Issues: Disciplinary Termination (failure to comply with performance expectations) and Retaliation (grievance activity); Hearing Date: 07/28/11; Decision Issued: 08/01/11; Agency: UVA Health System; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9645; Outcome: Full Relief; **Administrative Review: AHO Reconsideration Request received 08/16/11; Reconsideration Decision issued 09/05/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 08/16/11; EDR Ruling No. 2012-3065 issued 11/04/11; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 08/16/11; DHRM Ruling issued 12/01/11; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9645

Hearing Date: July 28, 2011
Decision Issued: August 1, 2011

PROCEDURAL HISTORY

On May 6, 2011, University of Virginia ("Agency") issued to the Grievant a disciplinary termination for failing to comply with terms and performance expectations from a performance warning issued April 13, 2011. The Grievant is Registered Nurse classified as Clinician III.

Grievant timely filed a grievance to challenge the Agency's action. The outcome of the administrative steps was not satisfactory to the Grievant and she requested a hearing. On June 28, 2011, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. A pre-hearing conference was held by telephone on June 30, 2011. The hearing was scheduled at the first date available between the parties and the hearing officer, July 28, 2011, on which date the grievance hearing was held, at the Agency's facility.

The Agency submitted documents for exhibits that were, without objection from the Grievant, admitted into the grievance record, and will be referred to as Agency's Exhibits. The Grievant also submitted documents that were admitted without objection. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Representative/Advocate for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Formal Performance Improvement 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 (e.g., properly characterized)?

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?

The Grievant requests rescission of the termination, reinstatement, back pay and all benefits.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

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

The Agency's Medical Center Human Resources Policy No. 701, Employee Standards of Performance ("SOP"), defines the progressive discipline that must be followed before a termination may occur. Agency Exh. 4. On April 13, 2011, the Agency issued the Grievant a Performance Warning.

The SOP defines work expectations and provides guidance for dealing with performance deficiencies. The SOP, Section C, states as its objective:

> The Medical Center expects employees to meet standards of performance that enable all to work together to achieve the mission of the Medical Center.
>
> Performance issues are addressed through a process of progressive performance improvement counseling as outlined in this policy. The progressive performance improvement counseling process provides positive guidance, appropriate correction, and helps ensure fair and equitable treatment of all employees…

It states further, at Section D, in part, "The following are examples of some performance issues that are appropriate for the progressive performance improvement counseling process:

- Failure to meet performance expectations
- Adversely affecting another's ability to do work
- Misuse of work time
- Failure to report to work as scheduled
- Unauthorized absence from assigned work area
- Failure to meet attendance standard
- Failure to follow supervisor's instructions
- Failure to follow applicable policy

The SOP provides guidance to management officials for handling workplace behavior and for taking corrective action. The policy lists the four-step process as follows: (1) informal counseling; (2) formal written performance counseling; (3) performance warning; and, (4) termination.

More specifically, the SOP provides for a series of steps when Agency staff believes an employee's work performance in 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 Counseling – Step 1
> If performance issues continue after appropriate coaching and training, the supervisor will bring the performance deficiency issues to the attention of the employee in an

informal coaching session. This session should take place as soon as possible after the deficiency is noted, and in most cases should be conducted in private.
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B. Formal (Written) Performance Improvement Counseling – Step 2

If the performance issue persists subsequent to the informal counseling, formal performance improvement counseling shall be initiated. The severity of the performance issue may warrant formal counseling without prior informal counseling.
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[T]he employee shall receive a Performance Improvement Counseling Form documenting the expectations for performance improvement, the time frame for the improvement, and consequences if the employee fails to achieve and maintain the required performance level.

C. Performance Warning – Step 3

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 his/her job.

A performance warning will typically be applied progressively after at least one formal performance improvement counseling. Suspension will generally accompany the performance warning except in the case of attendance infractions.

Prior to taking any formal disciplinary step, the supervisor must meet with the employee to conduct a predetermination meeting. This meeting is held to review the facts and give the employee an opportunity to respond to the issues or explain any mitigating circumstances. Documentation of the predetermination meeting shall be maintained by the supervisor.

After reviewing the information provided by the employee, the supervisor will determine if a performance warning is warranted.

The performance warning must be documented on a Performance Improvement Counseling Form and include (1) clear and specific documentation of the performance issue(s), expected behavior and/or performance goals to be met, and (2) the time frame for achieving expectations. The performance warning is a significant step in the process of progressive performance improvement counseling. The performance warning shall document that unsatisfactory progress, or failure to meet all performance expectations at any time during the performance warning period shall normally result in termination.

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a registered nurse with 33 years experience. Her job role was Clinician III and she had been in that role since 2002.

