

Issue: Step 3 Performance Warning with Suspension (Inappropriate/unprofessional interaction with a coworker); Hearing Date: 10/19/11; Decision Issued: 11/11/11; Agency: UVA Health System; AHO: John V. Robinson, Esq.; Case No. 9677; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9677

Hearing Officer Appointment: September 14, 2011
Hearing Date: October 19, 2011
Decision Issued: November 11, 2011
Decision Re-Issued: November 14, 2011

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

As described in her Grievance Form A dated July 1, 2011, the Grievant requested an administrative due process hearing to challenge issuance of a Step 3 Performance Warning and Suspension effective June 3, 2011, pursuant to a Formal Performance Counseling Form, dated June 3, 2011 by Management of University of Virginia Health System (the “Department” or “Agency”). The Grievant is seeking the relief requested in her Grievance Form A.

The parties duly participated in a first pre-hearing conference call scheduled by the hearing officer on September 20, 2011 at 10:00 a.m. The Grievant's attorney, the Agency's attorney and the hearing officer participated in the call. The Grievant, by counsel, confirmed she is seeking the relief requested in her Grievance Form A.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on September 20, 2011 (the “Scheduling Order”), which is incorporated herein by this reference.

At the hearing, the Grievant was represented by her attorney and the Agency was represented by its attorney. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing¹.

¹ References to the Agency's exhibits will be designated AE followed by the exhibit number. References to the Greivant's exhibits will be designated GE followed by the exhibit number. The recording of the hearing is on five (5) compact discs which will be referred to as Tape 1-5.

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

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses which she asserts.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. During the time period relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as a Speech-Language Pathologist ("SLP") Clinician 3. The Grievant's supervisor (the "Supervisor") was and is the Agency's Manager of Rehabilitation Services.
2. The Supervisor has oversight of the therapy services department consisting of occupational therapists ("OTs"), physical therapists ("PTs") and SLPs. There were 4 SLPs at the time of the subject discipline: the Grievant, P, B and H.
3. Amongst other primary job duties, the Grievant was expected to (1) perform evaluations of speech, language and swallowing functions of patients in the hospital according to professional standards and Departmental guidelines; (2) demonstrate knowledge of intervention options and execute a program of skilled speech language pathology intervention; (3) actively participate in the professional growth of herself and others; and (4) communicate appropriately using good interpersonal skills. AE 9.
4. Concerning the above job functions, applicable performance expectations of the Grievant during the Period included (1) demonstrating proficient and timely conflict management skills; (2) taking a leadership role in resolving patient concerns and practice issues within the healthcare system; (3) projecting a positive, professional demeanor through verbal and non-verbal communications; (4) resolving interpersonal conflicts using appropriate methods and organizational resources, including but not limited to Employee Relations Services and Faculty Employee Assistance Program; (5) acknowledging diverse perspectives; (6)

modeling language and behaviors that build inclusiveness in the work environment; and (7) maintaining positive working relationships with peers at all times. AE 9.

5. There were only four (4) SLPs, including the Grievant, during the Period and the SLPs see mainly stroke patients at the hospital but work with all the hospital units. Accordingly, good communication and harmonious cooperative team work between this small group of skilled professionals are paramount for the safety and welfare of the patients and for the efficient and efficacious functioning of the facility.
6. The Grievant was on call as the designated SLP for the hospital during the weekend of May 14-15, 2011. The Grievant saw some patients during the weekend and pursuant to the practice of the team of SLPs the Grievant was entitled to take a corresponding amount of time off during the next work week.
7. The Grievant decided that she might take off her accumulated on call time from the weekend on Tuesday, May 17, 2011. The Grievant made an entry for this Tuesday on the SLP team's shared work electronic calendar to the effect "[Grievant] ? off for weekend call".
8. On Monday, May 16, 2011, when members of the SLP team including the Grievant, P and B discussed their workloads, P and B learned that the Grievant planned to see 2 patients and to orient a new student on the Tuesday afternoon.
9. On Tuesday, May 17, 2011, the Grievant was late getting to work but did not call in to inform her team or anyone else at the hospital.
10. In the meantime, B and P met in their office in the Annex as the only members of the SLP team present to divide up the patient assignments for the day as was the practice of the team. H was out that day. B and P waited for the Grievant until about 9:30 a.m. B and P checked the Grievant's workspace, saw that the Grievant's phone was there, that the Grievant's labcoat was there and that none of her belongings were there. Based on the facts of the entry by the Grievant on the calendar, the lack of visible presence at the facility at her workspace and because the Grievant did not call in to say that she would be late, P reasonably concluded that the Grievant had taken her accumulated on call time (which had to be used in the subject week or it would be lost) on Tuesday morning, May 17, 2011.
11. During the Tuesday, a new patient with a stroke in the Emergency Department needed speech language pathology services. B received a call concerning this need and P and B agreed that B would see the patient which B duly did.
12. P and B saw the Grievant Tuesday afternoon in the office when she left to go to the floor for her 2 patient assignments.

