Issues: Performance Improvement Counseling with 1-day suspension (failure to properly document diaper changes) and Performance Improvement Counseling with termination (leaving a child on the playground); Hearing Date: 12/04/02; Decision Date: 12/06/02; Agency: UVA Health System; AHO: David J. Latham, Esq.; Case No.: 5586

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5586

Hearing Date: December 4, 2002
Decision Issued: December 6, 2002

PROCEDURAL ISSUES

As part of her grievance, the grievant included a Performance Improvement Counseling given to her on August 28, 2002. The agency head denied qualification of that issue for hearing because the grievant failed to file her grievance within 30 days of the date on which she was counseled.[1]

Grievant had initially alleged that the agency eliminated her position improperly, placed her in a hostile work environment and retaliated against her for joining a union. However, during the second resolution step, grievant withdrew these allegations. During the hearing, grievant's attorney reaffirmed that grievant is not pursuing these allegations; rather, she is contesting only her removal from employment and the disciplinary actions of September 6 & 12, 2002.

[1] Section 2.2, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual,* effective July 1, 2001 provides that a written grievance must be initiated within 30 calendar days of the date that the employee knew, or should have known, of the event that formed the basis of the dispute.

APPEARANCES

Grievant
Attorney for Grievant
Director of Employee Relations
Director of Child Care Center
Seven witnesses for Agency

ISSUES

Did the grievant's actions warrant disciplinary action under the Standards of Performance policy? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Performance Improvement Counseling for failing to properly document diaper changes.[2] Grievant was suspended for one day as part of the disciplinary action. Grievant also filed a timely appeal from a Performance Improvement Counseling and termination of her employment for leaving a child on the playground.[3] Following a denial of relief at the third resolution step, the agency head qualified both grievances for a combined hearing.[4]

The University of Virginia Health System (Hereinafter referred to as agency) has employed the grievant for six years, first as a temporary employee for four years, and then as a full-time office services specialist beginning in December 2000.[5] Until August 2002, she was employed in the medical records department pulling and filing medical documents and charts. In July 2002, the agency eliminated grievant's position in the medical records department. Grievant was offered the opportunity to apply for over 100 job openings in other areas of the Health System. She applied for a part-time opening as a child care assistant in the Child Care Center. Grievant was interviewed and selected for the job, based on her experience as a parent of four children, two years of experience in a day care center,[6] and because she asserted that she would not need training in child care. At that time, there were two part-time openings for

[2] Exhibit 21. Performance Improvement Counseling, issued September 6, 2002.
[3] Exhibit 21. Performance Improvement Counseling, issued September 12, 2002.
[4] Exhibit 21. Grievance forms A, filed October 4, 2002.
[5] Exhibit 1. Reassignment Profile Sheet, July 9, 2002.
[6] Exhibit 2. Candidate resume, July 16, 2002.

child care assistants. The agency opted to combine the two part-time positions into one full-time position and placed grievant in the newly created position.

Among the essential functions of a child care assistant are: watching over the safety, welfare and cleanliness of children, and assisting with record keeping to include daily logs.[7] Grievant began work in the Child Care Center on August 5, 2002 and was given the same orientation as other new employees.[8] She was given verbal instruction and written material such as the Staff Handbook, which outlines the responsibilities of Child Care Center employees. Grievant was also advised of the Virginia Department of Social Services regulations that set forth minimum standards for licensed day care centers. Those regulations provide, in pertinent part:

> **Children under 10 years of age always shall be within actual sight and sound supervision of staff**, except that staff need only be able to hear a child who is using the restroom provided that …[9] (Emphasis added)
>
> For each infant, the center shall post a daily record which can be easily accessed by both the parent and the staff working with the child. The record shall contain the following information:
> a. The amount of time the infant slept;
> b. The amount of food consumed and the time;
> c. A description and time of bowel movements; and
> d. Developmental milestones.[10]
>
> When a child's clothing or diaper becomes wet or soiled, it shall be changed immediately. … The diapering surface shall only be used for diapering or cleaning children, and it shall be washed with soap and warm water or a germicidal cleansing agent after each use.[11]