There is reference to a prior substandard performance review resulting in demotion from Clinician III to Clinician II, effective in October 2010. That disciplinary action was reversed during the administrative steps and the Grievant was reinstated to Clinician III on or about March 29, 2011. Agency Exh. 3A; Grievant Exh. 2. There is no clear documentation of the reason for reinstatement, but procedural compliance was mentioned as a factor for the reinstatement.

Following the Grievant's reinstatement to Clinician III, her supervisor met with her on April 13, 2011, to initiate a Step 3 Performance Improvement Plan. The supervisor documented two incidents that occurred on the April 10, 2011, work shift. One concerned monitoring an infant patient's bilirubin level causing a delay in treatment. The other was not documenting a chart assessment in EPIC[1].

The Performance Improvement Plan ("PIP") identified the areas for improvement:

- Clinical competence as a Clinician III
- Leadership abilities as a Clinician III
- Providing accurate documentation on patient flow sheet to include, but not limited to vital signs and assessments
- Completing patient care effectively and efficiently
- Demonstrating critical thinking and problem-solving abilities
- To be in compliance surrounding medical orders and consulting with Interdisciplinary Team when questioning current orders

Agency Exh. 3E. The PIP was for a 90 day period, with follow up assessments every 30 days.

From auditing the Grievant's performance, the supervisor identified an occurrence on May 3, 2011, regarding a titrate flow for one infant patient and lack of a shift assessment on another. The supervisor scheduled a meeting with the Grievant for May 9, 2011, at which meeting the Grievant, because of suspicions over the Agency motivation, had arranged for the Agency's ombudsman to attend. The supervisor moved the meeting up to May 5, 2011, which meeting included a human resources representative, for the purpose of conducting a pre-determination meeting. The Agency did not contact the ombudsman for the rescheduling of the meeting. At the May 5, 2011, meeting, the supervisor placed the Grievant on paid administrative leave and on May 6, 2011, the supervisor proceeded with termination.

The supervisor testified that charting is an important aspect of the Grievant's responsibilities, and that if something was not charted "it did not happen." The supervisor stressed the significance of charting for continuity of patient care, billing, and legal responsibilities. The supervisor stated she had three concerns from the pre-determination meeting with the Grievant: that the Grievant declined her offer of additional EPIC training; does not fully appreciate the importance of documentation; and stated that documentation is a low priority. The supervisor did not believe the Grievant's account of her charting entry

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[1] EPIC is a medical records software system used by the Agency and instituted in March 2011.

disappearing from the EPIC system, because the supervisor was not aware of other such instances reported by others.

On cross-examination by the Grievant, the supervisor testified that the EPIC software system was started in March 2011, and that the Grievant was placed in Step 3 discipline because she had already been in Step 2.

The supervisor's assistant testified that she conducted the audit of the Grievant's charting entries and found two instances of assessments not being documented. The assistant confirmed the importance of documentation. The assistant admitted to making mistakes herself, and that management does not announce to others disciplinary actions taken against staff.

The human resources consultant testified that he was present during the May 5, 2011, predetermination meeting, as is required by procedures. He was not present at the Grievant's request or as a substitute for the ombudsman she wanted present for the meeting scheduled for May 9, 2011. The consultant confirmed that the Grievant stated her belief that actual patient care was more important than documentation.

Testifying on the Grievant's behalf was a staff registered nurse. She testified to an instance of one of her detailed assessments disappearing in EPIC, and that there are a lot of glitches in the EPIC system. She has had to go back to double and triple checking her charting entries to make sure they have not disappeared. She also testified that the computers often shut down and need restarting on the night shift. The Grievant works the night shift. The staff nurse also shared the belief that patient care was the number one priority and that charting, while important, sometimes has to be done later. She testified that she has observed numerous instances of assessments not being documented in the EPIC system. The staff nurse testified that the Grievant is a well-known and respected resource for other nurses for instruction and advice on high quality care.

The Grievant testified that she was concerned about management's reaction to her reinstatement to Clinician III on or about April 1, 2011, the reaction being an almost immediate placement under a Step 3 Performance Warning and PIP on April 13, 2011. In fact, the Grievant's first meeting with her supervisor following her reinstatement to Clinician III was the April 13, 2011, Step 3 Performance Warning. The Grievant asserts that management's actions leading to termination are retaliatory for her successful challenge of her demotion. The Grievant testified that the Agency ombudsman suggested the action was retaliatory.[2] The Grievant also

