

COMMONWEALTH OF VIRGINIA
Department of Human Resources Management
Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re: Case Number 12050

Hearing Date: January 16, 2024

Decision Date: **February 9, 2024 as amended for typographical corrections on February 13, 2024**

APPEARANCES

Grievant
Agency legal counsel
Agency Representative
Witnesses
Agency observer by consent of the Grievant and the hearing officer.

PROCEDURAL HISTORY

Grievant was a Health Counselor ("DIS") at a Virginia Agency center location. The Agency written notice, issued October 3, 2023, stated 11, 13, and 54 Group III offenses of breach of confidentiality, falsification, -misleading statements and unethical conduct, with the discipline of termination. Grievant timely grieved the disciplinary action by submitting the Grievance Form A on November 3, 2023. Grievant's Form A requested Grievant retain [their] employment back or replace the clause for termination.

EDR appointed the undersigned as the Hearing Officer ("HO") effective December 11, 2023. A Prehearing conference call was held with participation by the Grievant, the Agency advocate, and attorney, and the hearing officer ("HO") on December 14, 2023. The Hearing was held on January 16, 2024 at the Agency location, by agreement of the parties.

ISSUES

1. Whether Grievant engaged in the behavior described in the written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g. free of unlawful discrimination) and policy (e.g. properly characterize as a Group I, II, or III offense)?
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 Agency 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 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:

1. Exhibits.

(a). All proposed exhibits submitted prior to hearing by either party were admitted without objection of the other party as relevant and material to the case. The Grievant adopted the Agency exhibits. The exhibits submitted at the hearing were admitted without objection of either party.

(b). At the hearing, Grievant submitted Agency Exhibit 18, page 11 as their exhibit, which is a medical report dated 08/04/2023 of Grievant stating "...diagnosis of left ankle-protective footwear cam boot... return to work sedentary duty only 08/04/2023 through 09/01/2023 ...must wear the walking boot at all times, No field work until after reassessment at her followup..." Grievant testified she worked while under treatment for the injury.

(c). At the hearing, the Agency representative submitted two exhibits for entry for stated impeachment purposes, numbered Agency exhibits 19 and 20. Exhibit 19, dated 08/22/2022 is a labeled Commonwealth of Virginia email which refers to Grievant but s/he is not stated as a recipient or sender ; Grievant credibly stated at hearing s/he has not previously seen it. Exhibit 20, dated 02/03/2023, is a Written Counseling Memo from an individual with no other source identification and unsigned in the signature places. The Grievant did not object to admission of either exhibit. The Agency and the Grievant testified the source was a different employer; and on their face, the subject matter is of a different nature than the incidents at bar. The HO accordingly assigns little weight to Agency exhibits 19 and 20.

2. The Grievant employment title is Health Counselor, otherwise know as a Disease Intervention Specialist ("DIS"). Grievant's position is described as a "public health staff who is responsible for finding and counseling people with sexually transmitted diseases ("STD")...as well as notifying and locating unaware partners so they can receive confidential and prompt diagnosis and treatment....When a DIS notifies exposed partners, identifying information about the original patient is never disclosed. DIS are trained professionals with the responsibility to protect the confidentiality of the patient and their partners..." Grievant had like experience at a separate agency from 02/25/2022 until their competitive transfer to this agency on 0310/2023.(Grievant statement of prior DIS experience in Agency Ex. 16 pages 30,31; Agency Witness' testimony and Agency Exhibit 1).

3. Grievant had received job training in job duties, responsibilities and protocol, as well as in HIPPA and ethics, having signed acknowledgment of Ethics training on 07/19/2023 (Agency Ex. 6, page 2) and Standards of Conduct training (Agency Exhibit 4). Training was conducted through a variety of modalities including direct instruction, on line instruction, provision of training and regulatory written materials, direct supervision, shadowing, counseling, and coaching (Agency Ex. 16 page 2, Agency testimony), and consultations (Agency Witness' testimony, Agency Exhibits 1-12). Grievant was specifically trained in confidentiality- "...Respect the value and ownership of information received and do not disclose information without appropriate authority unless there is a legal or professional obligation to do so..." (Grievant Executed Agency Ex.6, page 1). Grievant had the knowledge, training, and experience to appropriately apply the principals of confidentiality and DIS protocol to her job duties.

