

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

**Office of Employment Dispute Resolution**

**DECISION OF HEARING OFFICER**

**In re:  
Case Number: 11484**

Hearing Date: February 17, 2020  
Decision Issued: February 21, 2020

**PROCEDURAL HISTORY**

On December 13, 2019, 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 due to the Grievant engaging in a series of disruptive and disrespectful behaviors on November 25, 2019 and November 26, 2019, in violation of Policy No. 701-Employee Standards of Performance and Conduct, Health System Policy No. BEH-001-ASPIRE Values, and Medical Center Policy No. 0283-Behavioral Code of Conduct. The Step 4-Termination Form also stated that termination resulted due to the fact that the alleged behavior occurred while the Grievant had a Step 3-Performance Warning and Suspension issued on November 19, 2019 and effective through February 17, 2020.

Grievant timely filed Grievance Form A to challenge the Agency's action. The Hearing Officer in this matter was appointed effective January 14, 2020, conducted a telephone conference with the Grievant and the Agency Representative on January 16, 2020, and set a hearing date of February 17, 2020.

**APPEARANCES**

Grievant

Agency Party Designee  
Agency's Representative

**ISSUES**

1. Whether Grievant engaged in the behavior on November 25, 2019 and November 26,

- 2019 described in the Step 4-Termination form?
2. Whether the behavior was a violation of one or more of Policy No. 701 Employee Standards of Performance and Conduct, Policy No. BEH-001-ASPIRE Values and Policy No. 0283-Behavioral Code of Conduct?
  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. Formal Performance Improvement Counseling Form Step 4-Termination
2. Grievant's Form A
3. Policy No. 701 Employee Standards of Performance and Conduct
4. Predetermination meeting on 11-26-19 (Notes)
5. Email dated November 25, 2019  
2 Emails dated December 2, 2019  
Predetermination meeting on 11-25-19 (Notes)  
2 Emails dated February 4, 2020
6. Step 3-Performance Warning and/or Suspension dated November 19, 2019  
Step 2-Formal Counseling Form
7. Step 3-Performance Warning and/or Suspension issued September 19, 2019

While the Grievant referred to documents during Grievant's testimony, Grievant did not offer any Exhibits.

### **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 Agency employed Grievant as a Certified Medical Assistant.

The Agency's first witness was the Grievant's manager on November 25, 2019 and November 26, 2019 when the alleged behavior took place. The manager testified that the Grievant had general orientation when hired and more specific training further into her employment. The manager pointed out that the Grievant signed the job description setting out in detail the duties of a certified medical assistant. The manager testified that although the Grievant had expressed concerns about the Grievant's training to perform certain duties of a certified medical assistant, an "action plan" was put in place to address those concerns and that the Grievant felt competent after further training or declined further training in some areas.

Agency Exhibit 6, the Step 3-Performance Warning form was issued for Grievant's use of intimidating and disruptive behavior as well as use of offensive language in violation of Policy No. 701, Policy No. BEH-001-ASPIRE Values and Policy No. 0283-Behavioral Code of Conduct for behavior for which occurred on November 13, 2019 and November 15, 2019. The Step 3-Performance Warning was effective from November 19, 2019 through February 17, 2020 and states as follows:

All performance expectations for the job must be met during the Performance Warning Period...failure to meet all performance expectations during this time frame shall normally result in termination. Please be aware that within one year after the issuance of this Performance Warning, if another performance and/or conduct issue arises, termination may result.

The Grievant's Manager testified (referring to the Step 4 form, Agency Tab 1) that on November 25, 2019 the manager and an Employee Relations Consultant held a predetermination meeting with the Grievant to discuss several matters including the Grievant's failure to let co-workers know if the Grievant would be away from the floor for an extended period of time. The Manager testified that during this meeting, the Grievant demonstrated unprofessional behaviors including repeatedly interrupting the Manager and after being told her conduct was not professional continuing the same behaviors.

The Manager testified (referring to the manager's notes of the predetermination meeting conducted on November 25, 2019, Agency Exhibit 5 C-1) that when the Grievant was advised that there was a concern from a fellow team member that the Grievant had left the clinic for over twenty minutes without telling anyone, the Grievant stated she didn't think she needed to tell anyone and said to "write her up." The manager testified that during this meeting the Grievant was rude, interrupted several times, wouldn't answer all the questions and didn't want to give full explanations. The manager further testified that at one point the Grievant talking about the team member said "just wait, they need to be ready". When told that her statement sounded

threatening the Grievant stated that she was upset that people reported her being out of the clinic and that the Grievant's manager had asked her co-workers to watch her.

