Issue: Formal Performance Improvement Counseling with Demotion (leaving worksite without permission); Hearing Date: 10/29/10; Decision Issued: 11/01/10; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 11/12/10; Reconsideration Decision issued 11/29/10; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 11/12/10; EDR Ruling No. 2011-2831 issued 12/03/10; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9440

Hearing Date: October 29, 2010
Decision Issued: November 1, 2010

PROCEDURAL HISTORY

On June 23, 2010, Grievant was issued a Formal Performance Improvement Counseling Form with demotion for leaving the worksite without notifying his supervisor, bringing his child into the workplace, and untruthfulness regarding the event.[1]

On July 21, 2010, 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 he requested a hearing. On October 13, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 29, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Representative

[1] The Agency subsequently issued a Formal Performance Counseling Form on June 29, 2010 which added an additional allegation against Grievant. The Agency withdrew that Formal Performance Counseling Form. Only the issues addressed in the Formal Performance Counseling Form dated June 23, 2010 are before the Hearing Officer.

Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Formal Performance Counseling Form?

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 Grievant as a Patient Services Supervisor until his demotion effective June 23, 2010. Grievant's typical work shift is from 4 p.m. until 12:30 a.m. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency had experienced problems with employees bringing their children to the workplace during work hours. Agency managers instructed employees not to bring their children to the workplace. Grievant knew of this prohibition because several of his subordinates had brought children to the workplace and he was involved in the process of informing those employees not to bring their children with them to work.

On June 7, 2010, Grievant reported to work approximately one half hour prior to his shift beginning at 4 p.m. He was scheduled to work until 12:30 a.m. of the following day. Grievant met with the Manager but did not mention that he intended to leave the

workplace during a shift. At approximately 9:48 p.m., Grievant left the worksite without notifying anyone. At approximately 11:31 p.m., Grievant returned to the worksite with his son. Grievant's son remained near Grievant while Grievant continued his work. At approximately 12:26 a.m. on June 8, 2010, Grievant and his son left the workplace.

On June 16, 2010, the Manager asked Grievant if he worked his entire scheduled shift on June 7, 2010 and if there were any incidents out of the ordinary. Grievant stated that he was working the whole day and nothing out of the ordinary occurred. Grievant provided a written statement to that effect. Grievant wrote:

> I couldn't think of anything that would have me missing from work for 4 hours on Monday 6/7/10. To my recollection I was on grounds from 4 p.m. to 12:30 a.m.[2]

On June 23, 2010, during a disciplinary predetermination meeting, the Manager again asked Grievant if he was at work for his entire shift on June 7, 2010. Grievant denied leaving work that day. The Manager told Grievant that the Manager had a badge access report and camera pictures showing Grievant leaving the loading dock on June 7, 2010. Grievant then admitted that he left the workplace and drove to another county to pick up his son.

CONCLUSIONS OF POLICY

The Agency's Standards of Performance is poorly drafted. For example, it omits any discussion of demotion. Va. Code § 2.2-2905 exempts the University of Virginia Health System from the Virginia Personnel Act.[3] Because of this, the DHRM Policy 1.60, Standards of Conduct, cannot be used as a framework to supplement missing portions of the University of Virginia Health System's Standards of Performance. A demotion is a lesser disciplinary action than a termination. Accordingly, the Hearing Officer will construe the Agency's Standards of Performance to require the existence of facts sufficient to support a termination of employment in order to justify a demotion. The question then becomes whether the Agency has presented sufficient evidence to support Grievant's removal. If so, then the Agency can support Grievant's demotion.

Medical Center Human Resources Policy Number 701 sets forth the Agency's Employee Standards of Performance. Employee performance issues are addressed through a process of progressive performance improvement counseling. This process consists of four steps: (1) informal counseling, (2) formal performance improvement counseling, (3) performance warning and/or suspension, and (4) termination.

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[2] Agency Exhibit 2.

[3] The University of Virginia Health System remains subject to the State Grievance Procedure, Va. Code § 2.2 – 3000 et seq.

Grievant brought his son to work contrary to the Agency's practice. At most, this behavior would justify an informal counseling for failure to meet quality or quantity work performance standards. Grievant left the workplace without obtaining permission from the Manager. At most, this behavior would justify a formal performance improvement counseling for "[f]ailure to properly notify the supervisor when leaving a work area thereby compromising patient care."

Under certain circumstances the Agency may interrupt the process of progressive counseling and take action depending upon the facts surrounding a first occurrence of certain behavior. Policy Number 701 provides:

> Depending on the severity of the performance issues and the employee's past performance record, a performance warning with a possible suspension may accompany the first written counseling. In cases of serious misconduct, performance warning is the minimum action that will be taken. Careful review of an employee's work record and compliance with any imposed training and/or return to work agreements shall be considered in a decision to retain the employee and place him or her on performance warning versus termination. Examples of first offense serious misconduct actions that may warrant a performance warning and suspension without previous progressive counseling include, but are not limited to:
>
> > Falsification or misuse of University of Virginia parking permits or stickers ***
> > Falsifying records, including vouchers, leave records and pay records ….

This language supports the conclusion that the Agency may interrupt progressive counseling process when an employee engages in serious misconduct. The Agency may then decide whether to retain the employee, place him or her on a performance warning or terminate the employee. Examples of serious misconduct include, but are not limited to, falsification of parking permits and records. Grievant engaged in behavior of falsely informing the Manager that he was at work without leaving the work place during his shift on June 7, 2010. This behavior is consistent with the examples of serious misconduct listed in the Agency's policy thereby justifying Grievant's removal from employment. Because the Agency has established a basis to remove Grievant from employment, its decision to demote Grievant must be upheld.

Grievant argued that he simply did not remember leaving the work place on June 7, 2010 when he was asked by the Manager on June 16, 2010. There are three reasons to believe that on June 16, 2010, Grievant remembered that he had left the workplace on June 7, 2010 but failed to accurately reply to the Manager's inquiry. First, the Manager drew Grievant's attention to a specific date, namely June 7, 2010, and asked if there were any incidents out of the ordinary on that date. Second, Grievant knew he was not supposed to bring his child to the workplace. By bringing his child to

the workplace, Grievant engaged in behavior that was out of the ordinary and, thus, more likely for him to remember. Third, on June 23, 2010, the Manager told Grievant that the Manager had a badge access reports and camera pictures of Grievant leaving the loading dock on June 7, 2010 and returning with his child. Grievant admitted that he left the workplace to pick up his son. The Manager observed Grievant's demeanor and concluded that Grievant gave the appearance of being caught lying.

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. 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 Formal Performance Counseling Form with demotion is **upheld**.

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:

   Director

[4] Va. Code § 2.2-3005.

Department of Human Resource Management
101 North 14th St., 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
600 East Main St. STE 301
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 all of your appeals 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 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.[5]

[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

[5] 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: 9440-R

Reconsideration Decision Issued: November 29, 2010

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant seeks reconsideration of the original hearing decision. He restates arguments that he made during the hearing or that he could have made during the hearing. He does not offer any new evidence.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. The requesting party simply restates the arguments and evidence presented at the hearing. For this reason, the request for reconsideration is **denied.**

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

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer