

**COMMONWEALTH OF VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution**

DIVISION OF HEARINGS

In the matter of: Case Nos. 11434 & 11435

Hearing Officer Appointment: October 9, 2019
Hearing Date: December 18, 2019
Decision Issued: January 16, 2020

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge the issuance of a Group II Written Notice issued on June 24, 2019 and Group II Written Notice with Termination issued August 16, 2019 by the Virginia Commonwealth University ("VCU" or the "Agency"), as described in the Grievance Form A dated July 29, 2019 and dated September 16, 2019. The Office of Employment Dispute Resolution ("EDR") consolidated the 2 grievances by Ruling Numbers 2020-4987 and 2020-4988.

The Grievant is seeking the relief requested in her Grievance Forms A including rescission and removal from her record of the Group II and Group II with Termination Written Notices and reinstatement.

The parties held a second pre-hearing conference call on December 5, 2019 to address certain documents and witness issues. The call lasted approximately 1 hour. The hearing officer issued certain orders for witnesses and documents which he deemed appropriate and the parties entered into a Protective Order attached hereto.

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. The Grievant bears the burden of proof concerning any affirmative defenses.

APPEARANCES

Representative for Agency

Witnesses for Agency

Grievant

Witnesses for Grievant

FINDINGS OF FACT

1. In November 2015, the Grievant was employed by an important research center (the "Center") at the Agency as a Laboratory Research Specialist.
2. Her required qualifications for her position included:
 - Ability to interpret and follow guidelines and adhere to policies and regulations.
 - Ability to work independently, use initiative, manage time efficiently in a pro-active manner and make judgment calls.
 - Excellent follow-through skills, attention to detail and a high level of accuracy (meticulous and thorough).
 - Strong organizational skills and the ability to prioritize workload and work under pressure.
 - Excellent interpersonal relations and ability to interact professionally with patients, faculty, and staff and outside agencies.
 - Knowledgeable in phlebotomy and biologic specimen handling with some hands-on experience.
 - Experience maintaining laboratory equipment and supplies inventory and ordering supplies and services.
 - Certification in Phlebotomy required.
 - GE 9.
3. The Grievant suffered a car accident in May 2017 which caused her significant health issues.

4. While the Director of the Center acknowledged that the Grievant did not make significant errors in performing her job before 2019, the Grievant committed numerous serious, material and program-threatening errors described in detail in the 2 Written Notices which are the subject of this proceeding and which are incorporated herein by this reference. AE 2 & 3.
5. The Grievant took a leave of absence on March 27, 2019.
6. During the Grievant's leave of absence, management at the Center discovered numerous errors by the Grievant committed prior to her leave of absence which placed the safety of Center participants and staff as well as the integrity of Center research data at significant risk. AE 2.
7. Accordingly, upon Grievant's return to work on June 17, 2019, management issued to Grievant a Return to Work Plan ("RTW"), including a Notice of Improvement Needed Plan ("NIN") and, following progressive discipline, the Group II Written Notice issued on June 24, 2019. AE 27.
8. The hearing officer agrees that the Agency has borne its burden of proving, upon a preponderance of the evidence, the myriad disciplinary infractions by the Grievant described in the Written Notice issued June 24, 2019. While not specifically again reciting in his Decision each of these offenses by the Grievant, the hearing officer does address certain specific offenses below to amplify and clarify the serious nature of the particular infractions, recognizing (as argued by the Agency's attorney) that certain of these offenses in and of themselves could constitute separate, independent Group II offenses or could properly have been characterized cumulatively as a Group III offense supporting termination.
9. On March 7, 2019 the Director of the Center, a medical doctor (the "Director"), discovered while reviewing the chart of Research Participant 20810 that the Grievant recorded a Negative drug screen result on the Biomeasures form for the visit of 12/3/2018, and the Grievant also entered a Positive result for Cocaine on the COC150 Panel Urine Drug Screen for the 12/3/2018.
10. Had the Director not been able to corroborate the positive result with the second Research Assistant signing off on the COC150 result, the participant's entire record may have been required to be removed from all study results for reporting purposes.
11. It is essential that all data entered into a participant's chart be accurate for trial integrity and participant safety.
12. The Grievant recorded in the electronic medical research record for a visit by participant 20916 on 3/15/19, a positive pregnancy result for a 57 year old woman who has had a hysterectomy.

