Issue: Step 4 Formal Performance Improvement Counseling Form with Termination (threatening a patient); Hearing Date: 03/13/19; Decision Issued: 03/27/19; Agency: UVA Medical Center; AHO: William S. Davidson, Esq.; Case No. 11303; Outcome: Full Relief; **Administrative Review Ruling Request received 04/01/19; EDR Ruling No. 2019-4897 issued on 05/10/19; Outcome: Remanded for Clarification; Remand Decision issued 05/17/19; Outcome: Original decision affirmed; Administrative Review Request on Remand Decision received 05/28/19; EDR Ruling No. 2019-4938 issued on 07/09/19; Outcome: AHO's decision affirmed; Attorney's Fee Addendum issued 07/12/19 awarding $9,825.00.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 11303

Hearing Date: March 13, 2019
Decision Issued: March 27, 2019

PROCEDURAL HISTORY

On November 2, 2018, the Grievant was issued Formal Performance Improvement Counseling Form wherein she was terminated for:

> ...threatening a patient with physical harm, which is considered gross misconduct and a violation Medical Center Human Resources Policy No. 701 - Employee Standards of Performance and Conduct, Medical Center Policy No. 283 - Behavioral Code of Conduct, and Health System Policy No. BEH-001 - ASPIRE... [1]

On November 30, 2018, the Grievant timely filed a grievance challenging the Agency's actions. [2] On December 26, 2018, the grievance was assigned to a Hearing Officer. Based on the original hearing date being continued because of inclement weather, a hearing was held on March 13, 2019, at the Agency's location.

APPEARANCES

Counsel for Agency
Counsel for Grievant
Grievant
Witnesses

ISSUES

Did the Grievant violate Medical Cen Did the Grievant violate Medical Center Human Resources Policy No. 701 Employee Standards of Performance and Conduct, Medical Center Policy No. 283 - Behavioral Code of Conduct, and Health System Policy No. BEH-001 - ASPIRE? If so, was termination an available option for the Agency?

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

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. 3 Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs,* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

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

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. 4 However, proof must go beyond conjecture. 5 In other words, there must be more than a possibility or a mere speculation. 6

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of the witness, I make the following findings of fact:

The Agency provided me with a notebook containing 26 tabs and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

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[3] *See* Va. Code § 2.2-3004(B)
[4] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[5] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)
[6] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

The Grievant provided me with a notebook containing 15 tabs. That notebook was accepted in its entirety as Grievant Exhibit 1, without objection.

During the course of the hearing, a stipulation was proffered by both parties and the stipulation was accepted as - Stipulation 1.

The Agency presented four witnesses in this matter. For purposes of identification, they will be RN1, RN2, RN3 and Grievant's Supervisor.

RN1 was an oncology nurse caring for her patient. In the early morning on or about September 22, 2018, the condition of her patient became such that she called RN2 and RN3 to come to his bedside to offer advise and assistance. After RN2 and RN3 had assessed the patient, RN3 produced a written narrative as to the patient's condition. 7 Clearly, this patient was in severe distress and an immediate CT scan was ordered. RN1, RN2 and RN3 took the patient to where he would receive his CT scan. The Grievant was the CT scan technician who would perform that scan. When the patient arrived at the location, the patient was on the hospital bed that had carried him from his room. The relative location of that bed and the CT equipment can be seen at Agency Exhibit 1, Tab 6, Page 9. There is some disagreement and/or confusion between the testimony of RN1, RN2, RN3 and the Grievant as to where everyone was located at all times during the CT scan procedure. Generally speaking, the three RN's were on the side of the table where the patient's bed was and the Grievant was at the far side of the CT scan table. The patient had numerous monitors attached to him, all of which had to be arranged so that he could be moved from his transport bed to the CT scan table. The patient was altered, agitated and in pain. At some point during this process, the patient struck the Grievant in her abdomen. The Grievant testified that she was struck hard enough that she had a bruise that lasted for approximately one week. RN1 testified that she heard the Grievant say, "If you hit me, so help me God, I will hit you back." Upon hearing that statement, RN1 did not say or do anything at that time.

