Issues: Two Step 4 Formal Performance Improvement Counseling Forms with Termination (gross misconduct and failure to follow policy); Hearing Date: 12/09/14; Decision Issued: 12/23/14; Agency: UVA Medical Center; AHO: John V. Robinson, Esq.; Case No. 10466; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 01/06/15; EDR Ruling No. 2015-4079 issued 01/26/15; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10466

Hearing Officer Appointment: September 22, 2014
Hearing Date: December 9, 2014
Decision Issued: December 23, 2014

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge termination of his employment pursuant to 2 Formal Performance Improvement Counseling Forms (each, a "PIC" and together, the "PICs") issued on August 26, 2014, by Management of the University of Virginia Medical Center (the "Department" or "Agency"), as described in the Grievance Form A dated September 8, 2014.

The hearing officer was appointed on September 22, 2014. The hearing officer scheduled a pre-hearing telephone conference call at 10:00 a.m. on September 25, 2014. The Grievant's attorney, the Agency's attorney and the hearing officer participated in the pre-hearing conference call. The Grievant's attorney clarified during the conference call that the Grievant is challenging the issuance of the PICs because the Grievant, by counsel, asserts that the applicable Agency policies do not support the discipline imposed on the Grievant by the Agency under the facts and circumstances of this case. The Grievant is seeking reinstatement and the other relief described by his attorney at the hearing. Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on September 25, 2014, which is incorporated herein by this reference.

By e-mail sent October 27, 2014, the Grievant, by counsel, requested a continuance for medical reasons. The Agency did not object to the continuance and pursuant to Decisions entered October 30, 2014 and November 5, 2014, which are incorporated herein by this reference, the hearing officer continued the hearing to December 9, 2014.

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.

At the hearing, the Grievant was represented by his 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 hearing, namely exhibits 1-27 in the Agency's exhibit binder and exhibits 1-6 in the Grievant's exhibit binder.[1]

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

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as the Chief Imaging Technologist. The Grievant had responsibilities as the Clinical Research Coordinator ("CRC" or "Coordinator") for the Institutional Review Board ("IRB") Protocol #9039 for human subject research.

2. The responsibilities of the Grievant as CRC included the following:

> The primary responsibility of the clinical research coordinator is to manage all aspects of conducting clinical trials under the direction of the Principal Investigator. The research coordinator is required to have an in-depth knowledge of protocol requirements and good clinical practices as set forth by the federal regulations. As the primary resource for the protocols, the clinical research coordinator will provide:
>
> - Sound conduct of the clinical trial, which may include, but not be limited to recruitment, screening, enrollment, and follow-up of eligible subjects according to protocol requirements (e.g., subject follow-up, case report form completion, and reporting of adverse drug experiences).

[1] References to the agency's exhibits will be designated AE followed by the exhibit number. References to the Grievant's exhibits are designated GE followed by the exhibit number.

- Maintenance of accurate and complete documentation, which may include but not be limited to regulatory documents, signed informed consent forms, relevant IRB approvals, source document, drug dispensing logs, subject logs, and study-related communication.

- Organizational management of all aspects of the trial, which may include but not be limited to timeliness in completing case report forms (CRFs), data entry, reporting adverse drug experiences (ADEs), managing caseload and managing study files.

- Communication of all protocol-related issues/problems to the appropriate management staff, which may include but not be limited to questions regarding the conduct of the clinical trial, concerns regarding possible ADEs or subject compliance.

- Professional conduct in the presence of subjects, research staff, sponsors, monitors, etc.

AE 11.

3. Because of notorious historical abuses, the area of human subject research is closely regulated by the Federal Government including the Office for Human Research Protection ("OHRP"). The Agency has developed and implemented numerous policies to ensure that it scrupulously follows applicable federal regulations and that it reports any violations, as required by the Agency policy and federal law. AE 11.

4. In this regard, one of the most basic policy safeguards is the concept of informed consent. A fundamental Agency policy is that the consent form for human subject research developed and authorized by the IRB must be used. AE 71.

5. Policy provides that no changes to the text of the informed consent form and authorization approved by the IRB may be made without the IRB's prior written approval. AE 11.

6. Policy requires that the most recent form of the IRB-HSR approved consent form is used and that all elements of the form are thoroughly discussed with the subject. AE 11. The approved form is easily identified by an official IRB stamp on the front. AE 9.

