



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11592

Hearing Date: January 5, 2021
Decision Issued: January 25, 2021

PROCEDURAL HISTORY

On July 16, 2020, Grievant was issued a Step 4, Performance Improvement Counseling Form with removal for failing to conduct herself in a professional and cooperative manner.

On August 17, 2020, Grievant filed a grievance to challenge the University's action. The matter advanced to hearing. On September 28, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 5, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Formal Performance Improvement Counsel?

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 Registered Nurse at one of its locations. She had been employed by the University for four years and seven months. Grievant transferred to the Unit in March 2019 and began reporting to the Supervisor. She received active disciplinary action following her transfer. On July 24, 2019, Grievant received a Step 2 Formal Performance Improvement Counseling failing to conduct herself in a professional and cooperative manner. On February 4, 2020, Grievant received a Step 3 Formal Performance Improvement Counseling with a 24 hour suspension and Performance Warning for failing to conduct herself in a professional and cooperative manner. On March 26, 2020, Grievant received a Step 3 Former Performance Improvement Counseling with a 48 hour suspension and a Performance Warning from March 26, 2020 to June 25, 2020 for failure to conduct herself in a professional and cooperative manner. During the Performance Warning, "failure to meet all performance expectations during this time frame shall normally result in termination."

On June 10, 2020, the Supervisor asked Grievant if she wanted to go home early. He explained that the number of patients did not require a full complement of staff. Grievant became defensive and said she did not want to go home. She said she should not have to go home because she "always has to go home." Grievant's claim was untrue. The Supervisor told Grievant he was looking for volunteers but that if no one volunteered

he would use a fair method to select two staff to leave early. After the Supervisor spoke with other employees, two employees, Mr. Q and Ms. G, volunteered to leave early.

Grievant was not performing patient care. When the two other employees left, it became necessary for Grievant's assignment to change to provide patient care in the ICU for a patient of Mr. Q. A Shift Manager told Grievant of her new assignment. Grievant became upset and began arguing with the Shift Manager. The Shift Manager told her to take her concerns to the Supervisor.

Grievant entered the Supervisor's office and began arguing loudly about having to be sent home early every week. The Supervisor denied Grievant's assertion but she continued to argue that she was sent home early at least every other week and she kept a record in her diary at home. The Supervisor again denied Grievant's claim and said he did not understand why Grievant was so upset given that two other employees volunteered to go home that day. Grievant then began complaining about her patient assignment. The Supervisor explained that the change was normal and necessary to accommodate the treatments that would have been provided by the two volunteers who went home early. The Supervisor said that keeping Grievant in her CRRT role in the afternoon would be the equivalent of keeping her staffed and getting paid to do nothing since there was nothing to address regarding CRRT machines at that time. The Supervisor assured Grievant that the decision was fair. Grievant replied in a sarcastic tone, "Well, that's a surprise." The Supervisor said that their conversation was at an end and that Grievant's comment was insulting and unprofessional. Because Grievant would not leave his office, the Supervisor left his office and walked to the nursing station.

Grievant followed the Supervisor to the nursing station and continued to argue with him. Grievant said she had changed her mind and wanted to leave early. The Supervisor said Grievant had had her chance and someone else had already replied. Grievant glared at the Supervisor.

Ms. O observed Grievant's behavior at the nursing station and was shocked at how loud, disrespectful and unprofessional Grievant's outburst was. Ms. O believed Grievant's behavior was "really disturbing."

At approximately 7:15 p.m., on June 12, 2020, Grievant was finishing her work duties and day shift. The RN began her night shift. The Agency expected employees to finish cleaning their machines before ending their shifts. Using an abrupt tone, Grievant asked the RN to clean Grievant's machine. The RN asked Grievant why she could not clean her own machine. Grievant said she preferred not to clean her machine when a patient was in the room. This response confused the RN because the RN knew if the RN was cleaning the machine the patient would still be in the room. The RN asked Grievant for clarification but Grievant did not answer. Grievant then falsely accused the RN of discriminating against Grievant based on Grievant's race. The RN became upset and asked Grievant not to accuse the RN of such things.

Approximately 15 minutes later, the RN noticed that Grievant still seemed agitated. She asked Grievant if everything was ok. Grievant replied, "I'm not talking to you." The RN said it was time for Grievant to go home and finish up with her patient. Grievant replied, "You are not paying me and cannot tell me when to go home; I will stay as long as I want to." Grievant continued to look for something for her patient and the RN asked if she could help. Grievant shouted, "I'm not talking to you." The RN lightly touched Grievant's shoulder to try to calm down Grievant as a "conciliatory gesture." Grievant shouted, "Don't touch me! If you touch me again, I'll call security." The RN walked away.

The RN later told the Supervisor that if Grievant did not apologize to her, she would be unable to work with Grievant for fear of her safety.

The University recognized that the RN should not have touched Grievant and took corrective action against her for failing to conduct herself in a professional and cooperative manner.

On July 7, 2020, Grievant sent a text message to the Physician about a machine that was clotting. The Physician called Grievant back and requested Grievant rebuild the machine and finish the remaining 50 minutes of treatment. Grievant did not respond and did not acknowledge the Physician's request before hanging up the telephone. The Physician told the Supervisor that he believed Grievant was angry that he asked her to rebuild the machine and that this was not the first time Grievant had acted that way.

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.

Policy 701 requires employees to:

treat others with respect, courtesy, and dignity, and shall conduct themselves in a professional and cooperative manner.¹

Grievant was subject to a Performance Warning until June 25, 2020 requiring her to meet all performance expectations of her job. Her failure to do so "shall normally result in termination."

In this case, Grievant displayed numerous instances of failing to treat others with respect, courtesy, and dignity. On June 10, 2020, Grievant was abrasive towards the

¹ Agency Exhibit 6, page 1.

Supervisor. She falsely claimed he “always” made her go home. She argued with the Supervisor to the point that he had to leave his office to end the conversation. Grievant followed him to the nursing station and continued to argue with him in front of other staff. After declining to leave early, Grievant said she wanted to leave early because she did not want to assume the responsibilities of another employee who wanted to leave early. On June 12, 2020, Grievant was abrasive to the RN. Grievant falsely accused the RN of racial discrimination. Grievant shouted at the RN. On July 7, 2020, Grievant abruptly hung up the telephone while speaking with the Physician instead acknowledging the Physician’s request and saying goodbye. The University has presented sufficient evidence to support the issuance of a Step 4 Formal Improvement Counseling Form with removal.

Grievant disputed most of the University’s factual allegations and asserted the Supervisor was disrespectful towards her. Grievant argued the Supervisor was retaliating against her because she filed a grievance in April 2020. The University’s witnesses were credible and there is sufficient evidence to show the University did not meet all of her job expectations during the performance warning period. No credible evidence was presented showing the Supervisor retaliated against Grievant because she filed a grievance.

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 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.³

DECISION

² Va. Code § 2.2-3005.

³ Some of Grievant’s behavior towards the Supervisor could be protected under Virginia Code § 2.2-3000(A) as an attempt to freely discuss her concerns with management. To the extent such protection served as a mitigating circumstance, aggravating circumstances exist. Grievant received several disciplinary actions relating to unprofessional and uncooperative conduct and was aware of the University’s high expectations for civility. When mitigating and aggravating circumstances are considered, there is no basis to disregard Grievant’s interaction with the Supervisor.

For the reasons stated herein, the Agency's issuance to the Grievant of a Step 4 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]

[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.