From the outset of grievant's employment, it became apparent that grievant was forgetting the importance of documentation. Grievant's supervisor and the director reminded her of the necessity to document the times of diaper changes and feeding. In the second week of her employment, grievant was observed diapering a child on a surface other than the designated diaper-changing stations. Grievant did not use the changing stations because both were in use when her infant's diaper needed changing. The Center director counseled grievant in writing about this incident.[12] Grievant's documentation of feeding and diapering continued to be unacceptable to the director. The director

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[7] Exhibit 3. Role description, *Child Care Assistant*, effective October 4, 1998.
[8] Exhibit 4. Orientation Checklist for Grievant, August 5, 2002.
[9] Exhibit 6. 22 VAC 15-30-430.E, *Supervision of Children.*
[10] Exhibit 6. 22 VAC 15-30-490.E, *Communication*.
[11] Exhibit 6. 22 VAC 15-30-575.B.3 & 6*, Diapering*.
[12] Exhibit 9. Letter from Center director to grievant, August 13, 2002.

gave grievant a formal counseling in late August.[13] By September 6, 2002, the Center director continued to observe deficiencies in grievant's documentation and issued a second formal counseling and a one-day suspension.[14]

Late in the morning of September 12, 2002, grievant had taken three toddlers (6-16 months) to the playground just outside the Center.[15] After a time, another child care assistant brought one of her toddlers to grievant and asked if grievant would watch the child. Grievant accepted responsibility for the additional child. When playtime ended and lunchtime was approaching, grievant brought her three toddlers back into the building. She did not bring the fourth toddler that had been placed in her custody by the other child care assistant. Grievant returned to her own classroom. The other assistant happened to look out her classroom window when grievant was walking toward the building. She noticed that grievant did not have with her the fourth child that she had placed in grievant's custody. She located another teacher to watch the children in her classroom and then went to retrieve the fourth toddler. Approximately two to five minutes elapsed between the time grievant came into the building and the other child care assistant retrieved the fourth toddler. Grievant did not tell anyone that the fourth toddler was missing.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2.3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between

[13] Exhibit 11. Performance Improvement Counseling form, August 28, 2002.
[14] Exhibit 15. Performance Improvement Counseling form, September 6, 2002.
[15] Testimony varied as to whether grievant had two, or three toddlers in her custody on this date. However, the number is not relevant to the issue for which grievant was disciplined.

state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[16]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training[17] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The agency has promulgated its own policy regarding Standards of Performance. The policy provides that performance issues such as failure to follow applicable policy or to meet performance expectations are subject to a four-step process consisting of informal coaching, formal counseling, suspension, and termination of employment. Serious misconduct such as patient neglect is subject to immediate removal from employment without prior counseling.[18]

Grievant was discharged because she neglected to maintain sight and sound supervision of a toddler for whom she had accepted care, custody and control on September 12, 2002. As a child care assistant, grievant knew that the primary essential function of her job was to watch over the safety and welfare of children placed in her custody. After accepting custody of a young toddler on September 12, 2002, grievant left him behind on a playground and returned to her classroom without notifying anyone, and without determining where the child was. Such conduct amounts to neglect of an infant and is clearly an offense that warrants removal from employment.

Grievant contends that she looked for the child before leaving the playground but did not see him. She assumed that the other child care assistant had retrieved the child without grievant's knowledge. Grievant then returned to her classroom but failed to ascertain where the child was. If grievant believed that the other assistant had retrieved the toddler, grievant should have immediately checked to determine if her assumption was correct. There are two possible explanations for grievant's actions. First, grievant may have done

[16] § 5.8, EDR *Grievance Procedure Manual*, effective July 1, 2001.
[17] Now known as the Department of Human Resource Management (DHRM).
[18] Exhibit 13. Agency Policy # 701: *Employee Rights and Responsibilities*, effective October 4, 1998, revised June 13, 2001.

exactly what she contends – assume without checking that someone else had the child. If this is so, such conduct is negligent – negligence being defined as the failure to exercise the care which an ordinarily prudent person would use under the circumstances. The second possibility is that grievant may have forgotten that she had the fourth child in her custody. Even though this is not an intentional offense, it nevertheless constitutes negligence.