Although there were discussions referenced in the manager's notes regarding the Grievant's job performance in certain technical areas, Grievant's termination of employment was solely based on Grievant's behavior. The manager further testified that Agency Exhibit 6B-1 indicates that the Grievant exhibited the same behavior in a different clinic in August of 2018 for which the Grievant received a Step 2-Formal Counseling Form.

Grievant's manager testified that during the predetermination meeting conducted on November 26, 2019 (referring to the manager's notes at Agency Exhibit 4-1) that when the Grievant was asked why she slapped the post-it note down, told the charge nurse that she was told to tell them everything and then walked away, the Grievant denied any of that happened.

The Agency's second witness, the Charge Nurse, testified that later on November 25, 2019, following the predetermination meeting which had occurred that morning, the Grievant approached the Charge Nurse while the Charge Nurse was speaking with another employee, slapped a post-it note down in front of them and stated that the Grievant was going to the bathroom. When the Charge Nurse asked the Grievant to explain why she had written the information on a post-it, the Grievant responded that the Grievant was required to tell the charge nurse every time she went somewhere, including the bathroom, and then walked away. The charge nurse testified that the Grievant was loud and aggressive in an area where co-workers and patients could hear and observe. The charge nurse testified that they work in a very busy clinic with two pods and that the Grievant's disruptive behavior "...sends a bad message to patients about our clinic."

The Agency's third witness, another of Grievant's co-workers, (referring to Agency Exhibit 5 B-1) initially confirmed that the description in the email of December 2, 2019 at 4:12 pm was correct so far as it indicated that the Grievant put post-it notes in front of her but testified that the Grievant was not disruptive, aggressive or creating a hostile work environment. The witness did confirm that the Grievant was upset.

The Grievant testified that she was terminated as an African American female suffering from post-traumatic stress syndrome. She testified that physically she cannot raise her voice and did not curse. She testified that her denial of training caused the onset of her behavioral problems and that she was upset for a year fearing that she was not competent to perform her job. She testified that she was denied necessary training. She testified that the behavior described by the Agency witnesses were symptoms and that the "symptoms severity" depended on her stress levels.

In addition to Grievant's testimony, the Grievant set out in Grievant's Form A (Agency Exhibit 2) that "My termination of employment (I believe) was based on my Service Connected

Disability for PTSD. This disorder had been caused by my denial of training, retaliation and my being singled out during a department meeting as having been the reason for co-workers not trusting each other. ...Any (disruptive) behavior consisted of my pacing around, heavy sweating, the inability to sit still. I informed the Supervisor that I (was) having an anxiety attack, and that I would like to go to my VA Clinic because of this...my supervisor ... was recently hired ... for a little over three to four months. I believe she has used my termination as a way to “uplift” her position ...

The Grievant did not offer any corroborating evidence in the way of witness testimony or exhibits.

## CONCLUSIONS

Step 4-Termination (Agency Exhibit 1) states that the Grievant was terminated for engaging in a series of disruptive and disrespectful behaviors on November 25, 2019-November 26, 2019 in violation of the various policies earlier cited. Specifically, the form states that the Grievant’s comments during both predetermination meetings were deliberately antagonizing and non-productive. The form states that all individuals working in the medical center shall treat others with respect, courtesy and dignity and that they shall also conduct themselves in a professional and cooperative manner. The Agency concluded that the Grievant had repeatedly failed to meet the standard despite being given multiple opportunities to correct the behavior.

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 meetings on November 25, 2019 and November 26, 2019 the Grievant was on a Performance Warning issued on November 19, 2019 for use of

intimidating and disruptive behavior as well as use of offensive language. At any time during the ninety day performance warning, any unsatisfactory progress, or failure to meet all performance and conduct expectations, shall normally result in termination.

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 disruptive behavior which constituted misconduct under the cited policies. The Agency further demonstrated that termination inconsistent with law and policy in that the termination occurred as a result of behavior during the Step 3-Performance Warning Period.

Finally, in light of the Grievant's demonstrated attitude during the second predetermination meeting on November 26, 2019, the Agency's conclusion that there were not mitigating circumstances justifying discipline short of termination is upheld.

Virginia Code Section 2.2-3005.1 authorizes Hearing Officer's to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "accordance with rules established by the Department of Human Resource 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 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.

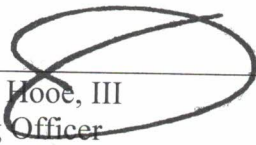
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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.[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: 2/27/2020  
Date

  
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John R. Hooe, III  
Hearing Officer

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