Issue: Formal Performance Improvement Counseling Form with Removal (patient neglect); Hearing Date: 06/03/10; Decision Issued: 07/13/10; Agency: UVA Health System; AHO: John V. Robinson, Esq.; Case No. 9241; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 07/27/10; Reconsideration Decision issued 08/10/10; Outcome: Original decision affirmed; Judicial Review: Appealed to Charlottesville Circuit Court on 09/08/10; Outcome pending.**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9241

Hearing Officer Appointment: December 9, 2009
Hearing Date: June 3, 2010
Decision Issued: July 13, 2010

PROCEDURAL HISTORY, ISSUES AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge termination of her employment effective October 6, 2009, pursuant to a Formal Performance Counseling Form, dated October 6, 2009 by Management of University of Virginia Health System (the "Department" or "Agency"), as described in the Grievance Form A dated October 8, 2009.

In her Compliance Ruling of Director dated April 7, 2010, essentially, the Director of the Virginia Department of Employment Dispute Resolution ("EDR") upheld the pre-hearing decisions of the hearing officer, certain of which both parties had appealed to EDR on an interim or interlocutory basis before the hearing.

In the meantime, by letter dated February 19, 2010, the Grievant's recently retained attorney informed the hearing officer and the Agency's attorney that he had been retained as legal counsel for the Grievant. Accordingly, the parties duly participated in a fourth pre-hearing conference call scheduled by the hearing officer on April 22, 2010 at 10:00 a.m. The Grievant's attorney, the Agency's attorney and the hearing officer participated in the call. The Grievant is seeking the relief requested in her Grievance Form A, namely, reinstatement and previously confirmed during an earlier conference call that she is also seeking back-pay and restoration of all benefits.

Following the fourth pre-hearing conference call, the hearing officer issued a Fourth Pre-Hearing Conference Call Status Report and Scheduling Order entered on April 23, 2010 (the "Scheduling Order"), which is incorporated herein by this reference. The hearing was duly held on June 3, 2010 and the parties, by counsel, submitted closing briefs instead of closing argument by 5:00 p.m. on June 25, 2010.

At the hearing, the parties were represented by their respective attorneys. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing[1].

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant was a registered nurse for the Agency, previously employed by the Agency for approximately 9-10 months before the termination of her employment by the Agency.

2. The Grievant came on duty on the night of September 30, 2009 at 7:00 p.m. The Grievant's shift (the "Shift") ended at 7:00 a.m. on October 1, 2009.

3. During her shift, the Grievant was responsible for the care of a diabetic patient ("JB") who had previously had both legs amputated, and who was subject to the Agency's Nursing Protocol for Insulin Infusion in Acute Care (the "Protocol"). AE 4.

4. On the night of September 30, 2009 when the Grievant began her shift at 7:00 p.m., JB was on an insulin drip which was infusing at 6 units an hour. The Grievant signed off on the daily Acute Care Insulin Infusion Flow Sheet (Agency Exhibit 2) signifying that she was aware of the drip. The Protocol and the policy on the Grievant's floor both dictate that patients on an insulin drip must have their blood glucose level checked every hour with the nurse and the patient care assistant ("PCA") alternating checks. AE 4.

[1] References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number.

5. While the PCA may perform the checks, the ultimate responsibility for monitoring the patient's blood glucose levels lies with the nurse.

6. The applicable chart, the "Patient Results by Patient" chart, shows that the Grievant never checked JB's blood glucose level at all during the Shift and that checks were not performed hourly, as required by policy. AE 2.

7. The "Patient Results by Patient" chart shows an alarming drop in JB's blood sugar from 257 mg/dl at 10:09 p.m. to 98 mg/dl at 12:25 a.m. AE 2.

8. One of the Grievant's responsibilities as a nurse was to be aware of her patient JB's condition. When JB's blood sugar dropped from 257 mg/dl to 98 mg/dl in consecutive checks a drop of 159 mg/dl, the Protocol dictated that the infusion was to be decreased by 50%. AE 4.

9. The Grievant admitted in her testimony at the hearing that she was familiar with the Protocol and that she had the Protocol folded in her pocket.

10. The Grievant's supervisor, the Agency's Director of Clinical Operations (the "Director"), testified that where the drop in blood glucose levels is so drastic, turning off the drop entirely would be the prudent thing to do. The Grievant did not decrease the drip or turn it off.

11. An hour and 13 minutes later, at 1:38 a.m., Ms. L., a PCA, realizing the seriousness of the situation, returned to check JB's blood glucose level and found that it had dropped dangerously low to a critical level of 44 mg/dl.

12. The Protocol dictates that hypoglycemia treatment should have started once the blood glucose level has dropped to 80 mg/dl. AE 4.

13. JB's speech was garbled and incoherent; he was sweating profusely; he was in and out of awareness; and he was not able to eat or drink.

14. In spite of this and in contravention of the Protocol, the Grievant tried to get JB to drink orange juice.

15. JB could not actively drink and swallow and when orange juice was poured into his open mouth, the juice simply dripped down his chin.

16. The Protocol states that if the patient is unable to eat or drink, the medical staff is to give an injection of Dextrose 50%.

