



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11729

Hearing Date: December 15, 2021
Decision Issued: December 30, 2021

PROCEDURAL HISTORY

On July 23, 2021, Grievant was issued a Step 4, Formal Performance Improvement Counseling Form with removal for falsifying pay records. The University designated Grievant as ineligible for rehire.

On August 6, 2021, Grievant timely filed a grievance to challenge the University's action. The matter advanced to hearing. On August 30, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 15, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
University 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 a Child Life Assistant. She had been employed by the University for approximately three years. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency used a time and attendance system known as Kronos to track when employees began and ended their shifts. Employees were expected to "clock in" at the Kronos terminal the moment they entered the building where they worked. Employees were not permitted to clock in from a remote location.

Kronos has a software application allowing employees to clock in using their cell phones. Employees can use the Kronos application to clock in from a location other than a Kronos terminal. Grievant downloaded the Kronos application to her cell phone.

On June 16, 2021, Grievant was scheduled to begin working at 8 a.m. Grievant arrived at a parking lot located within walking distance of the building where she worked. At 7:52 a.m., Grievant used the Kronos application on her cell phone to record that she had begun working even though she had not entered the building where she worked.

The Administrative Assistant observed Grievant entering Grievant's workplace at 8:25 a.m. As part of her job duties, she accessed the Kronos log and realized Grievant

had clocked in before she entered the building. The Administrative Assistant notified Agency managers who audited Grievant's time records to determine how many times she had clocked in remotely. The Agency reviewed Grievant's time records from January 5, 2021 to June 18, 2021. The audit revealed that Grievant had been using her cell phone to clock in remotely at least three times per week since January 5, 2021 for a total of 72 times. Although Grievant was tardy to work on those days, she did not report being tardy on her time records.

During a predetermination meeting on June 18, 2021, Grievant told the Agency she clocked in using her cell phone before walking into the building where she worked. She said she did not want to forget to clock in. Grievant indicated she was attempting to clock in on time but did not know that she could not use the Kronos cell phone application. Grievant confirmed she was clocking in several times per week after she parked her vehicle and before she entered the building where she worked.

The Agency estimated that Grievant was paid for approximate 14 hours she did not work.

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.

Serious misconduct includes, "[f]alsifying ... records, including vouchers, leave records, pay records, or attendance records. *** If the employee's ... misconduct has a significant or severe impact on ... Medical Center operations, termination may be the appropriate course of action. If, in Medical Center management's opinion, the employee's misconduct or deficient performance has a significant or severe impact on ... Medical Center operations, employment may be terminated without resorting to Steps 1 through 3."¹

Grievant had to be present in the building where she worked to perform her work duties. She had been instructed to clock in at the terminal inside that building. From January 5, 2021 through June 18, 2021, Grievant used her cell phone to clock in at a time when she was in the parking lot and not in her work building. Grievant knew she was not working when she clocked in using her cell phone and knew that it would appear to the University that she was working from the time she clocked in remotely. The University has presented sufficient evidence to show that Grievant falsified her time records and pay records. Grievant engaged in serious misconduct. In the University's opinion Grievant's

¹ University Exhibit 3A-1.

misconduct had a significant or severe impact on Medical Center operations. The evidence is sufficient to support the University's opinion because Grievant demonstrated a pattern of behavior and the University paid for approximately 14 hours of work that was not performed. The University has presented sufficient evidence to support the issuance of a Step 4, Performance Improvement Counseling Form with removal.

Grievant argued that the University did not engage in progressive disciplinary action. Under the University's policies it was not obligated to engage in progressive disciplinary action. Although the University could have taken disciplinary action without removal and properly corrected Grievant's behavior, it acted within its discretion.

Grievant asserted she was unaware she was prohibited from using the Kronos application given that it could be downloaded to her cell phone. Grievant was not disciplined for using the Kronos application, she was disciplined for clocking in before she was capable of beginning her work. Presumably, Grievant could have used her cell phone to clock in after she reached her worksite.

Medical Center Human Resource Policy 405 governs Separation from Employment. This policy provides:

At the time of separation, employees may be determined to be ineligible for rehire by the Medical Center for reasons that include, but are not limited to:

- Separation from employment due to serious misconduct, gross misconduct or violation of policy.

The Hearing Officer does not agree with the University's decision to make Grievant ineligible to rehire because (1) Grievant's work performance was otherwise satisfactory, (2) Grievant was truthful and cooperative during the University's investigation, and (3) she has learned from her mistake and is unlikely to repeat it. The University's determination that Grievant is ineligible for rehire, however, is consistent with the University's policy governing Separation from Employment. The Hearing Officer will not disturb the University's decision to make Grievant ineligible for rehire, but recommends the University reverse that decision.

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 ..."² 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

² Va. Code § 2.2-3005.

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 University'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]

^[1] 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

Carl Wilson Schmidt, Esq.
Hearing Officer