RN2 testified that he heard the Grievant say, "Do not hit me, or I'm going to hit you back." At that time, RN2 stated to the Grievant that - "The patient was in an altered state; did not know what he was doing; could not follow commands; the Grievant ought not to have said that; and the Grievant should not speak to him in that way." RN2 further testified that was all that he was going to do in this matter.

RN3 testified that he heard the Grievant say, "Do not hit me, or I will hit you back." RN3 testified that he neither said or did anything regarding this incident.

The Grievant testified before me that, while she does not remember the specifics of what she is alleged to have said, she cannot contradict that she said it. Accordingly, for the sake of the balance of this Decision, it will be an established fact that the Grievant said something to this patient that essentially was, "If you hit me, I will hit you back."

RN1, subsequent to these events, filed Management Form 96369 with the Agency. 8 This form is euphemistically referred to as a "Be Safe Report." This report is what triggered this

[7] Agency Exhibit 1, Tab 14, Page 1
[8] Agency Exhibit 1, Tab 6, Page 1

matter moving forward. Because this form is rather inartfully crafted, and because it attempts to capture all possible situations in very little space, it resulted in RN1 making the allegation that the potential harm or potential impact to the patient was moderate. That translated to - He might be transferred to a higher level of care, additional stay or additional procedures. 9 During her testimony, RN1 indicated that really was not a likely outcome. RN1, on the Be Safe Report, deemed it unlikely that this issue would ever occur again with the Grievant. 10

At the conclusion of all witnesses presented by the Agency, it was crystal clear that the patient was not harmed by the Grievant, the patient timely received his CT scan, and the patient was timely returned to his original room. There was agreement in the patient's complete inability to understand or comprehend anything that was said to him during this event because of his altered state and because of his severe condition. It would appear, that Medical Center Human Resources Policy No. 701 is the operative policy in this matter. 11 That policy sets forth in part as follows:

> ...Performance issues and misconduct are generally addressed through a process of progressive performance improvement counseling as outlined in this policy. This process provides positive guidance, appropriate correction, and helps ensure fair and equitable treatment of all employees. Medical Center management will institute corrective action at any appropriate "Step," as explained below, based on the totality of the circumstances. In such situations, Medical Center management has the authority to institute corrective discipline at any appropriate "Step" up to and including termination of employment. In determining the appropriate level of counseling to initiate, supervisors shall consider multiple factors, including but not limited to the nature of the performance issue, the **employee's intent, the consequences of the employee's actions, the employee's past performance/disciplinary record, and other mitigating or aggravating circumstances**...
>
> ...Pursuant to Virginia Code Section 2.2-3004, Medical Center management reserves the exclusive right to manage the affairs and operations of the Medical Center. Accordingly, management reserves the right to take appropriate action in circumstances where an employee's performance or misconduct warrant greater sanctions than addressed herein, including termination of employment without performance improvement counseling addressed below... 12 (Emphasis added)

Regarding Virginia Code Section 2.2-304, the entirety of the section that Management quotes is found at Virginia Code Section 2.2-3004(B), and it states as follows:

> Management reserves the exclusive right to manage the affairs and operations of state government. Management shall exercise its powers with the highest degree of trust. In any employment matter that management precludes from proceeding to a grievance hearing,

[9] Agency Exhibit 1, Tab 6, Page 3
[10] Agency Exhibit 1, Tab 6, Page 4
[11] Agency Exhibit 1, Tab 23, Pages 1-7
[12] Agency Exhibit 1, Tab 23, Pages 1 and 2

> management's response, including any appropriate remedial actions, shall be prompt, complete, and fair.

It is clear that this reservation of right to manage the affairs and operations, deals primarily where management has precluded a matter from moving to a grievance hearing. When a matter is qualified by management to proceed to grievance hearing, Virginia Code Section 2.2-3005.1, becomes applicable. Accordingly, I am bound by the limitations set forth in that Statute and as stated earlier in the section of this Decision dealing with my authority, I review the facts de novo, as if no determinations had been made between the Agency and the Grievant. The sole reason for having this independent review is to guarantee that both the Agency and the Grievant are afforded an independent review of the facts to determine whether misconduct occurred, whether the Agency's prescribed punishment appropriate and whether there were any aggravating or mitigation circumstances that would impact either the Agency or the Grievant.