[2] The Grievant requested a witness order for the ombudsman, which the hearing officer issued. The ombudsman declined to appear for the hearing. The Agency advanced the excuse for the ombudsman's refusal was his role that requires confidentiality to be effective. Agency witnesses are not allowed the unilateral prerogative to determine the competency or relevance of their testimony or the propriety of their appearance, and it is impermissibly presumptive to conclude the ombudsman's testimony involved confidential information and that any such information was protected by any recognized privilege. Prior to the hearing, the hearing officer advised the Agency that the hearing rules provide potential sanction for non-appearance of a witness ordered to appear. If a party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as the hearing officer or the EDR Director had ordered, an adverse inference may be drawn with respect to factual conflicts resolvable by

testified that her comments about documentation are taken out of context—she testified that she only meant that actual patient care came first, and she admitted that she, like everyone, has made mistakes. The Grievant testified other nurses miss charting entries, too, because of the often-irregular occurrences that might happen during a shift. The Grievant testified that on at least one instance, an assessment she entered into the EPIC software system disappeared from view. She also testified that a respiratory therapist had the same experience of disappearing EPIC entries.[3] The Grievant testified that she declined further EPIC training because she felt her training was adequate, that she just needed more experience with using EPIC, and that she could access EPIC "super users" when questions arose.

At the second resolution step, the Agency responded to the grievance by sustaining the termination based on the Grievant's performance issues over the last year, including the charting errors in EPIC.

The circumstances of moving the meeting scheduled for May 9, 2011 (when the Grievant had arranged for the Agency's ombudsman to be present), to May 5, 2011 (without arranging for the ombudsman's presence), is not adequately explained by the Agency. Certainly, the necessity of moving the meeting without coordinating with the ombudsman is not explained. The urgency at which the Agency treated this diciplinary action is suggestive of a "serious misconduct" offense, yet the Grievant has not been charged with a serious misconduct offense as defined in the SOP.

The Grievant advances the position that the discipline is too severe and should be mitigated. Her contention is that the EPIC software system was new and others had experienced lost data entries inexplicably. The Agency has the burden of proof of all the elements of the discipline levied. Based on the evidence presented, I find that the Agency has not met its full burden of proof that the Grievant has committed misconduct as charged. I find that the misconduct associated with the EPIC software system is, at least to some degree, related to glitches in the software that were disbelieved by the supervisor, yet corroborated by two witnesses. I also find that the EPIC system, being very new to use (since March 2011), has inherent learning curve aspects that have contributed to the charting deficiencies noted. I also find that the Grievant's inaccurate use or lack of skill with the software program EPIC is a likely contributor. The misconduct was at least compounded by the Grievant's lack of skill or experience with EPIC.

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the ordered documents or witnesses. *Rules for Conducting Grievance Hearings, § V.B.* At the hearing, the Agency conceded that the ombudsman would verify the Grievant's account of the scheduled disciplinary meeting on May 9, 2011, his plan to attend, and that the ombudsman was not consulted for his availability to attend the meeting moved earlier to May 5, 2011. The Grievant testified that the ombudsman thought the Agency's reaction following her reinstatement to Clinician III suggested retaliation.

[3] The Grievant requested a witness order for the respiratory therapist, and the therapist was on vacation without any telephone service on the hearing date. The Agency stipulated to the singular occurrence of the respiratory therapist's disappearing EPIC entry.

Va. Code § 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 § 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 determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), 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."

The Agency had the discretion to elect less severe discipline. 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…." Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."

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

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 Agency voiced that it has conducted progressive discipline, including the multiple instances of informal counseling for the Grievant before issuing the present termination. In light of the standard set forth above in the *Rules*, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. However, the Hearing Officer finds that the relatively new EPIC software system started in March 2011 is a mitigating factor for performance charting errors within a month or so. I find both that unexplained glitches in the

EPIC system and the newness of the EPIC system played a part in her charting errors. Accordingly, this mitigating factor counters some of the instances used to terminate the Grievant's employment. Because of these mitigating factors, the termination exceeds the limits of reasonableness and compels a reduction of the disciplinary action from a Step 3 Performance Warning Termination to the lesser Formal (Written) Performance Improvement Counseling – Step 2 for unsatisfactory work performance. Accordingly, the Agency shall issue such Performance Improvement Counseling Form ("PIC") documenting the expectations for performance improvement, the time frame for the improvement, and consequences if the employee fails to achieve and maintain the required performance level.

The Grievant asserts that the Agency's termination action is motivated by retaliation. It appears that the grievant's theory of unfair or disparate treatment is in essence the same as her retaliation argument, and challenges the same management actions. As such, her claims of unfair/disparate treatment will be analyzed under a retaliation theory. For a claim of retaliation to succeed, the Grievant must show (1) she engaged in a protected activity; (2) she suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); s*ee, e.g*., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. If the Agency presents a nonretaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case). A claim of retaliation can often hinge on circumstantial evidence.