13. This information did not match the screening intake form the Grievant completed.
14. The Grievant knew a positive pregnancy test result is typically exclusionary criterion for all Collaborative Advances Research Imaging (CARI) studies and the Principal Investigator (PI) who directs the research project or program must be notified immediately to determine if the participant may continue in the study.
15. It is essential that all data entered in a participant's chart and electronic record be accurate for that trial integrity and participant safety.
16. On 3/26/19, the Grievant recorded on the visit in-take form that Participant 20916 was male (participant is actually female) and then administered a pregnancy test whose result was negative.
17. Grievant also recorded on the in-take form the participant tested positive for Buprenorphine (BUP) and Cocaine (COC), which were confirmed by a second reader.
18. However, when completing the PhAB Study checklist, Grievant stated incorrectly urine toxicology results as "Negative". It is essential that all data recorded into a participant's chart and electronic records be accurate for trial integrity and participant safety.
19. On 3/25/19, one of the vital signs reported for Participant 20926 was a respiratory rate (RR) of 24 breaths per minute. When the nurse practitioner saw the participant within the next 15 minutes, the participant's RR was at 13-14 breaths per minute.
20. Assuming the RR of 24 was correctly calculated, this is outside the normal range for an adult and was required to be reported immediately. As a licensed CNA, the Grievant is required to seek the assistance of a medical practitioner immediately in such circumstances. This is so, particularly given the compromised health circumstances of many of the Center's research participants. The Grievant failed to take this action.
21. Given the Grievant's performance deficiencies identified by management (despite multiple trainings provided to Grievant on the REDCap ordering process), the following changes to the ordering process were made effective immediately by the first Written Notice:
 - (a) At the weekly inventory meeting, the Grievant was required to provide a list of items that required ordering based on business need or low inventory. Information had to include item description, vendor information, vendor stock number, and index/charting instructions.

- (b) The list was to be reviewed and approved by the Grievant's supervisor to ensure accuracy/appropriateness.
 - (c) Grievant was required to enter the item(s) on the REDCap purchasing form which was to have been pre-approved at the weekly meeting. The Center's Administrative Director remained as the REDCap purchasing approver.
22. As a Laboratory Research Specialist, the Grievant was responsible for the management of the day-to-day activities of the Collaborative Advanced Research Imaging (CARI) laboratory.
 23. This included performing vital sign measurements, breathalyzer tests, urine toxicology/drug screening, EKG's and blood draws, recognizing and reporting any abnormalities in vitals or EKGs to providers (NPs or MDs) immediately, and being able to handle, when needed, multiple participants in the lab area.
 24. The results of these tasks, and biomeasures, were to be recorded in the electronic database (REDCAP) in real time as per study specific protocols.
 25. Grievant was also responsible for the processing of urine and blood samples from patients in accordance with established research protocols, and was required to ensure all specimens were stored and shipped properly.
 26. Grievant was also to maintain inventory by ordering and stocking supplies for the laboratory.
 27. Management appropriately issued the first Group II Written Notice for the reasons and offenses specified in the first Written Notice, namely failure to follow instructions and/or policy.
 28. On August 16, 2019, management issued to the Grievant a second Group II Written Notice with termination for failure to follow instructions and/or policy. AE 3.
 29. The Grievant had continued to fail to comply with written procedures and established laboratory protocol in the Collaborative Advanced Research Imaging (CARI) laboratory.
 30. Since completing her retraining period and returning to her laboratory duties, Grievant failed to follow specific supervisory instructions and Grievant failed to properly execute three (3) procedures for which Grievant had been professionally trained and for which Grievant completed retraining at VCU on 7/19/2019.