4. Confidentiality is crucial in STD matters, given the sensitive, private, confidential, potentially scandalous, potentially of legal concern, and the potentially controversial nature of sexually transmitted diseases.

5. Grievant was disciplined in one incident commencing July 27, 2023 for violation of Agency policies and procedures regarding a case assignment, including on confidentiality, HIPPA, failure to follow supervisor's instructions, unsatisfactory performance, and related standard of conduct requirements. The parties do not dispute that Grievant discussed STD matters with the patient's daughter on more than one occasion (Agency Ex. 12, page 1) with Grievant acknowledging knowledge that Grievant was speaking not with the patient but with her daughter (Agency Ex.12, 13, 15, 16). The Agency documented its directive to Grievant of proper procedure to follow in this case, and concluded Grievant did not follow those directives, and breached confidentiality. The Agency also raised concerns about Grievant's failure to properly and timely examine and report the medical record, including weight. (Testimony and rebuttal statement Agency Ex.15, page 6, 29). Grievant included as possible explanations, mitigators or defenses that s/he was conducting permissible cluster interviews, that s/he was explaining how syphilis works, that she was verbally informed but did not see that daughter was patient's POA, that she was asking if the CSF test had been administered, and that although Grievant explained to daughter what syphilis could do to one's body, s/he did not discuss patient's care, treatment, or staging, the daughter already knew the patient had an STD and that she had never before had such a case where the patient was unable to communicate.

A. Agency witnesses testified credibly and referred to the policy exhibits, that Grievant's conduct was not permissible cluster interviews to determine partners but violative breaches of confidentiality; that even with a written POA provided, the Agency could still determine not to breach confidentiality; that Grievant wrongfully did not follow the protocol when a patient is non-communicative; wrongfully held STD discussions with said daughter under the circumstances; was properly trained and did not follow the procedural and protocol directives provided to Grievant specific to this case (Witness' testimony, Agency Ex. 16).

B. Agency witnesses testified credibly that interviews to determine the contacts the patient has had with partners are known as cluster interviews.

C. The Agency on or about 08.10/2023 ordered Grievant to not make any more movement on the case due to work performance issues (Witness testimony, Agency exhibits 13, 15).

6. The Agency acknowledges, and the HO finds that DIS employees, including Grievant, are subjected to, difficult and potentially dangerous challenging situations and persons.(Agency Ex.1, 7).

7. Grievant was also disciplined for an unrelated violation of Agency policies and procedures, of failure to follow a supervisor's instructions and/or policy, falsification-misleading statements and unethical conduct regarding like incidents on July 5, 2023 and August 14, 2023. Grievant does not dispute that s/he inaccurately identified him/herself in the field as a "friend" rather than an Agency employee; with Grievant stated rationale of establishing rapport with challenging persons. The second like incident occurred after Agency counseling and Agency directive to not again commit this "friend" terminology violation, and instead to provide Agency identification. The second violation occurred in the presence of an Agency Regional STD Coordinator. Agency witnesses, testified that this deception was a major Agency violation since Grievant was on official Agency business but again misrepresented herself as a friend, and showing personal ID rather than Agency ID put their safety at risk. Further, Grievant inaccurately told the Coordinator this was the first occasion they used the word "friend" in the field; that Witness stated that inaccuracy made Witness lose trust in Grievant since Grievant at times would work in the field alone.(Witness' testimony, Grievant written statements, Agency exhibit 15 page 6).

CONCLUSIONS OF POLICY

1.Employee Offenses :Unacceptable behavior is divided into three types of offenses , according to their severity, as per the Virginia Department of Human Resource Management ("dhrm") Attachment A: Policy 1.60.

Group I Level offenses "include acts of minor misconduct that require formal disciplinary action".

Group II Level offenses " include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action".

Group III Level offenses "...generally include acts of misconduct, violations of policy or performance that is of a most severe nature and significantly impacts agency operations...or serious violations of policy, procedures or laws ...First Offense: Discharge. In lieu of discharge the agency may suspend without pay for up to 30 workdays; and/or Demote or transfer with disciplinary salary action of at least 5%..."