The Grievant engaged in protected activity by initiating a prior grievance, in which she prevailed in reversing her demotion and gaining reinstatement as a Clinician III. The Grievant asserts that the retaliation she has experienced stems from this prior demotion and reinstatement. The termination certainly satisfies the requirement of a materially adverse action. However, the Grievant faces a challenge showing a causal connection. The Fourth Circuit requires little evidence for a showing of a causal connection between the complaint and the adverse employment action. *See Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 443 (4th Cir. 1998) ("Normally, very little evidence of a causal connection is required to establish a *prima facia* case. . . ."). Indeed, the Fourth Circuit has held that "merely the closeness in time between the [protected activity] and an employer's firing is sufficient to make a *prima facia* case of causality." *Tinsley*, 155 F.3d at 443 (citing *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989)).

The Agency's evidence is that virtually all employees who are found to have deficiencies in charting and patient care are disciplined consistently in one form or another. While the Grievant may question this evidence, the record does not show actual instances of disparate treatment. Perhaps the Grievant could have requested documentation of the Agency's discipline in similar instances, but that evidence was not presented. However, the timing of the Agency's disciplinary activity toward the Grievant, having geared up on the heels of her reinstatement

from demotion, raises a *prima facia* claim of retailation. The Agency does not show or allege any substandard performance by the Grievant during the period of the claimant's demotion from October 2010 until reinstated in March 2011. Immediately following the Grievant's reinstatement the Agency discovered an instance of alleged misconduct. While all of the instances of misconduct identified by the Agency's charges are not specifically mitigated as discussed above, the Agency's failure to demonstrate any consideration of mitigation in the termination decision, coupled with other questionable actions, raises an inference of retaliation. Once such occurrence is the close timing of the discipline following the Grievant's successful grievance challenging her demotion. Another suspicious factor is the unusual urgency displayed by moving up the pre-determination meeting from the date scheduled with the ombudsman. This conduct raises questions of the Agency's motives. Thus, I find some retaliatory taint to the termination process. However, because of the mitigation exercised as discussed above, even a finding of retaliation would not erase all of the performance deficiencies noted by the Agency and render the Agency concerns totally pretextual. For this reason, the severity of the discipline is mitigated to reverse the termination.

When dealing with patient medical care, the hearing officer recognizes that even the slightest mistake or miscue can possibly have very detrimental consequences. The hearing officer recognizes and upholds the Agency's great responsibilty to ensure patient care, but this Grievant is not charged with a "serious misconduct" offense as defined in the SOP. While the Agency cites a history of performance issues, the prior disciplinary demotion was reversed by the Agency, and the Agency has not shown that Grievant's termination from current discipline was within the bounds of reasonableness.

The Agency's obligation and action to ensure the satisfactory care of its patients is fully recognized, and the Agency may initiate the PIC to ensure that the Grievant has competence in the EPIC software program, even to include mandatory training. The Grievant is advised to assess carefully her skills using EPIC and to take advantage of all training opportunities afforded her to avoid a record of further EPIC charting mistakes. The Agency is ordered to refrain from even the slightest retaliatory motive in conducting the Grievant's continuing performance evaluation.

DECISION

For the reasons stated herein, the Agency's termination is rescinded and the Agency is ordered to reinstate Grievant to her former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The level of discipline is reduced from a Step 3 Performance Warning Termination to the lesser Formal (Written) Performance Improvement Counseling – Step 2 for unsatisfactory work performance. The Agency may, if it so elects, continue with issuance of a Performance Improvement Counseling Form to ensure that the Grievant develops competence in the EPIC software program and other deficiencies.

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, VA 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 the 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates as indicated on the attached cover sheet.

Cecil H. Creasey, Jr.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

RECONSIDERATION
DECISION OF HEARING OFFICER

In the matter of: Case No. 9645

Hearing Date: July 28, 2011
Decision Issued: August 1, 2011
Reconsideration Decision Issued: September 5, 2011

RECONSIDERATION DECISION

§ 7.2(a) of the Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, (effective August 30, 2004) provides, "A hearing officer's original decision is subject to three types of administrative review. A party may make more than one type of request for review. However, all requests 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. Requests may be initiated by electronic means such as a facsimile or e-mail. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests must be provided to the other party and to the EDR Director."

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 conclusion is the basis for such a request. § 7.2(a)(1), Grievance Procedure Manual.

