Issue: Formal Performance Improvement Counseling Form and Termination (failure to meet performance expectations during performance warning period); Hearing Date: 05/03/11; Decision Issued: 05/06/11; Agency: UVA Health System; AHO: William S. Davidson, Esq.; Case No. 9566; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 05/10/11; AHO Reconsideration Decision issued 05/19/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 05/10/11; EDR Ruling No. 2011-2980 issued 06/10/11; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9566

Hearing Dates: May 3, 2011
Decision Issued: May 6, 2011

PROCEDURAL HISTORY

The Grievant was issued a Formal Performance Counseling Form on February 1, 2011 for:

> Failure to follow procedure for assembly of surgical instrumentation; soiled instrumentation in a prepared instrument set which violates infection control and patient safety practices, repetitive infraction subsequent to step 2 PIC on 9/8/2010. Soiled instrument reported and confirmed on 1/24/11 for set assembled on 1/19/2011. [Grievant] was given a Step 3 PIC with 90 day performance warning period on 12/16/10 for insubordinate behavior. This incident results in a failure to meet performance expectations during performance warning period. A predetermination meeting was held. [1]

Pursuant to the Formal Performance Counseling Form, the Grievant was terminated. [2] On February 16, 2011, the Grievant timely filed a grievance to challenge the Agency's actions. [3] On April 5, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On May 3, 2011, a hearing was held at the Agency's location.

APPEARANCES

Advocate for the Agency
Grievant
Witnesses

ISSUE

Did the Grievant fail to meet performance expectations during a performance warning period?

AUTHORITY OF HEARING OFFICER

[1] Agency Exhibit 1, Tab 1, Page 7
[2] Agency Exhibit 1, Tab 1, Page 7
[3] Agency Exhibit 1, Tab 1, Page 1

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. [4] However, proof must go beyond conjecture. [5] In other words, there must be more than a possibility or a mere speculation. [6]

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 Agency provided the Hearing Officer with a notebook containing five (5) tabbed sections. During the hearing, an additional Tab was added (Tab 6), and that documentation was introduced without objection. That notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided a group of documents that consisted of seven (7) pages and that was introduced without objection. Those seven (7) pages were accepted as Grievant Exhibit 1.

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[4] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[5] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)
[6] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

The facts in this matter are very straightforward. On December 16, 2010, the Grievant was issued a Formal Performance Counseling Form for insubordination. [7] Pursuant to that Formal Performance Counseling Form, the Grievant was suspended for eight (8) hours on December 21, 2010 and was placed on a performance warning for the time period of December 16, 2010 through March 16, 2011. That document contained the following language:

> All performance expectations for the job must be met during this Performance Warning Period. Failure to meet performance expectations will result in termination. [8]

Accordingly, as of December 16, 2010, the Grievant was on notice that any performance failure on his part, prior to March 16, 2011, would result in his termination.

The Hearing Officer heard testimony from the manager of the department in which the Grievant works. The Grievant's title is that of a Sterile Processing Technician. A part of his job is to decontaminate instruments, assemble them pursuant to a particular physician's recipe and then sterilize them. On January 19, 2011, pursuant to the recipe of one (1) of the physicians who works at the Agency location, the Grievant prepared a set or pan of instruments. [9] The recipe itself indicates that it was prepared by the Grievant based on his initials and, on Page 2 of the Exhibit, the Grievant signed his name. On January 24, 2011, this pan of instruments was being used during a surgical procedure. During that procedure, it was discovered that one (1) of the instruments in the pan (a Rongeur Bone Double Action Left Leksell 3mm) contained bone fragments from a prior usage. One (1) of the nurses who was assisting in this procedure notified the Sterile Processing Coordinator of this problem and turned over a bag containing this soiled instrument, as well as the recipe for that set of instruments containing the Grievant's signature, to this Coordinator. The Coordinator turned the instrument and documentation over to the Manager and the Grievant was subsequently terminated for failing to meet performance expectations during the time frame of December 16, 2010 through March 16, 2011.

The Grievant called three (3) witnesses on his behalf. The Grievant did not testify. The first witness for the Grievant was asked if she had ever witnessed discrimination being directed towards the Grievant. She testified that on one (1) occasion she saw and heard the Grievant's supervisor yell and scream at the Grievant. Other than that, she had no further testimony regarding discrimination against the Grievant. The Grievant questioned her as to the possibility of his Supervisor using the Grievant's identification code and it appeared that the Grievant was asking this question to possibly prove that he was not the person who produced the set of instruments containing the soiled instrument. This witness testified that she had heard that the Supervisor had used other people's identification codes but had no personal knowledge of this.

The Grievant then called a Patient Care Technician as his next witness. This person had very little to add by way of the issue of discrimination and affirmatively acknowledged that the Grievant had acknowledged to him that the signature of the second page of the recipe list, Exhibit 6, was the signature of the Grievant.