As is clear from the above statements found in Policy No. 701, the Agency's intent is to go through a level of disciplinary steps except where it may otherwise determine that the employee's conduct was so egregious as to allow it to move directly to termination. In this matter, the Agency takes the position that the Grievant's conduct amounted to "gross misconduct" inasmuch as it threatened a patient. 13 Policy No. 701 sets forth four steps in management's ability to work with its employees and the fourth step is termination.

That Policy sets forth in part as follows:

> ...if the employee's Serious or Gross Misconduct has a significant or severe impact on patient care or Medical Center operations, termination may be the appropriate course of action. If, in Medical Center management's opinion, the employee's misconduct or deficient performance has a significant or severe impact on patient care or Medical Center operations, employment may be terminated without resorting to Steps 1 through 3... 14

Inasmuch as the Agency skipped Steps 1, 2 and 3, of it's progressive discipline, the Agency clearly came to the conclusion that the Grievant's misconduct or deficient performance had a significant or severe impact on patient care or Medical Center operations. Yet, when the Grievant's supervisor testified before me, she stated unequivocally, that there was neither a significant nor severe impact on this patient's care. Indeed, this patient was sent to have a CT scan on an emergency basis, and the scan was performed within all of the guidelines of that emergency basis. Furthermore, the Grievant's supervisor testified that she knew of no significant or severe impact on Medical Center operations because of the Grievant's statement.

As stated earlier, Policy No. 701 sets forth several issues that must be considered to determine an appropriate level of discipline or counseling. One of those is the employee's intent. The Grievant's supervisor testified that she could only surmise that because the Grievant said she would hit the patient that she intended to hit the patient. The Grievant testified that she had no intent to hit the patient, and indeed, did not hit the patient. Another matter that must be considered pursuant to Policy No. 701 was the consequence of the employee's actions. As has been stated, there was no consequence regarding the patient. And, regarding the three RN's who

[13] Agency Exhibit 1, Tab 23, Page 3
[14] Agency Exhibit 1, Tab 23, Page 6

heard this statement, one chose to do nothing at all; one told the Grievant it was inappropriate language and then did nothing more; and one filed the Be Safe Report. Accordingly, I determine that one RN deemed the statement to be of such concern that he decided nothing needed to be done; a second RN decided that the statement was such that it required verbal rebuke and nothing more; the third RN deemed that she should file a report. A third aspect that must be considered, pursuant to Policy No. 701, is the employee's past performance or disciplinary record. The Formal Performance Improvement Counseling Form stated in part as follows:

> ...although [Grievant] does not have any prior counseling... [15]

Finally, Policy No. 701 directs the Agency to consider mitigating or aggravating circumstances. The Grievant's supervisor testified that she was not surprised that this happened because of the stress under which the Grievant was operating. The Grievant's mother had died withing the prior month, and the Grievant's home had sustained severe damage within the prior one or two days from a hurricane.

The issue before me in this matter has nothing to do with patient care and/or safety. The patient received excellent care and treatment. No one testified before me that the work product of the Grievant was anything other than to the standards of which this Agency requires. No one testified before me that this patient was harmed in any way. No one testified before me that the operations of this Agency were impacted in any way.

In a closing argument, counsel for the Agency argued that the Agency would be harmed if the Grievant was not terminated. Counsel seemed to argue that anything short of termination would cause other employees to speak out to the community that patients were being regularly threatened by staff members of this Agency and that would impact the operations of the Agency. That argument of course disregards the concept of progressive discipline. It is just as likely that employees of the Agency are now frightened that anything they say could be perceived by any fellow employee as justifying a Be Safe Report and they could be terminated based on an arbitrary determination by management that whatever was said was sufficient to go directly to termination. I find that what was said in this matter did not harm the patient nor did it harm the operations of the Agency. I do find that it was a statement that the Grievant made under exigent circumstances and that, in a perfect world, should not have been made. Further, I find that, as RN1 stated in the Be Safe Report that she filed, it is unlikely that this would ever happen again. Accordingly, I find that the proper response to the Grievant's statement should have been a Step 3 Performance Warning and a suspension. I find that the suspension should have been for two work weeks.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." Under the Rules for Conducting Grievance Hearings, "a Hearing Officer must give deference to the Agency's consideration and assessment of any mitigating and aggravating circumstances. Thus a Hearing Officer may mitigate the Agency's discipline only if, under the record evidence, the Agency's discipline exceeds the limits of reasonableness. If the Hearing Officer mitigates the Agency's