On August 16, 2011, the Agency's request for reconsideration was received timely. Grievant provided a reply to the Agency's request for reconsideration. The Agency has asserted an incorrect legal conclusion in that the hearing officer reduced the termination (a Step 4 termination, referred to by the hearing officer in the original decision as a Step 3 Performance Warning Termination) to a Step 2 Formal (Written) Performance Improvement Counseling for unsatisfactory work performance. The Agency correctly points out that the termination is a Step 4 in the disciplinary process, and the original grievance decision shall be corrected, accordingly. Nevertheless, with that correction, the hearing officer, because of mitigating circumstances explained in the decision the discipline exceeded the bounds of reasonableness.

The Agency also points out that the Grievant was not charged with first offense "serious misconduct." However, the hearing officer did not consider the discipline to be characterized as first offense "serious misconduct." The hearing officer did not ignore the performance issues

raised by the Agency, however, the hearing officer found that at least part of the alleged performance deficiencies concerned EPIC documentation. A review of all the supporting documentation for the termination included deficiences in EPIC charting. The hearing officer found mitigating circumstances existed that the Agency did not consider, namely the EPIC lapses noted by other witnesses and the claimant. Further, the hearing officer found the Agency's scheduling of the predetermination meeting so as to prevent the Agency's ombudsman from attending the meeting as requested by the Grievant stained the process with a retaliatory taint. For the reasons explained in the original decision, the hearing officer mitigated the discipline down from termination.

The Agency's Policy No. 701, Agency's Exh. 4, is a document bearing an effective date of July 1, 2011, which is after the termination in this grievance. Since the Grievant did not object to this document, the hearing officer considered the pertinent sections applicable. Policy No. 701 provides access to the State Grievance Procedure. Among the hearing officer's authority is the responsibility to uphold, reduce or rescind disciplinary actions. § 5.9(a) of Grievance Procedure Manual. In this grievance, the termination (which should be characterized as a Step 4 Termination) was rescinded to the lesser Formal (Written) Performance Improvement Counseling –Step 2 for unsatisfactory work performance. The terminology in the original decision is corrected, accordingly.

The Agency also challenged the hearing officer's treatment of the ombudsman's failure to attend the hearing. While the hearing officer referred to the potential adverse inference when a party does not produce a witness, no such adverse inference was applied in this case. The Agency stipulated to the facts the Grievant sought to establish—that the ombudsman was planning to attend the predetermination meeting at the Grievant's request but the Agency changed the date of the predetermination meeting, which prevented the ombudsman's attendance. The Agency submits additional evidence on the role and constraints on use of an ombudsman in the grievance process, however, such documentation and evidence was not submitted at the grievance hearing. Once a grievance hearing is closed, a hearing officer may only consider newly discovered evidence under certain limited circumstances.

The EDR Director has held:

> Because of the need for finality, documents not presented at 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
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> > (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.

EDR Ruling Number 2010-2467 (December 10, 2009) (citations omitted). The evidence does not meet the applicable test to reopen the hearing or to consider newly discovered evidence.

The hearing officer did not adopt the alleged opinion of the ombudsman of a retaliatory intent. The hearing officer drew that conclusion based on the Grievant's testimony and the Agency's actions leading up to the termination, particularly rescheduling the predetermination meeting to a time unknown to or unavailable for the ombudsman's attendance. The hearing officer found evidence of a retaliatory intent by the Agency. However, the Agency presented evidence of unsatisfactory work by the Grievant, rendering disciplinary action not completely pretextual. After weighing the evidence presented by both sides, the hearing officer found that the Agency's action of termination was not justified. The Agency's disregard of the potential impact of system glitches in the newly installed EPIC software was contrary to the weight of the evidence. Thus, the combination of mitigation and retaliatory intent formed the bases of the hearing officer's rescission of the termination.

Upon such findings, the hearing officer has the authority to completely rescind the discipline levied. That authority must, by necessity, include reducing the discipline to all lesser levels. In this case, the hearing officer did not reach back to any prior disciplinary action. The Step 4 Termination was reduced in severity, to include job reinstatement and a current Formal (Written) Performance Improvement Counseling – Step 2 for unsatisfactory work performance.

Should that action not comply with either the grievance procedure or applicable policy, then the hearing officer's decision will yield to a determination by EDR or DHRM.

In conclusion, the hearing officer declines to change the original decision.

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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by electronic transmission.

Cecil H. Creasey, Jr.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
University of Virginia
Health System

December 1, 2011

The agency has requested an administrative review of the hearing officer's decision in Case No. 9645. For the reasons stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

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In his FINDINGS OF FACT, the hearing officer wrote, in relevant part, the following:

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a registered nurse with 33 years experience. Her job role was Clinician III and she had been in that role since 2002.