31. Management reasonably concluded that Grievant was not able to adequately perform her role and responsibilities , which severely and adversely impacted the Center's research patients and the integrity of the Center's research data.
32. Again, the hearing officer agrees that the Agency has borne its burden of proving, upon a preponderance of the evidence, the numerous disciplinary infractions by the Grievant described in the Written Notice issued August 16, 2019. While not specifically again reciting in his Decision each of these offenses by the Grievant, the hearing officer does address certain specific offenses below to amplify and clarify the serious nature of the particular infractions, recognizing (as argued by the Agency's attorney) that certain of these offenses in and of themselves could constitute separate, independent Group II offenses or could properly have been characterized cumulatively as a Group III offense supporting termination.
33. On 7/22/2019, a serious issue occurred when Grievant performed the biomeasures on a patient (1041046-0031) from the Nektar study (NKTR-181). This is a study for which Grievant received training on 12/17/2018. Grievant was required to reread the study protocol upon return from leave on 6/17/19.
34. Upon operating the pulse-ox monitor, Grievant recorded a reading of 82% for a research patient and the patient was sent home without further evaluation.
35. A reading of 82% means the patient is severely hypoxic, which is a condition where the body or a region of the body is deprived of an adequate oxygen supply.
36. As Grievant knew from her CNA training, this would mean the patient was in respiratory distress and would require supplemental oxygen and immediate medical attention.
37. The Grievant was previously trained by her supervisor in the Grievant's lab work at VCU on the interpretation of these readings and the need to obtain immediate medical assistance for patients in distress.
38. As a licensed CNA by the Commonwealth of Virginia, Grievant failed to recognize this reading as a potentially dangerous medical condition, and Grievant failed to summon a medical provider, such as a nurse practitioner or an MD, to render help for the patient.
39. If Grievant observed that the patient was, in fact, not in respiratory distress, then Grievant failed to take another pulse-ox reading to confirm the reading for the patient was incorrect.
40. Instead Grievant simply signed off that her portion of the lab visit was complete, which was not proper procedure for patient safety.

41. On 7/19/2019 while working in the lab with one of the CARI research assistants on the U54 Project 2, study protocol required a drug screen test for Participant 20380.
42. As per standard operating procedure, the drug screen reading was performed by the Grievant.
43. The Grievant marked the test for cocaine as “negative” when the results were in fact, “positive”.
44. As Grievant had been previously instructed, the drug screening test is much like an over the counter pregnancy test, with a positive result indicated by one pink line and a negative result indicated by two pink lines.
45. However, the Grievant interpreted the results and recorded incorrect information, which adversely impacts the research study and the important work that the Center provides to the community.
46. Not only does the Grievant’s incorrect recordation adversely impact the integrity of the Center’s research data, but it could also potentially place a patient in a study when they should be excluded for health reasons.
47. Grievant also continued to fail to fulfill her supply ordering duties in spite of retraining by management as specified in the second Written Notice.
48. This failure to follow supervisory instructions created undue hardship and demand on the time of the Center’s business office because it was unable to rely on the information Grievant provided.
49. On 7/29/2019, Grievant informed her supervisor that Grievant had restocked the supplies in the wet lab. On 7/30/2019, when her supervisor went to the lab to retrieve supplies, her supervisor observed that the wetlab had not been restocked.
50. As a Laboratory Research Specialist, the Grievant should be able to exercise sound judgment and take appropriate steps to resolve important laboratory issues. In this case, the Grievant’s action and inaction has exposed the agency to significant risk in a heavily regulated context. The Grievant’s actions and decisions in this case violate the DHRM Policy 1.60, *Standards of Conduct* by failing to follow policy and/or instructions.
51. The Grievant's infractions disrupted Agency operations, adversely affecting the Agency’s operations and reputation.
52. The testimony of the Agency witnesses was credible. The demeanor of the Agency witnesses was open, frank and forthright.

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. AE 5. The SOC provide a set of rules governing the professional and personal conduct and acceptable

standards for work performance of employees. The SOC serves 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.

Pursuant to DHRM Policy No. 1.60 and Agency policy and State law, concerning the first Written Notice, the Grievant's conduct of failing to follow instructions and/or policy could clearly constitute a Group II offense, as asserted by the Agency. AE 5. In this instance, the Agency appropriately determined that the Grievant's violations constituted a Group II Offense.

Pursuant to DHRM Policy No. 1.60 and Agency policy and State law, concerning the second Written Notice, the Grievant's conduct of failing to follow instructions and/or policy could clearly constitute a Group II offense with termination, as asserted by the Agency. AE 5. DHRM Policy 1.60, *Standards of Conduct*, at 7-9 (stating that the issuance of "[a] second active Group II Notice normally should result in termination.") In this instance, the Agency appropriately determined that the Grievant's violations constituted a Group II Offense with termination in view of the accumulation of 2 active Group II Written Notices.

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 Group II Written Notices with termination by Management. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as 2 Group II offenses leading to termination.

In this case, the Grievant was clearly given by the Agency both pre-discipline and post-discipline constitutional and policy due process rights. AE 2 & 3.

