



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11440

Hearing Date: January 6, 2020
Decision Issued: January 23, 2020

PROCEDURAL HISTORY

On August 29, 2019, Grievant was issued a Step 4 Formal Performance Improvement Counseling Form with removal for Gross Misconduct.

On September 27, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 21, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 6, 2020, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's 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 University'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 University 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 an Extracorporeal Membrane Oxygenation (ECMO) Specialist. She was responsible for supporting, treating, measuring, and supplementation of the cardiopulmonary and/or circulatory systems of University patients. Grievant had prior active disciplinary action. On April 22, 2019, Grievant received a Step 2 Formal Counseling, Formal Performance Improvement Counseling Form.

An ECMO machine is used to drain blood from the vein, add the oxygen and remove the CO₂, warm the blood, and then return the blood to the artery and pump the blood through the body. This machine allows a patient's blood to bypass the patient's heart and lungs. Errors made in ECMO administration could result in a patient not having systemic blood circulation or blood oxygenation.

An ECMO system includes an approximately four foot long clear hose. At the middle of the hose is a pump to push fluids through the hose. If one side of the hose is clamped with the bridge closed and the pump is pushed, fluids will flow through the other side of the hose. One end of the hose is called Arterial and the other end is called Venous depending on the flow of fluid through the hose. A second hose connects at the middle of each side of the four foot long hose. This second hose is called a bridge¹ and it has switches to allow fluid to pass through the bridge from one side to the other side

¹ A bridge "is a shunt that allows blood flow from the higher pressure arterial side of the ECMO circuit to flow into the lower pressure venous side of the ECMO circuit." See, Agency Exhibit 3.

of the four foot hose. If the bridge is closed and the Arterial side is clamped while the pump is pushed, fluid will flow through the Venous side of the four foot hose. The reverse is also true. If the bridge is left open while fluids are pumped, it is possible for fluids to flow through the wrong side causing confusion as to which end is Arterial or Venous.

Grievant received training as to how to determine which end of the hose was Arterial and Venous. Her training included instruction that the switches on the bridge had to be closed during the process.

Grievant was responsible for assisting a one month-old Patient who was attached to an ECMO machine. On July 2, 2019, Grievant moved the Patient to the Operating Room for the Physician to determine if the ECMO machine could be removed from the Patient. The Physician instructed that the ECMO machine be removed from the Patient but for the circuit to be kept running in the event it needed to be reconnected. Grievant removed the ECMO system from the Patient.

Approximately 90 minutes later, the Physician determined that the ECMO system should be reconnected. In order to determine which end was the Arterial line, the Physician asked that the Arterial line of the hose be pumped with fluid. Grievant failed to properly clamp the line. She did not close the bridge. When Grievant attempted to flush the ECMO through the Arterial line, the blood crossed over the bridge and went up the Venous line. This caused the Physician to mistake the Venous line for the Arterial line. The Physician placed the Venous line on the Arterial cannula and the Arterial line on the Venous cannula which caused the ECMO to fail. The Patient "coded" for approximately three minutes. Grievant did not recognize the nature of the mistake. Another ECMO Specialist traced the lines from his oxygenator to the sterile field to confirm with the Physician that the ECMO lines had been reversed when connected to the Patient.

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 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." Example of Gross Misconduct include but are not limited to, "neglect of safety".

Grievant was obligated to operate the ECMO system in a manner to provide safe patient care. Grievant failed to close a bridge on the ECMO system which resulted in

the Physician mistaking the Venous line for the Arterial line. The Patient coded. Grievant neglected the Patient's safety. The University has presented sufficient evidence to show that Grievant engaged in Gross Misconduct.

"If an employee's Serious or Gross Misconduct has a significant or severe impact on patient care or Medical Center operations, termination may be the appropriate course of action. If, in the Medical Center management's opinion, the employee's misconduct or deficient performance has a significant or severe impact on patient care or Medical Center operations, employment may be terminated without resort to Steps 1 through 3."²

Grievant's behavior jeopardized the Patient's care and exposed the University to possible legal liability. The University's opinion that Grievant's behavior had a significant impact on patient care is supported by the evidence. Accordingly, the University's decision to issue Grievant a Step 4 Formal Performance Improvement Counseling Form with removal is upheld.

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.

Grievant contends the disciplinary action should be mitigated because she believed she was held to a different standard than other employees. She indicated an employee was not able to turn on and operate an ECMO machine but was not removed from employment. She asserted that another employee mishandled medication but was not removed from employment. These examples are not sufficient to show the discipline should be mitigated because they are not examples of similarly situated employees. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

² Medical Center Human Resources Policy 701(E)(4).

³ *Va. Code § 2.2-3005.*

DECISION

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