13. P and B did not page the Grievant on their office phones on Tuesday about the new stroke patient in the Emergency Department.
14. On Wednesday morning, May 18, 2011, the Grievant questioned P as to why P had not informed the Grievant of the needs of the new stroke patient the previous day, which the Grievant maintains she could have taken care of.
15. The Grievant made her point that P should have paged the Grievant concerning the new stroke patient in the Emergency Department as was the team's agreed practice. The counter-point made by P was that P and D took care of the matter and the Grievant should let it go.
16. P and D made their respective points and counter-points several times before the interaction ended with neither of them achieving a satisfactory resolution from their own perspective.
17. H observed the interaction and testified at the hearing. H's testimony was credible and her demeanor was open, frank and forthright.
18. While H characterized this interaction between the Grievant and P in the SLP team's office area in the Annex as "nonproductive", H also testified under oath that the Grievant was not aggressive, was not verbally abusive to P and stated that the Grievant did not otherwise act in an unprofessional manner.
19. Before this incident, the Grievant had met with the Supervisor to voice her concern that certain SLP team members excluded her from matters and communications relating to their collaborative team practice.
20. The Supervisor advised the Grievant to address such concerns with team members as they arose in an effort to resolve them, obviously in accordance with applicable policy.
21. The next day, Thursday, May 19, 2011, the Grievant asked in the afternoon to "shadow" P in the surgical trauma intensive care unit (the "STICU") and P agreed.
22. At the time of the discipline which is the subject of this proceeding, the Grievant was subject to a Step 2 Formal Performance Counseling Form (the "Step 2") for, amongst other things, inappropriate and unprofessional interactions with a patient's family. AE 3.
23. Under the plan of action in the Step 2, Management recommended that the Grievant use other members of the SLP team to mentor her concerning the improvement of her communication and interpersonal skills in the hospital and cautioned the Grievant that "[d]uring the performance warning period, we will

follow up with staff and family members to insure that appropriate and professional interactions are occurring." AE 3.

24. Accordingly, Management through the "shadowing" was attempting to assist the Grievant with her communication and interpersonal skills in the hospital by allowing the Grievant the opportunity to observe P interacting with physicians, nurses, patients, etc. and to improve from her observations.
25. The Grievant observed P evaluate P's patient in the STICU with an ice chip and because the patient did not do well with the ice chip, P readily concluded that a swallow test would not be appropriate.
26. P left the patient's room and said words to the effect of "that's that" but the Grievant said she wanted to continue to observe P interact with the physician (who needed to be informed) and nurses.
27. P sat at a computer in the nurses station, an open, central, relatively busy, public area, with 2 tables, where conversations could potentially be overheard by other staff, patients and the general public.
28. The Grievant made negative comments to P about elements of management of the therapy services department and the organization in general.
29. However, matters really took a turn for the worse when the Grievant remarked to the effect that the Grievant still had weekend comp time to take and P responded to the effect that, "Oh, I thought you took that already."
30. P explained to the Grievant that the basis for P's response was that P and B thought the Grievant had taken her weekend call time on Tuesday morning because they didn't know where the Grievant was, her phone was on her desk and the calendar was marked that she may take it that day. Of course, the Grievant had come in on Tuesday morning but was late and had not informed the SLP team or hospital as she normally does. While mistaken, P's assumption was reasonably made and was honestly formed.
31. The Grievant became enraged, believing mistakenly that P was questioning her integrity, and the Grievant launched into a loud, very angry, lengthy, accusatory diatribe against P and the SLP team, accusing P of essentially questioning her integrity and stating, amongst other things, that she was going to do what everyone else does and come and go as she pleases.
32. P was dumbstruck.
33. The Grievant admitted to the Supervisor in the first of two predetermination meetings concerning this discipline on May 25, 2011, that the interaction truly

escalated to "contentious" when the Grievant told P she had planned to take time off on Friday and that the Grievant felt compelled to apologize to P later that afternoon in the Annex for escalating the argument to the acknowledged contentiousness in the public nurses station area where other professionals were around. AE 2; Tape 2.

34. The hearing officer finds that the testimony of the Supervisor concerning the admissions of the Grievant to the Supervisor was credible, consistent and compelling. The Supervisor's demeanor was direct, open, frank and forthright. As a neutral representative of the institution (and not of either management or the Grievant), Ms. S from the Agency's Human Resources Department also sat in during the first predetermination meeting to observe and take notes. Ms. S corroborated the Supervisor's testimony of the admissions made by the Grievant. The testimony of Ms. S was credible, consistent and compelling. Her demeanor was direct, open, frank and forthright.
35. P was disciplined in a similar manner (although at a lesser level because she had not accumulated any prior discipline) to the Grievant for her outburst and behavior toward the Grievant in the Annex towards the end of the work day on May 19, 2011.