17. After a quick assessment of the situation, the Charge Nurse stopped the attempted administering of juice to JB and removed the D-50 from the Pyxis medicine dispenser and handed it to the Grievant for her to administer.

18. A physician was consulted to fully assess the situation and shortly JB recovered from the hypoglycemia.

19. The Charge Nurse testified that the Grievant's actions could have harmed JB by causing him to aspirate the orange juice.

20. Applicable policy required that the Grievant document this entire episode of JB's patient care in the medical record, including JB's hypoglycemic incident. AE 7.

21. The Grievant agreed in the hearing that the episode should have been documented.

22. However, the Grievant failed to document JB's hypoglycemic incident in his medical record.

23. The Director explained that one important purpose behind Agency Policy No. 0094 (AE 7) was obviously to provide for continuity and consistency of patient care in keeping the next nurse or any physician informed about any care or occurrences concerning JB.

24. While apparently JB did not suffer any permanent injury, the hypoglycemic episode clearly constituted a serious negative result in his treatment plan which applicable policy required to be documented in his medical record. The Grievant agreed at the hearing that the incident should have been documented in JB's medical record.

25. The hearing officer finds that the Grievant did have access to the JB's chart.

26. The testimony of the Agency witnesses was credible. The demeanor of such witnesses was open, frank and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. Code § 2.2-3000(A) 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 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. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The operative Agency Standards of Conduct (the "SOC") are contained in Agency Human Resources Policy No. 0701 (effective January 1, 2009). AE 6. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC 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 task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g.*, *Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

Pursuant to Policy No. 0701 and consistent with the SOC, the Grievant's conduct could clearly constitute a terminable offense, as asserted by the Agency. AE 6.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's attorney that the Grievant's disciplinary infractions justified the termination by Management. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a terminable offense.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department apparently did not consider mitigating factors in disciplining the Grievant.

While the Grievant did not specifically raise mitigation in the hearing or in her Form A and while the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein and all of those listed below in his analysis:

1. the Grievant's service to the Agency of 9-10 months;

2. the Grievant's asserted lack of experience with patients on an insulin drip; and

3. the Grievant received a positive Peer Review.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was very serious and the Grievant had not even been with the Agency a whole year yet. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Agency's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The hearing officer has purposefully not dealt with all the violations of policy covered in the Agency's attorney's brief because not all were covered in the Agency's written notice.

In her Ruling Number 2007-1409 dated September 21, 2006, at page 7, the Director stated in part:

> Only the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.

Accordingly, the hearing officer has exclusively focused his consideration of applicable disciplinary infractions to the policy violations asserted within the four (4) corners of the Agency's written notice:

> On 10/1/09 [the Grievant] cared for a patient with an insulin drip. This patient's glucose feel below the parameter to need the drip and [the Grievant] failed to discontinue the drip. The patient's glucose was checked 1 hr 13 minutes later as being very low at 44. [The Grievant] reported giving the patient 2 cups of juice to drink. Staff reports that the patient was not safe to drink as his speech was

> not clear and the patient was given D50 by another staff member. This episode was not documented in the patient's record. This care is determined to be avoidable and negligent.

AE 1.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

> The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

The hearing officer decides for each offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and in terminating the Grievant's employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld,

having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. 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.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, Virginia 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

ENTER:

_____

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9241

Hearing Officer Appointment: December 9, 2009
Hearing Date: June 3, 2010
Original Decision Issued: July 13, 2010
Review Decision Issued: August 10, 2010

ISSUES

The Virginia Department of Employment Dispute Resolution's ("EDR") Rules for Conducting Grievance Hearings (the "Rules") provide that the hearing officer's decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision (Rules, Section VII). The grievant has raised one of the three types of review in this proceeding:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. 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;

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management ("DHRM"). This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with the grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, 600 East Main Street, Suite 301, Richmond, Virginia 23219 or faxed to (804) 786-0111.

If multiple requests for administrative review are pending, a hearing officer's decision on reconsideration or reopening should be issued before any decisions are issued by the DHRM Director or the EDR Director. Rules, Section VII.

The hearing officer should issue a written decision on a request for reconsideration or reopening within 15 calendar days of receiving the request. Rules, Section VII.

The hearing officer received the grievant's Request for Hearing Officer to Reconsider his Decision on July 27, 2010. Accordingly, the deadline for the hearing officer's reconsideration decision is August 11, 2010.

DECISION

In her request to reconsider the decision, the grievant has not offered any probative newly discovered evidence. Similarly, the grievant has not presented probative evidence of any incorrect legal conclusions by the hearing officer as the basis for such a request. The evidence presented by the Agency at the hearing was credible and compelling. For the reasons provided herein and in the Agency's rebuttal brief dated August 2, 2010, the hearing officer hereby denies the grievant's request for reconsideration directed to him and hereby affirms his decision that the Agency has met its burden of proving by a preponderance of the evidence that the discipline was warranted and appropriate.

APPEAL RIGHTS

The hearing officer attaches hereto and incorporates herein Section VII of the Rules.

ENTER:

_____

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List.