



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 12101

Hearing Date: May 22, 2024
Decision Issued: June 11, 2024

PROCEDURAL HISTORY

On February 22, 2024, Grievant was issued a Step 4 Termination, Formal Performance Improvement Counseling Form for disclosing a patient's protected health information to third parties.

On March 2, 2024, Grievant timely filed a grievance to challenge the University's action. The matter advanced to hearing. On March 18, 2024, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 22, 2024, a hearing was held by remote conference.

APPEARANCES

Grievant
University Party Designee
University Representative
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 Surgery Scheduler. She began working for the Agency on April 4, 2021. She enjoyed her job and was proud to work for the University.

On May 23, 2023, Grievant received a Step 1, Informal Counseling Memo for "carelessly disclosing protected health information" Grievant was provided a copy of University Medical Center Policy 707, Violations of Confidentiality. She was advised that "subsequent misconduct may result in further disciplinary action up to and including termination."

On September 11, 2023, Grievant received annual training regarding the University's confidentiality policies. Grievant was informed:

Team members are prohibited from sharing or in any manner disclosing Confidential Information via Social Media in violation of policy.

On January 12, 2024, the Manager informed Grievant, "Facebook post – be mindful of what you post"

Grievant frequently interacted with Patient A and his wife when she scheduled Patient A's surgeries. Patient A and his wife appreciated the quality of Grievant's work and assistance. On January 25, 2024, Patient A and his wife brought to the Facility a gift bag with a candle inside for Grievant. The Manager delivered the gift to Grievant. Grievant was speechless and excited to see the appreciation she had received as a result of her work and friendship with Patient A and his wife. Grievant called the couple to say they really didn't need to do that.

The gift bag had a post-it note attached hand-written by the wife. The note stated:

Just a little "Thank you" for all your help.
[Wife's first name] + [Patient A's first and last name]
[Heart emoji]
[Town Name, State name]

Grievant took a picture of the gift bag without thinking about the note. She posted it on her Facebook page. Grievant wrote, "Nice to see I do something right, from my sweet patient."

Grievant had no business-related reason to post the note on her personal Facebook page. Patient A and his wife knew Grievant had posted the picture on her Facebook page.¹

A team member told the Manager that Grievant had posted a picture of the gift and note on social media. The Manager asked Grievant to remove the posting and she did so. The University investigated the matter.

The February 22, 2024 Formal Performance Improvement Counseling Form showed Grievant was ineligible for rehire in her former department or another UVA department.

CONCLUSIONS OF POLICY

Policy 701 sets forth the Agency's Standards of Performance for its employees. Progressive performance improvement counseling steps include an information 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 that may result in termination without prior progressive performance improvement counseling.

¹ No evidence was presented that Patient A and his wife authorized Grievant to disclose their information on Facebook before it was posted.

University Medical Center Policy HPA-001 governs Confidentiality of Patient Information. This policy defines protected health information ("PHI") as "all individually identifiable health and billing/payment information about a patient regardless of its location or form." "PHI shall only be Used or Disclosed for the purposes of Treatment, Payment or Health Care Operations"

University Medical Center Policy 707 governs Violations of Confidentiality. Confidential information includes protected health information.

This policy defines Disclosure as "the revealing of Confidential Information" and provides:

With respect to Protected Health Information, Disclosure includes, but is not limited to revealing the name of a patient

A Level 3 violation occurs when "an employee deliberately makes an Unauthorized Use or Disclosure of Confidential Information (does not include inadvertent Disclosure)." Examples of Level 3 Disclosures include but are not limited to:

Regardless of privacy settings, posting, communicating or sharing PHI via social media.

The policy specifies corrective action for Level 3 violations of the policy:

Level 3 violations involving PHI or other Confidential Information shall, in most instances, result in termination of employment.

On or about January 25, 2024, Grievant took a picture of a post-it note containing a patient's first and last name, first name of his wife, and town and state where the patient lived. That information was protected health information. Grievant posted that information on her Facebook page and indicated the note was from a patient. Grievant did not have a business-related reason to post the information. Grievant made an unauthorized disclosure of confidential information contrary to University policy. Grievant's disclosure was a Level 3 violation of the University's Violations of Confidentiality policy. The University has presented sufficient evidence to support the issuance of a Step 4 Termination Formal Performance Improvement Counseling. Upon the issuance of a Step 4 Termination, the University may remove an employee. Accordingly, the University's decision to remove Grievant from employment must be upheld.

Grievant sought to resign in lieu of termination. Nothing in the University's policies requires it to accept resignation to forgo disciplinary action.

Grievant argued that the Manager should not have brought the gift to her. Grievant was responsible for her actions once she received the gift even if the Manager should not have brought it to her.

Grievant argued she should not be prohibited from being rehired. Medical Center Policy HR-405 governs Separation from Employment. This policy allows the University to designate a former employee as ineligible for rehire if the employee demonstrates unfitness for the job. Although a lifetime ban seems excessive to the Hearing Officer, there is no policy authorizing the Hearing Officer to limit the University's 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 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 Termination, 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.

² Va. Code § 2.2-3005.

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.