There is reference to a prior substandard performance review resulting in demotion from Clinician III to Clinician II, effective in October 2010. That disciplinary action was reversed during the administrative steps and the Grievant was reinstated to Clinician III on or about March 29, 2011. Agency Exh. 3A; Grievant Exh. 2. There is no clear documentation of the reason for reinstatement, but procedural compliance was mentioned as a factor for the reinstatement.

Following the Grievant's reinstatement to Clinician III, her supervisor met with her on April 13, 2011, to initiate a Step 3 Performance Improvement Plan. The supervisor documented two incidents that occurred on the April 10, 2011, work shift. One concerned monitoring an infant patient's bilirubin level causing a delay in treatment. The other was not documenting a chart assessment in EPIC.

The Performance Improvement Plan ("PIP") identified the areas for improvement:

- Clinical competence as a Clinician III
- Leadership abilities as a Clinician III
- Providing accurate documentation on patient flow sheet to include, but not limited to vital signs and assessments
- Completing patient care effectively and efficiently
- Demonstrating critical thinking and problem-solving abilities
- To be in compliance surrounding medical orders and consulting with Interdisciplinary Team when questioning current orders

Agency Exh. 3E. The PIP was for a 90 day period, with follow up assessments every 30 days.

From auditing the Grievant's performance, the supervisor identified an occurrence on May 3, 2011, regarding a titrate flow for one infant patient and lack of a shift assessment on another. The supervisor scheduled a meeting with the Grievant for May 9, 2011, at which meeting the Grievant, because of suspicions over the Agency motivation, had arranged for the Agency's ombudsman to attend. The supervisor moved the meeting up to May 5, 2011, which meeting included a human resources representative, for the purpose of conducting a predetermination meeting. The Agency did not contact the ombudsman for the rescheduling of the meeting. At the May 5, 2011, meeting, the supervisor placed the Grievant on paid administrative leave and on May 6, 2011, the supervisor proceeded with termination.

The supervisor testified that charting is an important aspect of the Grievant's responsibilities, and that if something was not charted "it did not happen." The supervisor stressed the significance of charting for continuity of patient care, billing, and legal responsibilities. The supervisor stated she had three concerns from the pre-determination meeting with the Grievant: that the Grievant declined her offer of additional EPIC training; does not fully appreciate the importance of documentation; and stated that documentation is a low priority. The supervisor did not believe the Grievant's account of her charting entry disappearing from the EPIC system, because the supervisor was not aware of other such instances reported by others.

On cross-examination by the Grievant, the supervisor testified that the EPIC software system was started in March 2011, and that the Grievant was placed in Step 3 discipline because she had already been in Step 2.

The supervisor's assistant testified that she conducted the audit of the Grievant's charting entries and found two instances of assessments not being documented. The assistant confirmed the importance of documentation. The assistant admitted to making mistakes herself, and that management does not announce to others disciplinary actions taken against staff.

The human resources consultant testified that he was present during the May 5, 2011, predetermination meeting, as is required by procedures. He was not present at the Grievant's request or as a substitute for the ombudsman she wanted present for the meeting scheduled for May 9, 2011. The consultant confirmed that the Grievant stated her belief that actual patient care was more important than documentation.

Testifying on the Grievant's behalf was a staff registered nurse. She testified to an instance of one of her detailed assessments disappearing in EPIC, and that there are a lot of glitches in the EPIC system. She has had to go back to double and triple checking her

charting entries to make sure they have not disappeared. She also testified that the computers often shut down and need restarting on the night shift. The Grievant works the night shift. The staff nurse also shared the belief that patient care was the number one priority and that charting, while important, sometimes has to be done later. She testified that she has observed numerous instances of assessments not being documented in the EPIC system. The staff nurse testified that the Grievant is a well-known and respected resource for other nurses for instruction and advice on high quality care.

The Grievant testified that she was concerned about management's reaction to her reinstatement to Clinician III on or about April 1, 2011, the reaction being an almost immediate placement under a Step 3 Performance Warning and PIP on April 13, 2011. In fact, the Grievant's first meeting with her supervisor following her reinstatement to Clinician III was the April 13, 2011, Step 3 Performance Warning. The Grievant asserts that management's actions leading to termination are retaliatory for her successful challenge of her demotion. The Grievant testified that the Agency ombudsman suggested the action was retaliatory. The Grievant also testified that her comments about documentation are taken out of context-she testified that she only meant that actual patient care came first, and she admitted that she, like everyone, has made mistakes. The Grievant testified other nurses miss charting entries, too, because of the often irregular occurrences that might happen during a shift. The Grievant testified that on at least one instance, an assessment she entered into the EPIC software system disappeared from view. She also testified that a respiratory therapist had the same experience of disappearing EPIC entries. The Grievant testified that she declined further EPIC training because she felt her training was adequate, that she just needed more experience with using EPIC, and that she could access EPIC "super users" when questions arose.

