



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11739

Hearing Date: January 14, 2022
Decision Issued: January 24, 2022

PROCEDURAL HISTORY

On August 13, 2021, Grievant was issued a Step 4 Formal Performance Improvement Counseling Form with removal for falsifying timesheets.

On August 29, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 14, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 14, 2022, 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 Patient Care Technician. She worked in B Building. She had been employed by the University for approximately 22 years. No evidence of prior active disciplinary action was introduced during the hearing.

The University used Kronos to record employee time. Employees were to "clock in" and "clock out" using a Kronos terminal. Kronos terminals were located throughout the Hospital complex including the Main Hospital and B Building. Most employees could walk from B Building to the Main Hospital in five to ten minutes.

Grievant testified she worked from 7 a.m. until 3:30 p.m.¹ on most days but on Wednesday's her shift began and ended later. She worked in B Building. Grievant often rode the bus home after her shift. The bus stop was located near the Main Hospital. Grievant was expected to clock out at the Kronos terminal on the second floor or basement of B Building. Sometimes she clocked out in the Main Hospital as part of her process to reach the bus stop in time to catch a bus to take her home.

¹ Most of the times Grievant clocked out at the Main Hospital were within a few minutes of 4 p.m. Grievant testified she often worked past her shift and her bus left the bus stop at 4 p.m.

Grievant clocked out using the Main Hospital Kronos terminal 27 times from February 21, 2021 to May 28, 2021.

During a predetermination meeting on June 28, 2021, Grievant told the University managers that she did not know she was prohibited from clocking out using the Main Hospital Kronos terminal.

The University concluded Grievant received additional pay for between 135 minutes (2.25 hours) and 270 minutes (4.5 hours).

If Grievant finished her duties before the end of her shift, the University permitted her to clock out 7 minutes before her shift ended but she would be paid as if she worked until the end of her shift. In other words, Grievant and her co-workers sometimes were paid for up to 7 minutes of time they did not actually perform work duties.

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.

Medical Center Human Resource Policy 704 governs Attendance. Under this policy, "[a]ll clocking transactions are to be done from within your work areas" and "[r]epeated failure to clock in/out or misrepresentation of time worked may result in performance improvement counseling"

Under Policy 701, serious misconduct refers to acts or omissions having a significant impact on patient care or business operations. Gross misconduct refers to acts or omissions having a severe or profound impact on patient care or business operations.

Grievant's behavior was not serious misconduct or gross misconduct.

Grievant's actions had no impact on patient care. Grievant testified she left B Building only after finishing her work duties. The University presented no evidence to contradict Grievant's statement.

Grievant's behavior did not have a significant, severe, or profound impact on business operations of the Medical Center. The University alleged Grievant's actions resulted in "additional pay" to Grievant for the time she walked from B Building to the Main Hospital. The University alleged Grievant falsified her timesheets. The University claimed removal was appropriate because of the number of times Grievant clocked out in the wrong building.

Grievant did not intend to “steal time” from the University. She did not clock out in the Main Hospital in order to be paid while not working. She clocked out in the Main Hospital in order to make sure she did not miss her bus. Clocking out in the Main Hospital was more convenient for her. Grievant did not intend to falsify her timesheets.

The University estimated the amount of time resulting in additional pay to be between 135 minutes (2.25 hours) and 270 minutes (4.5 hours). Grievant calculated this amount of time to equal between \$60.75 and \$121.50. These amounts are *de minimis*. In addition, these amounts are overstated. If Grievant finished her work, she was permitted to clock out 7 minutes before her shift ended and be paid as if she worked an additional 7 minutes. The University’s calculation should be reduced for the additional 7 minutes of paid time she was allowed to receive. The number of times Grievant clocked out at the Main Hospital showed that she did not realize she was obligated to clock out in B Building.

Step 1 Informal Counseling is “used to address deficiencies in performance of assigned duties or to spot correct minor incidents of employee misconduct.” Grievant’s behavior is best described as a minor incident of employee misconduct. Grievant’s behavior is easily corrected by reminding her to clock out in B Building. A Step 1 counseling is documented “in the departmental file, but does not become a part of the employee’s personnel file except as supporting documentation with any future Formal Counseling.”

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 **rescinded**. The University is ordered to **reinstate** Grievant to Grievant’s same position prior to removal, or if the position is filled, to an equivalent position. The University is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The University is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue. The University may consider Grievant as having a Step 1 Informal Counseling.

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.