[15] Agency Exhibit 1, Tab 3, Page 1

discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

Based on my finding that the Agency did not properly comply with the terms and conditions of its own Policy N. 701, I need not address the issue of mitigation at this time.

DECISION

For reasons stated herein, I find that the Agency has not bourne its burden of proof in this matter regarding termination of the Grievant. I find that the appropriate discipline in this matter was a Step 3 Performance Warning and suspension for two work weeks. I further order that the Agency reinstate the Grievant to the same position or an equivalent position. I award full back pay, from the two week suspension, which interim earnings must be deducted, to the Grievant as well as a restoration of full benefits and seniority, and reasonable attorney's fees. Attorney for Grievant is directed to §VI(E) of the Rules for Conducting Grievant Hearing, regarding time lines of filing for attorney's fees.

APPEAL RIGHTS

You may request an administrative review by EEDR within 15 calendar days from the date the decision was issued. Your request must be in writing and must be received by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

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William S. Davidson
Hearing Officer

[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
RECONSIDERATION DECISION OF HEARING OFFICER
In Re: Case No: 11303

Hearing Date: March 13, 2019
Decision Issued: March 27, 2019
EEDR Request for Reconsideration Received: May 10, 2019
Response to Request: May17, 2019

On May 10, 2019, I received an Administrative Review Ruling from the Director of the Office of Equal Employment and Dispute Resolution regarding this matter. That Ruling directed me to reconsider my findings as set forth in my Decision of March 27, 2019.

OPINION

The Director has directed me to determine whether or not the Grievant threatened the patient. [16]

In my original Decision, under Findings of Fact, I found as follows:

> ...Accordingly, for the sake of the balance of this Decision, it will be an established fact that the Grievant said something to this patient that essentially was, "If you hit me, I will hit you back..." [17]

The Director also provided me with a ruberic as to how to determine whether or not the above-referenced language constituted a threat. He points out that:

> ...veiled threats or other statements that could be interpreted or understood as threatening either by the target of the statement and/or other individuals, may constitute workplace violence... [18]

The Director also sets forth that, in determining whether or not an employee's statement is a threat, the Agency should consider the context of the statement and other surrounding circumstances such as, "...the employee's tone of voice or other behavior when making the statement, the employee's past conduct in the workplace, explanations or other clarification provided by the employee about the nature of the statement, and any subjective fear of harm experienced by the target of the statement and/or other individuals..." [19]

There were five people in the room when the Grievant made the aforesaid statement. The Grievant herself, the patient, RN1, RN2 and RN3. As between the three nurses and the Grievant, there was unanimous agreement that the patient, because of his status, was simply incapable of being threatened. Accordingly, I must look at how the three nurses and the Grievant reacted

[16] DHRM Administrative Review Ruling No. 2019-4897, dated May 10, 2019, Page 5
[17] Original Decision, Case No. 11303, dated March 27, 2019, Page 4
[18] DHRM Administrative Review Ruling No. 2019-4897, dated May 10, 2019, Page 5
[19] DHRM Administrative Review Ruling No. 2019-4897, dated May 10, 2019, Page 5

when the statement was made. As set forth in my original Findings of Fact, RN1 did nothing at the time of the statement. RN2 told the Grievant that the patient was in an altered state; did not know what he was doing; could not follow commands; and the Grievant ought not to have said that and should not speak to him in that way. Thereafter, RN2 did nothing further. RN3 testified that he neither said nor did anything regarding this incident. [20]