ADDITIONAL FINDINGS, APPLICABLE LAW, ANALYSIS AND DECISION

The General Assembly enacted the *Virginia Personnel Act*, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The operative Agency standards of conduct (the “SOC”) are contained in Agency Human Resources Policy No. 701 (effective January 1, 2011). AE 6. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The SOC provides in part as follows:

....

C. POLICY:

The Medical Center expects employees to meet standards of performance that enable all to work together to achieve the mission of the Medical Center. The University of Virginia Medical Center maintains an environment that is free from implicit and explicit behavior which is used to adversely control, influence or affect the well-being of any members of its healthcare community. All individuals working in the Medical Center shall treat others with respect, courtesy, and dignity, and shall conduct themselves in a professional and cooperative manner.

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. . . .

D. PROCEDURE:

1. Standards of Performance

The following standards of performance are designed to protect the well being and rights of all employees and promote safe and efficient operation of the Medical Center.

- A. Each employee shall adhere to Medical Center Policy No. 0283 - "Behavioral Code of Conduct", Medical Center Policy No. 0235 - "Compliance Code of Conduct", and University of Virginia Code of Ethics"
<http://www.virginia.edu/statementofpurpose/uethics.html>.
- B. In addition, each employee shall:
- a. follow all other Medical Center and departmental policies and procedures.
 - b. perform job duties as assigned by the supervisor, spending the work day efficiently and effectively performing such duties while demonstrating an awareness of priorities. . . .

2. Performance Issues

The Medical Center uses a process of performance improvement counseling to address unacceptable performance/behaviors 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.

The following are examples of unacceptable performance/behavior that would be addressed through the progressive performance improvement counseling process:

- Failure to meet performance expectations
- Adversely affecting another's ability to do work . . .
- Failure to follow supervisor's instructions
- Failure to follow applicable policy

3. Performance Improvement Counseling

It is the responsibility of the supervisor to ensure that the employee receives appropriate training and understands how to meet performance expectations. When concerns about employee performance arise, the supervisor is

responsible for assessing the situation, determining whether the employee understands how to meet performance expectations, providing coaching and monitoring changes in performance. If, after such supervisory attention/intervention, the performance issue is not corrected, the supervisor shall implement the progressive performance improvement counseling process. Progressive performance improvement counseling steps include informal counseling, formal (written) performance improvement counseling, suspension and/or performance warning, and ultimately termination or demotion. Although most cases will follow the sequence below, supervisors shall take into consideration the nature of the performance issue, the employee's intent, the consequences of the employee's actions, the employee's past performance record, and other mitigating or aggravating circumstances in determining the appropriate step to take.

Step One	Step Two	Step Three	Step Four
Informal Counseling	Formal Performance Improvement Counseling	Performance Warning And/or Suspension	Termination

....

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.

Depending on the severity of the performance issue 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. . . .

4. Disciplinary Suspension

A disciplinary suspension of up to five (5) working days may be applied progressively after at least one formal performance improvement counseling. However, depending on the severity of the performance issue and the employee's past performance record, a suspension may accompany the first written counseling or performance warning. A disciplinary suspension removes the employee

from duty without pay for a stated period of time to emphasize the importance of the performance counseling being given.

AE 6.

Medical Center Policy No. 0283 provides in relevant part:

....

C. POLICY:

This Behavioral Code of Conduct ("Code") is a statement of the ideals and principles which govern personal and professional behavior at the University of Virginia Medical Center. This Code applies to all persons providing patient care and other services within or for the benefit of the Medical Center, regardless of employer ("Covered Persons").

Adherence to the ideals and principles stated in this Code advances the Mission of the Medical Center and its commitment to the core values of respect, integrity, stewardship and excellence.

Covered Persons are expected to, at all times:

- Treat each other, patients and their families, with fairness, courtesy, respect and consideration.
- Cooperate and communicate with others, displaying regard for each person's dignity and worth.
- Use conflict management skills and direct verbal communication to manage disagreements.

....

Consistent with the Behavioral Code of Conduct requirements stated above, the Medical Center strives to maintain an environment that is free from intimidating and disruptive behavior, whether implicit or explicit, which is used to adversely control, influence or affect the well-being of any member of its healthcare community, its patients or their families. Such behavior compromises the performance of Covered Persons and threatens patient safety by disrupting teamwork, communication, and collaboration.

AE 7.