At the second resolution step, the Agency responded to the grievance by sustaining the termination based on the Grievant's performance issues over the last year, including the charting errors in EPIC.

The circumstances of moving the meeting scheduled for May 9, 2011 (when the Grievant had arranged for the Agency's ombudsman to be present), to May 5, 2011 (without arranging for the ombudsman's presence), is not adequately explained by the Agency. Certainly, the necessity of moving the meeting without coordinating with the ombudsman is not explained. The urgency at which the Agency treated this disciplinary action is suggestive of a "serious misconduct" offense, yet the Grievant has not been charged with a serious misconduct offense as defined in the SOP.

The Grievant advances the position that the discipline is too severe and should be mitigated. Her contention is that the EPIC software system was new and others had experienced lost data entries inexplicably. The Agency has the burden of proof of all the elements of the discipline levied. Based on the evidence presented, I find that the Agency has not met its full burden of proof that the Grievant has committed misconduct as charged. I find that the misconduct associated with the EPIC software system is, at least to some degree, related to glitches in the software that were disbelieved by the supervisor, yet corroborated by two witnesses. I also find that the EPIC system, being very new to use (since March 2011), has inherent learning curve aspects that have contributed to the charting deficiencies noted. I also find that the Grievant's inaccurate use or lack of skill with the software program EPIC is a likely contributor. The misconduct was at least compounded by the Grievant's lack of skill or experience with EPIC.

Va. Code § 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 § 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 determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum* v. *Dept. of Agr. & Consumer Serv.,* 41 Va. App. 110, 123,582 S.E. 2d 452,458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), 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."

The Agency had the discretion to elect less severe discipline. 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 ...." Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."

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

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 Agency voiced that it has conducted progressive discipline, including the multiple instances of informal counseling for the Grievant before issuing the present termination. In light of the standard set forth above in the *Rules,* the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. However, the Hearing Officer finds that the relatively new EPIC software system started in March 2011 is a mitigating factor for performance charting errors within a month or so. I find both that unexplained glitches in the EPIC system and the newness of the EPIC system played a part in her charting errors. Accordingly, this mitigating factor counters some of the instances used to terminate the Grievant's employment. Because of these mitigating factors, the termination exceeds the limits of reasonableness and compels a reduction of the disciplinary

action from a Step 3 Performance Warning Termination to the lesser Formal (Written) Performance Improvement Counseling-Step 2 for unsatisfactory work performance. Accordingly, the Agency shall issue such Performance Improvement Counseling Form ("PIC") documenting the expectations for performance improvement, the time frame for the improvement, and consequences if the employee fails to achieve and maintain the required performance level.

The Grievant asserts that the Agency's termination action is motivated by retaliation. It appears that the grievant's theory of unfair or disparate treatment is in essence the same as her retaliation argument, and challenges the same management actions. As such, her claims of unfair/disparate treatment will be analyzed under a retaliation theory. For a claim of retaliation to succeed, the Grievant must show (1) she engaged in a protected activity; (2) she suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. *Burlington N & Santa Fe Ry. Co.* v. *White,* 548 U.S. 53,67-68 (2006); *see, e.g.,* EDR Ruling Nos. 2007-1601,2007-1669,2007- 1706 and 2007-1633. If the Agency presents a non-retaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC* v. *Navy Fed. Credit Union,* 424 F.3d397, 405 (4th Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See Texas Dep't of Community Affairs* v. *Burdine,* 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case). A claim of retaliation can often hinge on circumstantial evidence.

The Grievant engaged in protected activity by initiating a prior grievance, in which she prevailed in reversing her demotion and gaining reinstatement as a Clinician III. The Grievant asserts that the retaliation she has experienced stems from this prior demotion and reinstatement. The termination certainly satisfies the requirement of a materially adverse action. However, the Grievant faces a challenge showing a causal connection. The Fourth Circuit requires little evidence for a showing of a causal connection between the complaint and the adverse employment action. *See Tinsley* v. *First Union Nat'l Bank,* 155 F.3d 435,443 (4th Cir. 1998) ("Normally, very little evidence of a causal connection is required to establish a *prima facia* case .... "). Indeed, the Fourth Circuit has held that "merely the closeness in time between the [protected activity] and an employer's firing is sufficient to make a *prima facia* case of causality." *Tinsley,* 155 F.3d at 443 (citing *Williams* v. *Cerberonics, Inc.,* 871 F.2d 452, 457 (4th Cir. 1989)).