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 asserted that the discipline was too harsh. 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 in the Written Notice, the Form A, the hearing, those referenced herein and all of those listed below in his analysis:

1. the Grievant's years of service to the Agency;
2. the demands of the Grievant's work environment;
3. the complicated nature of the work;
4. Grievant's accident and attendant health problems; and
5. the Grievant's leave of absence.

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 policy is important to the proper functioning of the Agency and the Agency issued to the Grievant significant prior progressive counseling and discipline concerning infractions in the recent past. AE 13. 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).

The Grievant has argued that she should not be disciplined concerning work related to the period or nature of her retraining. However, based on *Osterloh v. Va. Dep't of Soc. Servs.*, No. 0495-18-2, 2018 Va. App. LEXIS 351 (Ct. App. Dec. 18, 2018) (unpublished), the hearing officer decides that training or retraining present no impediment to disciplinary measures by the Agency.

In *Osterloh*, Osterloh, the grievant, was placed on a three-month re-evaluation plan due to unsatisfactory performance. While the re-evaluation plan was in effect, she received two Group II Written Notices and was terminated. At the grievance hearing challenging her termination, Osterloh argued that she could not be disciplined for performance issues while she was subject to

the re-evaluation plan. The hearing officer in that case, originally ordered Osterloh reinstated, finding that the corrective action under both the re-evaluation plan and disciplinary action could not be reconciled. The hearing officer further concluded the agency's decision to terminate Osterloh by issuing formal discipline before the end of the re-evaluation plan had a retaliatory motive because there was no other explanation for the agency's use of both processes (i.e., the re-evaluation plan and formal discipline) at the same time.

On administrative review, EDR clarified that state policy permits the issuance of disciplinary action for misconduct that occurs while an employee is on a re-evaluation plan. The hearing officer ultimately upheld Osterloh's termination, and the circuit court dismissed her legal appeal. She further appealed to the Court of Appeals of Virginia, arguing that (1) the circuit court applied the wrong standard of review, and (2) the hearing officer's decision was not based on his own factual findings that the agency's decision to terminate her was retaliatory.

With regard to the standard of review, the court found that "the circuit court failed to utilize the standard of review that is mandated by the tripartite review procedure" because it "reviewed the record in order to determine whether there was sufficient evidence to support the hearing officer's decision to terminate Osterloh's employment."¹ Consistent with its past decisions on this issue, the court clarified that "[t]he role of the courts in this procedure is solely to determine whether the grievance determination is 'contradictory to law'"² However, the court found that it was not necessary to address the circuit court's legal conclusions because Osterloh's

¹ *Osterloh*, 2018 Va. App. LEXIS 351, at *9.

² *Id.* (citing *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573, S.E.2d 319 (2002)).

appeal “present[ed] a question of pure law requiring a *de novo* review of the hearing officer’s final decision.”³

More importantly, the court was not persuaded by Osterloh’s arguments about the hearing officer’s factual finding that the agency engaged in retaliation. In essence, Osterloh claimed that EDR did not comply with the grievance procedure by failing to accept the hearing officer’s finding of retaliation as a final and binding factual conclusion that justified removal of the discipline.

The court, however, noted that “the hearing officer’s opinions make clear that the sole basis for his finding retaliation was his conclusion that the Department’s concurrent use of the two disciplinary processes was contrary to policy.”⁴ As stated by EDR in its administrative review, this practice is permissible under state policy; the hearing officer’s finding of retaliation was therefore inconsistent with policy, and thus, it was not a final or binding factual conclusion. Because the hearing officer found that Osterloh engaged in the misconduct charged on the Written Notices and they were consistent with policy, the court found no legal error in the hearing decision.

In July 2019, the Supreme Court of Virginia refused Osterloh’s petition for appeal of the Court of Appeals’ decision.

The Grievant offered no meaningful probative evidence concerning any affirmative defenses,

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

³ *Id.* at *10.

⁴ *Id.* at *10-11.

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 offenses specified in the written notices (i) the Grievant engaged in the behavior described in the written notices; (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.

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

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

Please address your request to:

Office of 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.

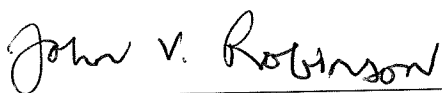
You must also provide a copy of your appeal to the other party and the hearing officer.

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]

ENTER: 1 / 16 / 2020



John V. Robinson, Hearing Officer

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

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