



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11767

Hearing Date: March 23, 2022

Decision Issued: March 24, 2022

PROCEDURAL HISTORY

On November 12, 2021, Grievant was issued a Step 4 Formal Performance Improvement Counseling Form with removal for gross misconduct. The University made her ineligible for rehire.

On November 12, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 30, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 23, 2022, a hearing was held by remote conference. Grievant was notified of the date and time of the hearing but did not participate.

APPEARANCES

University Representative
University Party Designee
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 Access Associate Senior. She had been employed by the University for approximately 36 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked in a room with several desks pushed against two walls. Three desks were located on the left wall. Ms. M sat at the desk farthest away from the door to the room. Mr. M sat at the desk closest to the door. Another desk was located between Ms. M and Mr. M but no employee worked there. Several desks were located on the right wall. Grievant worked at one of the desks closest to the door. When they were working, Grievant and Ms. M were separated by four or five feet and had their backs to one another.

On October 13, 2021, Ms. M was seated at her desk speaking on the telephone with a customer. Grievant turned towards Mr. M and Mr. M turned towards Grievant and they spoke loudly about what Mr. M had eaten for dinner. Ms. M had difficulty hearing the other person on her telephone call. After her call ended, Ms. M began complaining that "I can't f--king hear" during her telephone conversation. Grievant "snapped" and began yelling at Ms. M. Ms. M slammed a book on to middle desk and it landed loudly. Grievant called Ms. M a bi-ch.

Ms. D walked into the room. She observed the conflict and raised her hands up to ensure Grievant and Ms. M remained separated. Ms. D was fearful of physical conflict. Ms. D said, "Guys this behavior is unacceptable." Mr. M also positioned himself between Grievant and Ms. M.

Grievant said, "I will not put up with it, I will beat her ass!" Ms. D said, "No, you won't." Grievant said, "Yes, I will!" Ms. D said, "No, you will not!"

Ms. M "got her stuff" and walked out of the office. Ms. M was fearful of Grievant.

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.

Gross misconduct includes, "[t]hreatening or causing physical harm to a patient, employee, or visitor."¹ On October 13, 2021, Grievant was angry with Ms. M. Grievant said she would "beat her ass." When Ms. D contradicted Grievant's statement, Grievant reaffirmed her intent to "beat her ass." "Beat her ass" refers to physical conflict as in a physical fight. Grievant threatened to harm Ms. M by fighting her. The University has presented sufficient evidence to show that Grievant engaged in gross misconduct thereby justifying the issuance of a Step 4, Formal Performance Improvement Counseling Form. Upon the issuance of a Step 4, Formal Performance Improvement Counseling Form, the University may remove an employee. Accordingly, the University's decision to remove Grievant must be upheld.

Policy 405 governs Separation from Employment and authorizes the University to make an employee ineligible for rehire if the employee has been separated from employment due to gross misconduct. Grievant was separated from employment due to gross misconduct. Thus, the University's decision to make Grievant ineligible for rehire is upheld.

Grievant did not participate in the hearing or otherwise present evidence to challenge the University'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

¹ University Exhibit 3A-2.

....”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 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 with removal is **upheld**. The University’s decision to make Grievant ineligible for rehire 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.

² Va. Code § 2.2-3005.

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.