7. The 9-page IRB Consent Form for IRB-HSR Protocol #9039 was approved by the IRB and date-stamped. AE 9.

8. By policy, the IRB approved consent form was to be used for all # 9039 human subjects with any changes to the consent form resubmitted to the IRB for review and approval after first obtaining the consent of the Principal Investigator ("PI"), who supervised the Grievant.

9. In March 2005, an Agency Post Approval Monitor reviewed Protocol #9039 and identified several areas of concern and made several recommendations to rectify such issues. AE 26. Notably, the Post-Approval Monitoring Report issued March 10, 2005, found this an incorrect, unapproved version of consent was used. AE 26. The Report stressed the requirement that "the most current consent version approved by [the IRB] with a non-expired approval stamp" be used. AE 26. The Grievant was identified as the Research Coordinator at the time.

10. Follow-up visits by the Monitor were made with the Grievant in which the informed consent process was reviewed, documentation of consent and its relevance to the consent process was discussed, etc. AE 26.

11. Amongst other things the Post-Approval Monitoring Report issued January 12, 2006, still found some irregularities concerning the consent form used and required that no personnel would be allowed to work on Protocol #9039 until they completed the IRB-HSR on-line training and the IRB had been notified. AE 26. Dr. K was identified as the PI at the time and the Grievant was identified as the Research Coordinator. By this time, the Grievant was using the correct consent form.

12. In June 2014, the Vice Chair of Clinical Research (the "VC") became the new PI and the Manager of MR Research (the "Manager") became the Research Study Coordinator for Protocol #9039.

13. When the VC and the Manager began to investigate the files, the VC and Manager discovered in July 2014 that in 2007 the Grievant had reverted to using a one-page invalid consent form (which the Grievant created) without the approval of the prior PI (Dr. K.) and without IRB review or approval.

14. The consent form created by the Grievant lacks much of the information required on the 9-page IRB approved form, including risks or discomforts to the subject, alternatives to participating, costs to the subject, explanation of the limits of the confidentiality of the subject's information, explanation of HIPAA compliance, continuing contact person and contact information, version date, and page numbering. As such, this form would not have met the criteria for IRB approval had it been submitted to the IRB. In 2013, Mr. Christopher used the unapproved and invalid consent form to consent 13 subjects from 6/15/13-6/18/13.

15. During the Period, the Grievant mixed his use of the unapproved consent form with the correct consent form. *See* AE 9.

16. Because of the Grievant's use of his unapproved consent form, the Agency suffered significant, severe and/or profound impacts to its business operations because of the violations, including being forced to close Protocol #9039, not being able to use for publications the research collected over 14 years from the study, the imposition by the IRB of mandatory training for staff, significant time spent responding to IRB requests for information, having to report the failures to the OHRP (a black mark against the Agency and the University as a whole), etc.

17. The Grievant was not consistent in his use of the 1-page unapproved consent and interspersed use of the IRB approved consent during the Period. *See*, e.g., AE 9.

18. The Grievant received significant ongoing training concerning the use of the IRB approved consent form and applicable policies and procedures. AE 12-17. Despite the training and the post-approval monitoring described above, the Grievant deliberately continued over a period of years to use his unapproved 1-page consent for human subject research. This was done without informing Dr. K (the prior PI) and without IRB review or approval, as strictly required by policy.

19. The Grievant acknowledged that he should have informed the PI about the changes he made to the protocol, consent form, or consent and reporting processes.

20. The Grievant admits that the Agency's policies concerning informed consent are very important.

21. The Agency issued a second PIC concerning the Grievant's violations of Agency policies as CRC concerning Protocol #9039. AE 23. This PIC identified an additional 2 terminable offenses by the Grievant. AE 23.

22. First, both the protocol and the IRB approved consent clearly state that consent is valid for only 1 day. Accordingly, by policy, if human subjects were imaged on multiple days, multiple consents were required by policy.

23. The Grievant admitted that he failed to obtain an informed consent each time for human subjects who were imaged on multiple days.

24. The Grievant stated that he decided "to save a tree" and not consent people who had consented to the study within the preceding year. Policy allows no such exception and the Grievant committed this infraction on multiple occasions concerning multiple subjects.