Grievant's recollection is that when she left the playground, there were no children or adults there – that the playground was entirely empty. However, two witnesses testified credibly that another child care assistant, her aide, and eight of their children were still on the playground. Thus, when grievant left the playground there were a total of 11 people (including the fourth toddler) still on the relatively small playground area. If grievant forgot that there were so many people still in the playground, it may well be that she also forgot that she had been given custody of a fourth toddler.

From the grievant's demeanor and testimony at the hearing, it is clear that she is a very caring person and would not deliberately neglect the care of a child. She has raised four children and previously worked in a day care center. She therefore has ample experience caring for children and it is presumed that she did so successfully. For these reasons, it is not conceivable that grievant would have been so uncaring as to not check on the whereabouts of a child that is suddenly missing from her care. It is more likely than not that grievant may have forgotten about the fourth toddler. In either case, however, the failure to immediately ascertain the toddler's whereabouts is sufficiently negligent that the agency had no alternative but to remove grievant from her position as a child care assistant.

This incident standing alone is sufficient to warrant removal. If more is needed, the agency has demonstrated by a preponderance of evidence that grievant's repeated failure to document required events warranted the performance counseling and suspension imposed on September 6, 2002. Grievant acknowledged on more than one occasion during the hearing that she should have documented when she was checking diapers in addition to when she changed them.

Grievant argues that even if removal from her position is necessary, that the agency should not terminate her employment. She relies on the agency's transfer policy, which provides guidelines for the *voluntary* transfer of employees within the Medical Center.[19] It is undisputed that grievant's placement in the child care assistant position was *involuntary*. Her existing job had been abolished and therefore it was not grievant's choice to move into a different job. Accordingly, the purpose and policy statement of Policy # 166 make clear that this policy is not applicable to grievant's situation. However, even if one were to interpret this

[19] Exhibit 18. Agency Policy # 116: *Promotion and Transfer*, effective October 4, 1998, revised March 17, 2002.

policy to be applicable, it affords grievant little comfort. The policy provides for a "competency assessment period" of 90 days during which the supervisor determines whether the employee meets the skills, knowledge and performance expectations of the position. If the employee does not meet these factors, the employee may be demoted, transferred, or removed from employment. While it also provides for the possibility of placement in a suitable vacancy, the ultimate result is termination of employment if no suitable vacancies are found within a 90-day period.

A second agency policy, addressing reductions in force, establishes methodology for handling reductions in staff due to such factors as reduced patient volumes or reorganization of services that may necessitate the elimination of one or more positions.[20] The agency contends that this policy is not applicable because grievant's position was abolished due to a "realignment." However, the agency concedes that it does not have a "realignment" policy. Policy # 407 provides that employees whose positions have been identified for elimination will be given support in identifying vacant positions within the Medical Center, and will be expected to interview for the positions. This is precisely the process that grievant went through when Human Resources helped her identify the child care assistant vacancy, and arranged an interview for her. Therefore, semantics aside, it is concluded that grievant's position in medical records was abolished due to a reduction in force. One may choose to label it a "realignment," but a rose by any other name is still a rose. However, this policy also provides no assistance to grievant. While it is clear that the abolishment of her position in medical records was a reduction in force, her discharge from the Child Care Center was not a reduction in force. Rather, it was a dismissal due to performance issues, pursuant to the Standards of Performance policy.

It must be noted that grievant selected the child care position from among over 100 vacancies in the agency. She interviewed for the position, presumably understood what the position entails, averred that she had relevant experience, and said she did not require any training for the job. Thus, grievant was not forced into accepting this position. She applied for it and voluntarily accepted the position. Unfortunately, while grievant may have enjoyed child care, she failed to meet the performance expectations of the position.

DECISION

The disciplinary action of the agency is affirmed.

The termination of grievant's employment on September 12, 2002 is hereby UPHELD.

[20] Exhibit 19. Agency Policy # 407: *Reduction in Force*, effective October 4, 1998, revised May 14, 1999.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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.[21]

[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]

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David J. Latham, Esq.
Hearing Officer

[21] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.