Accordingly, neither RN1, RN2 or RN3 in their testimony before me, expressed any concept of fear or threat that they may have felt when this statement was made. RN2 chastised the Grievant for making the statement and did nothing more. RN3 did nothing at all. RN1, subsequently and later that day, filed Management Form 96369, the Be Safe Report. That report indicated that even RN1 did not feel this was an issue that would occur again with the Grievant. [21]

I had no testimony before me that: the Grievant raised her hand to strike the patient, the Grievant's fist was closed as if she was going to strike the patient, the Grievant used a raised voice, or anyone in the room was even remotely threatened. Interestingly enough, RN1 who was the only person to file a report, testified directly before me that she was not fearful or threatened at all. Accordingly, the three Agency employees who were present when the statement was made, were not threatened and offered no evidence that they were threatened. The Grievant testified that the statement was made and clearly was not meant.

The Grievant's supervisor, who issued the original Formal Performance Counseling Form, and who was not present when this incident occurred, testified before me that she could only surmise that, because the Grievant made the statement, she meant it. Of course, this is the same supervisor who set forth as grounds for firing that the conduct was such as to significantly or severely impact patient care or Medical Center operations. The one person who was not in the room to hear the statement seems to be the only person who felt threatened. No one else who was present when the statement was made, including RN1who is the only person who took the time to file a report, felt threatened. As previously stated, RN1 directly testified before me that she was not threatened.

No one testified before me as to the employee's tone of voice and, accordingly, I must assume that tone was neutral. No one testified that the Grievant's body language was such as to indicate a threat or danger to the patient or to anyone else in the room. The Grievant has worked with this Agency for approximately 30 years and, as set forth in my original Decision, the Formal Performance Improvement Counseling Form stated as follows, "...Although [Grievant] does not have any prior counseling..." [22]

Accordingly, based on the testimony of those present, I find specifically that the Grievant did not threaten the patient, nor did the Grievant threaten any of the nurses that were in the room at the time the statement was made.

When an Agency allows a party who was not remotely connected to the incident make a subjective determination as to something like "threatening language," then you run the very real possibility that it can surely find someone, somewhere who is threatened by any language. The Agency's interpretation of the totality of the conduct, that was presented before me, is not

[20] Original Decision, Case No. 11303, dated March 27, 2019, Page 3
[21] Original Decision, Case No. 11303, dated March 27, 2019, Page 4
[22] Original Decision, Case No. 11303, dated March 27, 2019, Page 6

reasonable. The Agency, in essence, takes a posture that interprets all words 100% literally. Further, it did not look at context, tone, body language or intent. The Grievant may as well have said, "I have a chip on my shoulder," and the Agency would be scurrying around attempting to find the actual chip.

If I concluded that there was no threat to the patient, the Director directed me to clearly identify and justify a level of discipline consistent with types of misconduct specified in Policy 701. Having previously found in my original Decision that there was no "Gross Misconduct," as defined by Policy 701, I now look to see if there was any "Serious Misconduct," as defined by Policy 701. Having determined that neither the patient nor other employees were threatened by the Grievant's language, "Serious Misconduct," as defined under Policy 701, is not applicable. Because of the Director's direction to articulate the behavior that supports my original recommendation of a two-week suspension, I find that I was in error. In reviewing the examples set forth for Serious Misconduct, as set forth in Policy 701, I can find none that the Grievant violated. In my original Decision, I focused on Policy 701, Performance Warning and Suspension, Step 3, where it stated:

> ...A performance warning is issued to address deficiencies in performance as well as acts of serious misconduct. In addition, a performance warning may be used to address issues that the employee has not corrected following informal counseling and/or formal counseling. A performance warning may also be issued to address new performance issues or misconduct occurring while an employee is receiving counseling for a different issue or act of misconduct...

Upon the Director's request that I review this matter, I now believe that Step 3 is not likely to be the appropriate correct punishment. The Grievant's performance was exemplary. There were no prior formal or informal counseling memo's that had not been corrected. The Grievant was not receiving counseling for a different issue or act of misconduct.

