Issue: Written Notice (Formal Performance Improvement Counseling Form) with Suspension (dress code violation), and Written Notice (Formal Performance Improvement Counseling Form) with Termination (failure to improve job performance); Hearing Date: 07/23/07; Decision Issued: 07/31/07; Agency: UVA Health System; AHO: William S. Davidson, Esq.; Case No. 8639; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: HO Reconsideration Decision request received 08/14/07; Reconsideration Decision issued 08/30/07; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 08/15/07; Outcome pending.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8639

Hearing Date: July 23, 2007
Decision Issued: July 31, 2007

PROCEDURAL HISTORY

On April 23, 2007, the Grievant was issued a Formal Performance Improvement Counseling Form of Disciplinary Action with suspension for twenty-four (24) hours regarding a dress code violation, refusal to comply and return to work, defiance of the overtime policy and belligerent behavior towards her Supervisor. She was placed on a performance warning from April 23, 2007 through July 16, 2007. Subsequently, on May 7, 2007, the Grievant was issued a second Formal Performance Improvement Counseling Form and was terminated because she caused two (2) employees from the Information Services area to spend several hours to solve a system error that in fact did not exist in order to cover a mistake that the Grievant had made.

On May 8, 2007, the Grievant timely filed a Grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On June 27, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 23, 2007, a hearing was held at the Agency's location.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUE

1. Whether the Grievant engaged in the behavior described in the two Formal Performance Improvement Counseling Forms?

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 Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. 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 Health System employed the Grievant as a Patient Access Specialist. She was responsible for "overall patient flow in the Department of Radiology." [1] She was removed from employment effective May 7, 2007.

On April 20, 2007, the Grievant met with her Supervisor because her Supervisor was concerned over the Grievant's dress on that day. The Grievant was wearing a t-shirt which specifically is not allowed in the Department where the Grievant works.[2] The Grievant was told by her Supervisor to return to her home and change her clothing and then report back to work on that same day. The Grievant was belligerent and told her Supervisor that if she went home, she would not return. In fact, the Grievant did leave and did not return. On the next following work day, April 23, 2007, the Grievant was issued a Formal Performance Improvement Counseling Form and was placed on a Performance Warning from April 23, 2007 through July 16, 2007. The Grievant was also suspended for three (3) work days or twenty-four (24) work hours.

[1] Agency Exhibit 1,Tab 8

[2] Agency Exhibit 1,Tab 6

On May 3, 2007, the Grievant sent an Order from her computer notifying a technologist of what procedure was to be performed for a particular patient. Approximately five (5) minutes later, the Grievant sent a note, which would be appended to the original Order. The Order, when sent, automatically printed at the technologist's station so that he/she knows what to do. The note did not print and, accordingly, the technologist was unaware of that note unless he/she force printed the original Order that was entered. The Grievant denied to her Supervisor that she sent the note after the original Order and continued to deny the chronology of the sent documents even after being presented with a system audit showing the time line in which things were processed through the computer. [3]

A Predetermination Meeting was held and the Grievant was presented with an opportunity to explain what she thought had occurred regarding the original Order and the note entry. The Grievant continued to be belligerent. She did not want to talk to anyone including her Supervisor about this and continued to maintain that she had sent things in the proper order.

CONCLUSIONS OF POLICY

University of Virginia Medical Center Policy #701, *Employee Rights and Responsibilities*, provides for a series of steps when University staff believe and employee's work performance is inadequate:

> The Medical Center may use a process of performance improvement counseling to address unacceptable performance when appropriate, except in cases of serious misconduct where suspension or termination is warranted. The purpose of the performance improvement counseling process is to correct the problem, prevent recurrence, and prepare the employee for satisfactory service in the future.
> ***
> Performance improvement counseling steps include informal coaching, formal (written) performance improvement counseling, suspension and/or performance warning, and ultimately termination.
> ***

A. Informal Coaching

If performance issues develop once a staff member has completed his/her probationary period, the Supervisor will bring these issues to the attention of the employee in an informal coaching session. The session should take place as soon as possible after the deficiency is noted, and in most cases should be conducted in private.
***

B. Formal (Written) Performance Improvement Counseling

[3] Agency Exhibit 1, Tab 7

If the performance issue persists subsequent to informal coaching, formal performance improvement counseling may be initiated. The severity of the performance issue may warrant formal counseling without prior informal coaching.
***
The employee will receive a Performance Improvement Counseling Form documenting the expectations for performance improvement, the time frame for the improvement, and action to be taken if the employee fails to achieve and maintain the required performance level.