The Formal Performance Counseling Form, Step 3 - Performance Warning and Suspension dated June 3, 2011 (the "Step 3"), issued by the Supervisor described the Grievant's disciplinary infractions as follows:

Performance warning is being issued resulting from inappropriate/unprofessional interactions with a co-worker occurring on:

5/18/11 in the PCC Annex office space - [Grievant] initiated a conversation with her co-worker which results in [Grievant] raising her voice and continuing to escalate the conversation. The co-worker reported that she felt "verbally attacked by the conversation."

5/19/11 in the STBICU - [Grievant] was shadowing the same co-worker on the unit and a conversation occurred that again resulted in [Grievant] talking over the employee, being forceful, and leaving co-worker feeling verbally attacked.

Under the Behavioral Code of Conduct (Policy 0283) it is stated:

Covered Persons are expected to, at all times:

- *Treat each other, patients and their families, with fairness, courtesy, respect and consideration.*
- *Cooperate and communicate with others, displaying regard for each person's dignity and worth.*
- *Use conflict management skills and direct verbal communication to manage disagreements.*

During the first interaction listed it was reported, and supported by a witness that [Grievant] did not follow this policy. For the second interaction, [Grievant] said during the first pre-determination meeting it was a contentious meeting, and one she felt compelled to apologize for having. While she did attempt to apologize for the 5/19/11 occurrence later in the day, which her actions were also supported by a witness, this does not absolve responsibility from the behavior in the prior engagements. The apology also further inflamed the situation. Even though others may have also responded negatively in this instance it does not allow for violation of the Code of Conduct and Medical Center HR Policy #701- Employee Standards of Performance.

A Pre-Determination Meeting was held with [Grievant] on 05/25/11. A follow-up meeting was held on 05/31/11 to allow [Grievant] to provide any additional information.

Concerning the interaction on May 18, 2011, based largely on the testimony of H and also on the hearing officer's findings above, the hearing officer decides that the Agency has failed to meet its burden of proving upon a preponderance of the evidence that the Grievant violated any applicable Agency policy cited in the Step 3.

However, the Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated Policy No. 0283 and Policy No. 701 concerning the Grievant's behavior and verbal attack against P in the STICU or STBICU (Surgical Trauma Burn Intensive Care Unit) on May 19, 2011.

As the Step 3 reflects, when the disciplinary infraction occurred, the Grievant was still subject to the Step 2 and, accordingly, management's decision to issue the Step 3 was warranted and appropriate under the circumstances.

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

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

Here, the Agency elected to suspend the Grievant for two (2) out of a possible five (5) days under policy. AE 6. Clearly, the punishment is not too harsh or unjust.

With regard to the incident in the STICU on May 19, 2011, the Agency appropriately determined that the Grievant's violations of Agency policies concerning inappropriate and/or unprofessional interactions with a co-worker warranted a Step 3 under the circumstances.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's attorney that the Grievant's disciplinary infractions justified the discipline by Management concerning the May 19, 2011 infractions. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Step 3 offense after taking into account the Grievant's prior, active Step 2 offense and the Agency's policy of progressive discipline.

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

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. *Rules* § VI(B) (alteration in original).

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

While the Grievant did not specifically raise mitigation in the hearing or in her Form A and while the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Step 3 and all of those listed below in his analysis:

1. the Grievant's service to the Agency;
2. the fact that the Grievant received an overall rating of "Fully Meets Expectations" in her most recent performance evaluation (AE 9) and overall ratings of "Consistently Exceeds Expectations" in the preceding two (2) annual evaluations (AE 9); and
3. the often difficult and stressful circumstances of the Grievant's work environment; and
4. the fact that the hearing officer found no disciplinary infraction on May 18, 2011.

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

Management needs to get the Grievant's attention concerning the need for the Grievant to adhere to these important interpersonal and communication policies which are critical to the smooth, efficient functioning of the SLP team and the hospital. The Grievant's past discipline and Management's past efforts of progressive discipline and proactive assistance to the Grievant to help her improve her communication and interpersonal skills justify Management's mitigation/aggravation analysis. The hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

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

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

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

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

The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense

under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

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

The hearing officer decides for the offense specified in the written notice concerning the Grievant's infraction on May 19, 2011 (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

In her Form A, the Grievant raised various affirmative defenses such as discrimination. These affirmative defenses were not pursued or fully developed at the hearing and, in any event, the hearing officer finds there is insufficient evidence in the record to even begin to decide that the Grievant has met her evidentiary burden of proof in this regard. In the event the Grievant is asserting that P received disparate treatment, as the hearing officer's finding in paragraph 35 above reflects, this is simply incorrect.

DECISION

The Agency has sustained its burden of proof in this proceeding and the disciplinary action of the Agency concerning the infractions by the Grievant on May 19, 2011 grieved in this proceeding, is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

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

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

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly

discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, Virginia 23219 or faxed to (804) 786-0111.

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

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

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

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

ENTER: 11 / 11 / 11 *nunc pro tunc*

John V. Robinson, Hearing Officer

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