The Agency's evidence is that virtually all employees who are found to have deficiencies in charting and patient care are disciplined consistently in one form or another. While the Grievant may question this evidence, the record does not show actual instances of disparate treatment. Perhaps the Grievant could have requested documentation of the Agency's discipline in similar instances, but that evidence was not presented. However, the timing of the Agency's disciplinary activity toward the Grievant, having geared up on the heels of her reinstatement from demotion, raises a *prima facia* claim of retaliation. The Agency does not show or allege any substandard performance by the Grievant during the period of the claimant's demotion from October 2010 until reinstated in March 2011. Immediately following the Grievant's reinstatement the Agency discovered an instance of alleged misconduct. While all of the instances of misconduct identified by the Agency's charges are not specifically mitigated as discussed above, the Agency's failure to demonstrate any consideration of mitigation in the termination decision, coupled with other

questionable actions, raises an inference of retaliation. Once such occurrence is the close timing of the discipline following the Grievant's successful grievance challenging her demotion. Another suspicious factor is the unusual urgency displayed by moving up the pre-determination meeting from the date scheduled with the ombudsman. This conduct raises questions of the Agency's motives. Thus, I find some retaliatory taint to the termination process. However, because of the mitigation exercised as discussed above, even a finding of retaliation would not erase all of the performance deficiencies noted by the Agency and render the Agency concerns totally pretextual. For this reason, the severity of the discipline is mitigated to reverse the termination.

When dealing with patient medical care, the hearing officer recognizes that even the slightest mistake or miscue can possibly have very detrimental consequences. The hearing officer recognizes and upholds the Agency's great responsibility to ensure patient care, but this Grievant is not charged with a "serious misconduct" offense as defined in the SOP. While the Agency cites a history of performance issues, the prior disciplinary demotion was reversed by the Agency, and the Agency has not shown that Grievant's termination from current discipline was within the bounds of reasonableness.

The Agency's obligation and action to ensure the satisfactory care of its patients is fully recognized, and the Agency may initiate the PIC to ensure that the Grievant has competence in the EPIC software program, even to include mandatory training. The Grievant is advised to assess carefully her skills using EPIC and to take advantage of all training opportunities afforded her to avoid a record of further EPIC charting mistakes. The Agency is ordered to refrain from even the slightest retaliatory motive in conducting the Grievant's continuing performance evaluation.

In his Decision, the hearing officer wrote as follows:

DECISION

For the reasons stated herein, the Agency's termination is rescinded and the Agency is ordered to reinstate Grievant to her former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The level of discipline is reduced from a Step 3 Performance Warning Termination to the lesser Formal (Written) Performance Improvement Counseling - Step 2 for unsatisfactory work performance. The Agency may, if it so elects, continue with issuance of a Performance Improvement Counseling Form to ensure that the Grievant develops competence in the EPIC software program and other deficiencies.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In its request to this Department for an administrative review, the University raises four issues. Three of those issues were deemed to be evidentiary in nature and were addressed as such by the hearing officer in his Reconsideration decision and by the Director of the Department of Employment Dispute Resolution in her ruling. The fourth issue, one that the agency deems to be policy- related, will be addressed in the ruling issued by this Agency.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. As a fourth issue, the University raised a concern that the hearing officer incorrectly interpreted Medical Center Policy 701, Employee Standards of Performance.

In his Original Decision, the hearing officer ruled as follows:

> …the Agency's termination is rescinded and the Agency is ordered to reinstate Grievant to her former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The level of discipline is reduced from a Step 3 Performance Warning Termination to the lesser Formal (Written) Performance Improvement Counseling - Step 2 for unsatisfactory work performance. The Agency may, if it so elects, continue with issuance of a Performance Improvement Counseling Form to ensure that the Grievant develops competence in the EPIC software program and other deficiencies.

In his Reconsideration Decision, the hearing officer wrote,

> Upon such findings, the hearing officer has the authority to completely rescind the discipline levied. That authority must, by necessity, include reducing the discipline to all lesser levels. In this case, the hearing officer did not reach back to any prior disciplinary action. The Step 4 Termination was reduced in severity, to include job reinstatement and a current Formal (Written) Performance Improvement Counseling – Step 2 for unsatisfactory work performance."

In this ruling, DHRM disagrees that the hearing officer misinterpreted policy. Rather, we feel that the issue is evidentiary in nature and the agency is disagreeing with how the hearing officer weighed the evidence and with the conclusion he drew. Furthermore, the hearing officer has a responsibility to decide the case based on the weight of the evidence and either to uphold, to modify or to overturn the agency's disciplinary action. Therefore, this Department has no basis to interfere with the application of this decision.

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Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services