A . Applicable Standards of Conduct include failure to comply with agency policies and procedures, failure to follow supervisor's instructions, falsification of official records, unethical conduct, HIPPA health violations, and unsatisfactory performance.

2. *Division of Disease Prevention, Office of Epidemiology, Security and Confidentiality Policies and Procedures (S&C)* -Virginia Department of Health. The stated mission of the Division [Agency] is "...to maximize public health and safety through the elimination, prevention, and safety through the elimination, prevention, and control of disease ...[including] sexually transmitted diseases... The surveillance of... STD's [other listings omitted] are principle functions used to shape the Division's prevention and treatment activity. This document includes security and confidentiality policies and procedures for management of patient level data..."(Agency Ex. 3, page 9). "...The S&C Policies and Procedures is intended to ensure privacy, confidentiality, and security principles of the Division's patient level information..." (Id. Page 10).

3. Virginia Department of Health (VDH) selected provisions:

A. Confidentiality policy # 01.07.101-VDH- VDV personnel shall limit disclosure or confidential information to only authorized persons.

B. Code of Ethics# 01.06.103-

(1) Comply with agency policy and law regarding privacy, confidentiality, and inappropriate release of sensitive patient, client, employee or emergency preparedness information...". Respect the value and ownership of information received and do not disclose information without appropriate authority unless there is a legal or professional obligation to do so..."

(2). Be honest and trustworthy.

(3). Demonstrate commitment to full compliance with VDH, state, and federal laws, regulations, requirements, and procedures.

(4). Maintain confidentiality of sensitive patient and client information.

C. STD Field Operations Manual ("FOM")/Field Investigation Standards: Division of Disease Prevention/Office of Epidemiology:

(1).VI. Thorough record searches should always be conducted before any field activity (page 4).

(2).VI. Ensure confidentiality of all patients (page 4)

(3) VI. If the patient is not at home, the DIS should not divulge any information why the DIS is looking for the individual.

(4). VI. Field Identification Standards: Identification badge not worn in plain sight but available when needed.

(5). V. Principles of an Investigation: Conduct a thorough investigation, ensure confidentiality of all patients and utilize communication skills.

(6). VII. Notifications: Be aware of caller ID and potential concerns with confidentiality and verify that you are talking to the correct person by verifying personal information.

4. Virginia Commonwealth Standards of Conduct Policy 1.60 /DHRM

(1)"...Minimum expectations for acceptable workplace conduct and performance [include] perform assigned duties and responsibilities with the highest degree of public trust...make work related decisions and or take actions that are in the best interests of the agency... conduct themselves at all times in a manner that supports the mission of the agency and the performance of their duties...and comply with the letter and spirit of all state and agency policies and procedures, the Conflict of Interest Act, and Commonwealth laws and regulations..."

5. The Hearing Officer finds that, by a preponderance of the evidence, under the facts in this case and in violation of the applicable regulatory standards, that the Grievant engaged in the behavior described in the written notice, that the behaviors at issue constituted misconduct, and that the Agency's discipline was consistent with law and policy. The agency had taken prior progressive action with counseling, resources, the opportunity to improve Grievant's job performance, and further training; which was not effective in this case. Further, the violations are of a most serious nature and significantly impacts agency operations, where this Agency mission and purpose is to serve the public in the goal of maximizing public health and safety.

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6. Mitigation. 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. 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...". In this case, after careful consideration of the record, witnesses, and party positions, and the applicable standards, the hearing officer finds no mitigating circumstances exist to reduce or remove the disciplinary action. Thus, the Agency had proper cause to terminate the Grievant's employment under the applicable criteria.

DECISION

For the reasons stated above, the Agency's issuance to the Grievant of a Group III disciplinary action of Termination 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 Street, 12th Floor
Richmond, VA 23219

or send by email 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 day calendar day period has expired or when requests for administrative review have been decided.

A challenge that the hearing officer decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing officer decision is not in compliance. A challenge that the hearing officer 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. Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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].

Lois N. Manes

Lois N. Manes, Esq.
Hearing Officer