25. Second, the Grievant did not keep accurate and complete documentation, as required by policy. *See* paragraph 2 above. Many consent forms and other crucial documents (some of which contained the social security numbers of

multiple subjects) were simply missing. Compensation records were discordant. AE 23; Tape.

26. Again, these infractions significantly or severely impacted business operations per paragraph 16 above.

27. The Grievant admitted that his files probably could have looked better and that being a secretary was not his forte. Tapes.

28. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.

29. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

30. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

31. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

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. GE 6 and AE 22. 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:

. . . .

2. Misconduct

a. **Serious Misconduct** refers to acts or omissions having a significant impact on patient care or business operations.

Examples of Serious Misconduct include, *but are not limited to:*

. . . .

b. **Gross Misconduct** refers to acts or omissions having a severe or profound impact on patient care or business operations.

Examples of Gross Misconduct include, *but are not limited to:*

. . . .

D. PROCEDURE:

Generally, performance deficiencies will be addressed through a performance improvement process which will progress through the four Steps listed below. Serious Misconduct generally will be addressed at Step 2 or Step 3 and Gross Misconduct generally will result in termination.

Supervisors must contact Medical Center Human Resources prior to issuing any formal discipline. (Steps 2,3,4).

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

. . . .

D. Termination - Step 4

If an employee does not successfully meet expectations following progressive performance improvement counseling, or 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.

Prior to determining whether termination of employment is appropriate, the supervisor must conduct a predetermination meeting with the employee to review the facts and give the employee an opportunity to respond to the issues or explain any mitigating circumstances. Documentation of this meeting shall be maintained by the supervisor. If Human Resources and Medical Center management determine that termination is appropriate, the termination will be documented on a Performance Improvement Counseling Form for the personnel file and a copy of the documentation shall be given to the employee.

In certain limited circumstances, demotion in lieu of termination may be an appropriate method to address performance deficiencies or acts of misconduct. Any decision to mitigate a Step 4 from termination to demotion shall be in the sole discretion of Medical Center management. In considering whether demotion is appropriate, managers should consider factors such as the employee's ability to succeed in another role, past history of success with the Medical Center, impact on Medical Center

operations, availability of suitable position(s), the employee's overall performance including motivation, absenteeism, and value to the Medical Center.

GE 6; AE 22.

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.
- Support and follow hospital policies and procedures.

. . . .

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 22.

The Grievant, by counsel, argues that the Agency has overreacted to the Grievant's infractions and has exaggerated the misconduct. At most, the Grievant asserts that the infractions constitute a performance deficiency warranting a reprimand. However, the hearing officer agrees with the Agency's attorney that in and of themselves, each of the Grievant's infractions concerning (1) the Grievant's use of the unapproved consent form, (2) the Grievant's failure to reconsent, and (3) the Grievant's failure to maintain complete and accurate records, constitute a terminable offense at the Step 4 level because the Grievant's serious or gross misconduct had a significant or severe impact on Medical Center operations, as described above.

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 at the Step 4 level concerning the Grievant's misconduct.

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).

The Grievant asserts that the discipline is too harsh. The Agency did consider mitigating factors, including the Grievant's past good service to the Agency over almost 19 years. However, the Agency reasonably concluded that what the VC characterized as the Grievant's breach of trust left her with little options but termination.

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.

The Grievant has specifically raised mitigation as an issue in the hearing. 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 Written Notice and all of those listed below in his analysis:

1. the Grievant's exemplary service to the Agency of almost 19 years;

2. the often difficult and stressful circumstances of the Grievant's work environment;

3. the fact that the Grievant has no prior formal discipline;

4. the Grievant's good performance evaluations, including those at GE 5;

5. the fact that no subjects were injured;

6. the skillfulness of the Grievant as a technologist; and

7. fact that the Grievant was an hourly employee.

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.*

Here the offense was very serious. Of course, there were also aggravating factors in play including the fact that in 2007 after the post approval monitoring review, the Grievant ignored what he should have understood to be clear protocol policies. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

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.

In this proceeding, the Agency's actions were consistent with law and policy. The Agency appropriately determined that the Grievant's violations of Agency policies concerning the protocol warranted a Step 4 termination under the circumstances. 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 offenses specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted serious 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.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and concerning all issues 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 two types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **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 refer 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 or e-mailed.

2. **A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR'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 Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

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 EDR before filing a notice of appeal.

ENTER: 12/ 23/ 14

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John V. Robinson, Hearing Officer

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