C. Suspension

A disciplinary suspension of up to five (5) working days would normally be applied progressively after at least one formal performance improvement counseling.
***
The suspension must be documented on a Performance Improvement Counseling Form indicating the date and time the suspension begins and ends.

D. Performance Warning

A performance warning is issued to specify a period of time (not to exceed 90 days) during which the employee is expected to improve or correct performance issues and meet all performance expectations for their role, or face termination.
***
The performance warning should be documented on a Performance Improvement Counseling Form stating how the employee fails to meet expectations, what must be done to meet expectations, and the time frame for achieving expectations. It will document that unsatisfactory progress, or failure to meet all performance expectations at any time during the performance warning period will normally result in termination.
***
Termination will be documented on a Performance Improvement Counseling Form for the personnel file and a copy of the documentation should be given to the employee.

Beginning April 23, 2007, the Grievant was working subject to a Performance Warning. She was obligated to meet all of the performance expectations for her position. Otherwise, she could be removed from employment.

On May 7, 2007, the Grievant failed to meet all of the performance expectations of her position for several reasons. First, the Grievant did not follow the proper procedure in entering data into her computer system, thereby creating a situation where the technologist did not have all of the information that he/she needed in the original Order to properly guide the patient through the system. Further, the Grievant, when given an opportunity to present her position on what happened, was belligerent, denied that she had done anything wrong, even in the face of a time line produced by the system showing that she clearly entered the data in the wrong sequence and refused to communicate with her Supervisor on how this might be corrected in the future.

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 Employment Dispute Resolution..." [4] 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.

The Hearing Officer finds no basis for mitigation in this matter. The Grievant was disciplined properly. In addition, the Grievant had received two (2) prior Formal Performance Improvement Counseling Forms for prior matters. The first on September 15, 2005 and the second November 10, 2005.[5]

DECISION

For reasons stated herein, the Agency's issuance to the Grievant of a formal Performance Improvement Counseling Form with removal is **upheld.**[6]

APPEAL RIGHTS

You may file an administrative review request within **15 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. Please address your request to:

[4] Va. Code § 2.2-3005

[5] Agency Exhibit 1, Tabs 4&5

[6] Because the disciplinary action is upheld, there is no basis to change the Grievant's eligibility for rehire.

Director
Department of Human Resource Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main Street, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[7] 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.[8]

[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]

_____
William S. Davidson
Hearing Officer

[7]An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8639

Hearing Date:	July 23, 2007
Decision Issued:	July 31, 2007
Reconsideration Request Received:	August 14, 2007
Response to Reconsideration:	August 30, 2007

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the Hearing Officer. A copy of all requests must be provided to the other party and to the EDR Director. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request. [9]

OPINION

The Grievant seeks reconsideration of the Hearing Officer's decision based on newly discovered evidence and the allegation of an incorrect legal conclusion in the Hearing Officer's original Decision. The Grievant offers as newly discovered evidence a recollection by the Grievant that there was an e-mail sent to all employees of the University of Virginia Medical Center Employers regarding the events that took place at Virginia Tech and a subsequent day of mourning that would take place.

The use of after discovered or newly discovered evidence that was not available at the time of the trial or hearing is a concept that has been well-discussed and defined by the Courts of the Commonwealth of Virginia. A motion to reconsider or to grant a new trial based on newly discovered evidence is a matter submitted to the sound discretion of the Circuit Court (herein the "Hearing Officer") and will be granted only under unusual circumstances after particular care and caution has been given to the evidence. [10]

[9] §7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

[10]Commonwealth v. Tweed, 264 Va. 524, 528, 570 S.E. 2d 797, 800 (2002); Stockton v. Commonwealth, 227 Va. 124, 149, 314 S.E. 2d 371, 387 (1984).

