on August 2, 2019. Grievant did not report to work as scheduled. Grievant did not contact the Supervisor by phone or email prior to the beginning of her shift to obtain approval to be absent on August 2, 2019.

At approximately 9:30 a.m., the Supervisor learned that Grievant was not in the office. Due to other duties, he was unable to send Grievant an email until 3:15 p.m. that day. Grievant did not respond to the email.

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.

Policy 704 sets forth the Agency's policy governing Attendance. Section D(3) defines "No Call/No Show" as:

An absence from work in which the employee has failed to report to work and failed to provide notification to the supervisor, or designee, of an unscheduled absence as required by the Department's Addendum. No Call/No Show absences will not be compensated.

Section D(7) provides:

³ Kronos is a time and attendance tracking system.

A No Call/No Show is Serious Misconduct. The first instance of a No Call/No Show shall result in a performance warning. The second offense may result in termination of employment.

The Unit's Attendance Policy Addendum provides:

Scheduled Absences

Advance Notice: Staff employees must provide at least 2 weeks' notice of a pre-planned vacation, holiday, personal day requests and at least 1 day notice of a medical or dental appointment or an unforeseeable time off request. The supervisor, or designee, will approve scheduled absence requests within 2 days of submission of the request.

Unscheduled Absences

Proper Notification: Staff employees will call in via telephone at least 1 hour before the start of the scheduled shift. When calling in, employees must talk directly to the supervisor, or designee. Leaving a voicemail message with the supervisor, or designee, is considered proper notification.⁴

Grievant was scheduled to work on August 2, 2019. She did not report to work. She did not contact a supervisor before her shift to speak with the supervisor or leave a voicemail message notifying the supervisor that she would be absent. She did not send an email to notify the Supervisor of her planned absence. She did not have sufficient PTO leave balances to utilize the Kronos system to obtain approval and provide notice for her absence. The Agency has presented sufficient evidence to show that Grievant engaged in serious misconduct of a No Call/No Show.

Grievant had prior disciplinary action for No Call/No Show. Accordingly, the Agency's issuance to Grievant of a Step 4 Formal Performance Improvement Counseling Form with removal must be upheld.

Grievant argued she gave the Agency sufficient notice of her absence because she wrote that she would be absent on her electronic calendar that was accessible by supervisors and on the Unit's electronic calendar accessible by supervisors. The evidence showed that none of Grievant's supervisors had reviewed her electronic calendar or the Unit's calendar to become aware that Grievant would be absent on August 2, 2019. Utilizing these two calendars was not an approved way of notifying a supervisor of her absence. Grievant could have made a telephone call to a supervisor or sent an email to accomplish proper approval and notification. Grievant's failure to do so supports the Agency's decision to issue disciplinary action.

⁴ Agency Exhibit 3.

Grievant argued that other staff were not sure how to request unpaid leave. The Agency surveyed its staff and concluded staff were not confused about how to request unpaid leave. The Agency's opinion is supported by the evidence.

Grievant argued that other staff reported to work late and were not given disciplinary action. Grievant's argument is not persuasive because Grievant was not given disciplinary action for being late to work. She was disciplined for failing to obtain approval prior to being absent for the entire day of August 2, 2019.

On August 5, 2019, the Manager met with Grievant for a predetermination meeting. The Manager was not aware of the Policy 701 that governed employee removal. The Manager mistakenly told Grievant she was removed from employment on August 5, 2019. The Manager contacted the HR department and the University followed the correct human resource policies to remove Grievant. The Manager's failure to comply with the human resource policies does not affect the outcome of this case. The Manager's failure to comply with human resource policy is not a basis for reversing Grievant's disciplinary action.

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"⁵ 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 Counseling Form of disciplinary action with removal is **upheld**.

⁵ 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.