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[7] Agency Exhibit 1, Tab 1, Page 8
[8] Agency Exhibit 1, Tab 1, Page 8
[9] Agency Exhibit 1, Tab 6, Pages 1 and 2

Finally, the Grievant called another technician who testified that she too had heard the Grievant's Supervisor "scream and holler" at the Grievant. Upon cross-examination, this witness stated that she had never taken the time to report any of this to anyone.

As stated earlier, the Grievant did not testify and, accordingly, did not deny that it was his signature on the second page of the recipe list (Exhibit 6). Other than the testimony of two (2) of his witnesses that they had seen a Supervisor raise his or her voice to the Grievant, no further evidence was introduced regarding retaliation, harassment or discrimination. The Grievant introduced no evidence regarding any accommodations that he may have been due because of any disabilities or mental challenges. When the Hearing Officer considers the lack of testimony provided by the Grievant regarding the Agency's allegation of his failure to meet performance expectations within a Performance Warning Period, the evidence introduced by the Grievant regarding discrimination, harassment or abuse, and the demeanor and lack of believability of the Grievant's witnesses, the Hearing Officer finds that the Agency has bourne its burden of proof in this matter.

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..." [10] 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

The Grievant did not introduce any other reasons to justify a mitigation in this matter and the Hearing Officer finds that the Agency has properly considered mitigation in this matter.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has bourne its burden of proof regarding this matter and upholds the Agency's position to terminate the Grievant.

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:

[10] Va. Code § 2.2-3005

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
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
600 East Main Street, Suite 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 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.[11] 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.[12]

[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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William S. Davidson

[11]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).

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

Hearing Officer

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9566

Hearing Date:

May 3, 2011

Decision Issued:

May 6, 2011

Reconsideration Request Received:

May 10, 2011

Response to Reconsideration:

May 19, 2011

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. [13] (Emphasis added)

OPINION

The Grievant, on May 10, 2011 and May 11, 2011, sent six (6) e-mails to the Administrator of EDR. It appears that none of those e-mails were sent to the Hearing Officer nor to the other party in this matter. The office of the Administrator of EDR forwarded the e-mails

[13] §7.2(a) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

to this Hearing Officer. In either the first or the second of this string of e-mails, as both show as being sent on Tuesday, May 10, 2011 at 2:59 p.m., the Grievant states as follows:

> I would love for my case to be reviewed I will send all info about my concerns I also sent them to [the Hearing Officer]

It would appear that the Grievant is asking the Administrator of EDR to make a ruling.

Inasmuch as the office of the Director of EDR has requested that the Hearing Officer provide his Reconsideration, the following is an attempt to comply with that request.

Normally, as set forth in Section 7.2(a)(1) of the Grievance Procedure Manual, a request for reconsideration deals with newly discovered evidence or evidence of incorrect legal conclusions. Because of the need for finality, documents not presented at the hearing cannot be considered upon administrative review unless they are "newly discovered evidence." 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 trial ended. However, the fact that a party discovered the evidence after the trial does not necessarily make it "newly discovered." Rather, the party must show that:

> 1. The evidence is newly discovered since the judgment was entered;
> 2. Due diligence on the part of the movant 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 judgment to be amended. [14]

Here, the Grievant has not only not provided any information to support a contention that the supposed new evidence should be considered newly discovered evidence under the above stated condition, he has not provided the Hearing Officer with any new evidence.

In the series of e-mails, the Grievant speaks to his mental illness. As stated in the original Decision, the Grievant did not testify and the Grievant offered no evidence whatsoever regarding a mental illness. Further, the Grievant speaks to being "cut off" in his closing argument by the Hearing Officer. During the pretrial conference call, there was a discussion of how the hearing would proceed. Prior to going on the record on the morning of the hearing, and on the record, the Hearing Officer pointed out to both parties that closing argument is not evidence before the Hearing Officer. In this matter, the Grievant, in his closing, for the first time began to talk about a mental illness. The Hearing Officer pointed out to him that he had introduced no evidence regarding that issue during the course of the hearing and the Grievant, voluntarily, ceased his closing argument. He was neither instructed nor encouraged to end his closing argument. Regardless, the closing argument is not evidence before the Hearing Officer.

[14] Administrative Review Ruling of Director, Dated December 12, 2009, Ruling No. 2010-2467, Page 3

The Grievant has suggested no new evidence for the Hearing Officer to consider and has simply attempted to re-characterize parts of the testimony that was presented before the Hearing Officer and many other matters which were not testified to before the Hearing Officer. None of this requires a Reconsideration by the Hearing Officer.

DECISION

For the reasons stated herein, the Hearing Officer finds that the Grievant's 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. [15]

William S. Davidson
Hearing Officer

[15] 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).