



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11578**

Hearing Date: November 9, 2020  
Decision Issued: January 29, 2021

**PROCEDURAL HISTORY**

On June 12, 2020, Grievant was issued a Step 4 Formal Performance Improvement Counseling Form with removal for making unprofessional and threatening comments to another employee.

Grievant filed a grievance to challenge the Agency's action. The matter advanced to hearing. On August 10, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 9, 2020, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
University's Counsel  
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 Agency'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 Sterile Processing Tech at one of its locations. Grievant began working for the University in July 2016.

Grievant had prior disciplinary action. On May 31, 2018, Grievant received a Step 1 Formal Performance Improvement Counseling Form for unscheduled absences. On September 1, 2018, Grievant received a Step 2 Formal Performance Improvement Counseling Form for failing to conduct herself in a professional and cooperative manner. This disciplinary action noted that on July 17, 2017, Grievant received a "verbal coaching for using profanity and making negative and inappropriate comments about another employee during the month of June 2017." Grievant was informed by the September 1, 2018 Step 2 Formal Performance Improvement Counseling Form:

[Grievant] must conduct herself professionally in the workplace at all times. Subsequent misconduct and/or performance deficiencies may result in further disciplinary action up to and including termination of employment.<sup>1</sup>

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<sup>1</sup> Agency Exhibit 8, page 2.

Grievant sometimes worked with Mr. P. Mr. P had trouble dealing with women. He “talked down” to women and degraded them. He was not a good employee to work with.

On Wednesday May 20, 2020, Mr. P approached Grievant and asked if Grievant knew about his missing telephone charger. His tone was accusatory. Grievant said “No.” Grievant replied by asking why he was asking her about his charger. Mr. P said she had his charger because her charger was different from his charger. Grievant became angry. Grievant loudly asked Mr. P why he did not ask her about the charger on Monday when Ms. F was not there. Mr. P became angry. Mr. P said, “I don’t have to do s—t.” Mr. P added, “Bi—ch, I don’t have to ask you nothing. Bi—ch, do you know what I will do to you.”

Grievant said to Mr. P, “someone is going to f--k you up.” Mr. P said, “Yes, I can get someone to f--k you up.”

Grievant said, “What are you doing to do to me and why do you feel you can talk to me that way?”

Ms. F was standing near Grievant and Mr. P. At some point, Ms. F got between Grievant and Mr. P to keep them separate. Ms. F told Mr. P to walk away and go upstairs. Grievant and Mr. P continued to yell and curse each other.

Mr. O approached the area and overheard arguing. He moved closer and observed Grievant and Mr. P arguing. He went to Grievant and told her to calm down. He then walked to Mr. P and told him to calm down. Mr. P said to Mr. O that Mr. P. was calm and did not know why Grievant was so upset. Ms. F told Mr. O to take Grievant out of the room. Mr. O walked to Grievant and told her they should go to the break room to calm down. Grievant replied, “No, because he is always picking on me since I started and he is acting like a bi—ch. Why would I need to take his charger. Only bi—hes would act like that. He’s a bi—ch!” Grievant was calling Mr. P a bi—h because he had been calling her one.

Mr. O and Grievant went to the break room. Mr. O asked Grievant again if she was okay and asked her to calm down. Grievant said she would leave and call her supervisor to inform him of what had happened.

The University removed Mr. P from employment.

## **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

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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.

Under this policy, employees are required:

Treat others with respect, courtesy, and dignity and shall conduct themselves in a professional and cooperative manner.<sup>2</sup>

Serious Misconduct includes, “[m]istreatment of a patient, visitor, or fellow employee” and “[u]se of profanity or offensive language in the workplace whether verbally, through gestures, or in writing.”<sup>3</sup>

Gross Misconduct includes, “[t]hreatening or causing physical harm to a patient, employee, or visitor.”

Medical Center Policy No. 0283 governs Behavioral Code of Conduct. Under this policy employees are required:

Treat each other, patients and their families, with fairness, courtesy, respect and consideration. \*\*\*

Cooperate and communicate with others, displaying regard for each person’s dignity and worth. \*\*\*

Use conflict management skills and direct verbal communication to manage disagreements.<sup>4</sup>

On May 20, 2020, Grievant became engaged in a verbal dispute with Mr. P. Mr. P initiated the conflict and Grievant continued to actively participate in the argument. Grievant was angry, yelling at times, and calling Mr. P names including “bi—h.” “F—k you up” is a phrase describing physically harming someone. Grievant told Mr. P someone could “f—k you up” meaning that he could be physically harmed. It would be reasonable for Mr. P to believe Grievant’s comment was a threat; in other words, that she could have someone physically harm him. Mr. P also discussed physical harm to Grievant in response to her threat. Grievant’s behavior constitutes Serious Misconduct and Gross Misconduct thereby justifying the University’s decision to issue Grievant 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, Grievant’s removal must be upheld.

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<sup>2</sup> Agency Exhibit 6, page 1.

<sup>3</sup> Agency Exhibit 6, page 3.

<sup>4</sup> Agency Exhibit 6, page 7.

Grievant argued that her behavior should be excused because she was merely responding to Mr. P. Mr. P was a difficult employee work with and she had raised her concerns to University managers without them taking any action against Mr. P. The evidence showed Mr. P was an abrasive and confrontational co-worker who initiated the verbal conflict with Grievant. The evidence also showed that Grievant had several opportunities to walk away from the conflict before engaging in behavior giving rise to disciplinary action. Grievant could have disregarded Mr. P's accusation. Instead she began arguing with him. When Mr. O attempted to have Grievant leave the area, Grievant refused and continued to argue and call Mr. P a "bi—h." It is clear that Grievant actively participated in the verbal conflict. Although it is clear Mr. P was more aggressive during the conflict, Grievant also actively participated. The University had warned Grievant that she was required to conduct herself professionally at all times. Grievant failed to do so. The University's decision to issue disciplinary action is supported by the evidence.

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 ...."<sup>5</sup> 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 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:

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<sup>5</sup> Va. Code § 2.2-3005.

Office of Employment Dispute Resolution  
Department of Human Resource 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.<sup>[1]</sup>

[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

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.