Here, the Grievant made a statement out of frustration and because of other stress factors of which the Grievant's supervisor was aware. It is difficult to justify the Agency's posture of not being surprised that this happened because of the stress the Grievant was under at the time and the Grievant's supervisor's draconian literalistic interpretation of the statement made. As stated before, this supervisor was not present in the space or in the time that the statement was made. The statement made was no more a threat than the statement, "I am so hungry, I could eat a horse" would require protection for all nearby horses.

I was in error in finding a Step 3 violation which would justify suspension. More appropriately, this is a Step 2 violation, with no suspension. Accordingly, I amend my original finding in this matter and direct that the Grievant not be suspended for two weeks.

Finally, the Director asked that I address mitigation if I find it appropriate. Based on my original Decision and this Reconsideration, there is no reason for me to consider mitigation at this time.

DECISION

I conclude there is no reason to set aside the original Decision, with the exception that a two-week suspension was not appropriate. The more appropriate action would be counseling of

the Grievant to seek time off when under the type of stress her supervisor testified that the Grievant was experiencing. I award full back pay and benefits from the date of the Grievant's termination.

APPEAL RIGHTS

Both parties will have the opportunity to request an administrative review of the hearing officer's reconsidered decision on any other new matter addressed in the remanded decision (i.e., any matters not previously part of the original decision). [23] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the remand decision. [24]

Pursuant to Section 7.2(d) of the Grievance Procedure Manual, the Hearing Officer's original Decision becomes a final hearing Decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the Hearing Officer has issued his remanded 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. [25] Any such appeal must be based on the assertion that the final hearing Decision is contradictory to law. [26]

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William S. Davidson
Hearing Officer

[23] See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

[24] See Grievance Procedure Manual Section 7.2.

[25] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

[26] Id.; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
FEE ADDENDUM OF HEARING OFFICER
In Re: Case No: 11303

Issued: July 12, 2019

PROCEDURAL HISTORY

A hearing was held in this matter on March 13, 2019, and a Decision was issued by me on March 27, 2019. Grievant's counsel, filed a Petition for Attorney's Fees with me on May 29, 2019, and filed a Second Amended Petition for Attorney's Fees on June 24, 2019. Grievant's counsel certified that, on June 24, 2019, a copy of the Petition was emailed to Sandra Pai, Esquire, Counsel for the Agency.

GOVERNING LAW

Attorney's fees are dealt with at VI(E) of Rules for Conducting Grievance Hearings and at Section 7.2(e) of the Grievance Procedure Manual. Attorney's fees are only available where the Grievant has been represented by an attorney and has substantially prevailed on the merits of a Grievance challenging her discharge. For such an employee to substantially prevail, the Hearing Officer's Decision must contain an Order that the Agency reinstate the employee to her former (or an equivalent) position. My Decision ordered that the Grievant be reinstated to the same position or an equivalent position.

Section 7.2(e) of the Grievance Procedure Manual requires that counsel for the Grievant ensure that the Hearing Officer receives within fifteen (15) calendar days of the issuance of the original Decision, counsel's Petition for Reasonable Attorney's Fees. In this matter, that was done and as provided, the Petition included an Affidavit itemizing services rendered, time billed for each service, and the hourly rate charged in accordance with the Rules for Conducting Grievance Hearings. Further, a copy of this Fee Petition was provided to the Agency, as is required by the Rules.

OPINION

I have carefully considered the Second Amended Petition for Attorney's Fees and accordingly, will allow counsel for the Grievant to collect attorney's fees of $131.00 per hour for 75.00 hours, for a total award of $9,825.00. I find that time billed for a second attorney is not justified. I deny Grievant's request for $77.36 in hearing related expenses.

APPEAL RIGHTS

Within ten (10) calendar days of the issuance of the Fee Addendum, either party may petition EEDR for a Decision solely addressing whether the Fee Addendum complies with the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings. Once EEDR issues a ruling on the propriety of the Fee Addendum, and if ordered by EEDR, the Hearing Officer has issued a revised Fee Addendum, the original Decision becomes final and may be appealed to the Circuit Court in accordance with Section 7.3(a) of the Grievance Procedure Manual.

William S. Davidson
Hearing Officer