A moving party's burden of proof before the Circuit Court based on newly discovered evidence is well established. The moving party must establish that such evidence:

> (1) Appears to have been discovered subsequent to the trial; (2) could not have been secured for use at the trial in the exercise of reasonable diligence by the movant; (3) is not merely cumulative, corroborative or collateral; and (4) is material, and such as should produce opposite results on the merits of another trial.[11]

The Grievant makes no reasonable proffer to the Hearing Officer as to why this e-mail could not have been secured prior to the hearing. The Grievant states that she did not have access to her computer at the time of the hearing. However, the Grievant, who chose to be unrepresented at this matter, could have requested discovery of this document at any time prior to the hearing. The Hearing Officer would find that there is no evidence that this e-mail could not have been secured by the Grievant prior to the hearing with the exercise of minimal diligence, much less reasonable diligence. However, the Hearing Officer does not have to reach this decision as the Agency has voluntarily provided the Hearing Officer with a copy of the e-mail. That e-mail is attached to this Decision as Hearing Officer Attachment 1. The second full paragraph of that attachment reads as follows:

> "As always, we want to present a professional appearance for our patients and guests tomorrow. The wearing of ribbons or maroon and orange clothing, other than tee-shirts and sweatshirts, will allow us to show our support in a professional way as well as comply with our dress code."

Clearly the Grievant was, once again, on notice that tee-shirts were not acceptable.

The Grievant, by her counsel, attempts to imply that the policy for the entire Medical Center did not prohibit tee-shirts. That is set forth in Medical Center Policy number 0051. Counsel for the Grievant does not point out that policy contains the following language:

> "Additional items of inappropriate attire or personal appearance may be designated by specific Department requirements to meet appropriate patient care service needs."

While the Grievant's department may have been the only department at the Medical Center to have such a policy, it clearly had the authority to adopt such a policy and the Grievant was on notice of that policy.

Accordingly, while the Hearing Officer does not deem the attached e-mail to be newly discovered evidence, it clearly shows that the Grievant was, once again, on notice that tee-shirts were not permissable in her department and, even if she did ask to put on another piece of clothing to cover the tee-shirt, she could not use that offer as an excuse for violating policy for which she was on notice.

The Grievant, by counsel, alleges that there has been a violation of Medical Center Human Resources policy number 701. The Hearing Officer finds that no such violation has occurred. This policy provides that a performance issue may warrant formal counseling without prior informal counseling. This policy requires that, prior to taking a formal disciplinary step, the

[11]Odum v. Commonwealth, 225 Va. 123, 130, 301 S.E. 2d 145, 149 (1983).

Supervisor must meet with the employee to conduct a pre-determination meeting. This took place in this matter. The purpose of that meeting is to review the facts and to provide the employee with an opportunity to respond. In this case, the Grievant chose not to respond in any constructive manner. Subsequently, the Grievant was provided with a Formal Performance Counseling Form on April 23, 2007. The Grievant refused to sign the form and that form gave her the specific matters for which she received this form and it set forth a probationary period for which any further incident would lead to her termination.

Subsequently, the Grievant, when a mistake was made, refused to even acknowledge the possibility of a mistake. The issue present was not the training that the Grievant had, but the Grievant's inability to acknowledge that an error had been made, even in the face of overwhelming evidence that an error was made.

DECISION

The newly discovered evidence, which the Grievant requested that the Hearing Officer re-open the hearing for, has been provided. It does not in any way help the Grievant. Indeed, the e-mail clearly establishes that the Grievant was on notice that tee-shirts were not acceptable clothing. Further, the Hearing Officer finds that, after consideration of the matters raised by counsel for the Grievant, there is no evidence of incorrect legal conclusions. The Hearing Officer has carefully considered the Grievant's arguments and concludes that there is no basis to change the Decision issued on July 31, 2007.

APPEAL RIGHTS

A Hearing Officer's original decision becomes a **final hearing decision,** with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the Hearing Officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. [12]

[12] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

_____

William S. Davidson
Hearing Officer