JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2023-5515
March 14, 2023

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11880. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11880, as found by the hearing officer, are as follows:[1]

> The Department of Behavioral Health and Developmental Services employs Grievant as a Registered Nurse at one of its locations. Grievant earned a Bachelor's of Nursing at a Virginia University. He began working as a CVICU Nurse at a Hospital. He then began working for the Agency on February 10, 2020.
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> Grievant's education included learning how to draw blood and he was licensed by the Commonwealth of Virginia to do so. He drew blood from patients prior to joining the Agency.
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> The Facility did not allow its nurses to draw blood from patients. The Facility used the services of phlebotomists working for private contractors to draw blood from patients at the Facility. Facility nurses were not trained that they should draw blood of Facility patients. Grievant's employee work profile did not include drawing blood as one of his duties.
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> On May 7, 2022, a Patient at the Facility was subject to a "lab over objection" order. When the Patient was informed of this order, he became irate, agitated, and began cursing at staff. A distress alarm was activated and staff began arriving at the Patient's location. Grievant spoke with the Patient in order to try to de-escalate the situation. Grievant was able to get the Patient to leave the room. Staff placed the Patient in the Emergency Restraint Chair. The Patient would not

[1] Decision of Hearing Officer, Case No. 11880 ("Hearing Decision"), January 31, 2023, at 2-3 (citations omitted).

let the Phlebotomist draw his blood. The Patient was confused. The Phlebotomist handed Grievant the needle and Grievant drew blood from the Patient.

On June 14, 2022, the agency issued to the grievant a Group II Written Notice for failure to follow instructions or policy.[2] The grievant timely grieved the disciplinary action and a hearing was held on January 11, 2023.[3] In a decision dated January 31, 2023, the hearing officer found that while the grievant did not violate any law or regulation by drawing the blood, he violated agency policy by doing so, and that the agency was permitted to limit the tasks performed by employees.[4] The hearing officer concluded that the agency had presented sufficient evidence to support the issuance of a Group II Written Notice because the grievant "acted contrary to the Facility's practice and policy thereby justifying the issuance of disciplinary action."[5] The hearing officer further determined that there were no circumstances warranting mitigation of the disciplinary action.[6]

The grievant now appeals the decision to EDR.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure . . . ."[7] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[8] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[9] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant argues that "(1) the Hearing Officer's decision is not supported by the record; and (2) the Hearing Officer failed to properly consider evidence of mitigation." More specifically, the grievant argues that the policy itself did not explicitly state that Registered Nurses (RNs) are prohibited from taking blood samples, that he reasonably believed that the patient's safety justified him taking the blood sample, and that doing so was consistent with state and agency policy.

Consideration of Evidence

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[11] Further, in cases involving discipline, the hearing officer reviews the facts

[2] Hearing Decision at 1; Agency Ex. 1.
[3] *See* Hearing Decision at 1.
[4] *Id*. at 3-4.
[5] Hearing Decision at 4.
[6] *Id*.
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.

de novo to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[12] Thus, in disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[13] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

The grievant claims that the hearing officer erred in upholding the Written Notice and that his decision was not supported by the evidence provided in the record. In support of his position, the grievant argues that the evidence provided by the agency, particularly Policy M-31 and the agency's evidence of making the nurses aware of this policy via facility practices, fails to meet the preponderance of evidence standard.

In the hearing decision, the hearing officer found evidence showing that while the grievant had the legal capacity to draw blood, the agency had the discretion to limit this legal capacity through policy and practices, and such policies and practices prohibited the grievant from drawing blood from patients.[14] Instead, the agency contracts with a third party to have their phlebotomists be the exclusive method of drawing patients' blood.[15] The agency added in the hearing that drawing blood may be allowed in medical emergencies, but that the incident in question did not amount to a medical emergency.[16] The relevant policy appears to be Policy M-31, which states that "[t]he phlebotomist shall draw blood and obtain other specimens in the laboratory room or on the unit when the individual is unable to leave the area."[17] In addition to the policy itself, the agency argued that the practice of RNs being prohibited from drawing blood has been sufficiently instilled in the facility; in support of this, the Registered Nurse Orientation Competency explicitly provides through its checklist that the RN's responsibilities are strictly limited to the training they are given during orientation.[18] They also noted that no other RN in the facility has been charged with wrongfully taking a patient's blood.[19]

In contrast, the grievant argues that M-31 does not explicitly state that RNs are prohibited from drawing blood – only that phlebotomists shall draw blood. For that reason, he argues that the policy is ambiguous and that he reasonably believed he was acting in accordance with policy by drawing the patient's blood given the situation of the patient's aggression. He also argues that the policy is not consistent with applicable state law, specifically with the position of the Virginia Board of Nursing and their general allowance of qualified RNs to draw blood, which is supported

[12] *Rules for Conducting Grievance Hearings* § VI(B).
[13] *Grievance Procedure Manual* § 5.8.
[14] Hearing Decision at 4.
[15] Hearing Recording at 22:15-23:15.
[16] *Id*. at 23:45-24:15.
[17] Agency Ex. 3 at 15.
[18] Hearing Recording at 27:45-28:30, 34:00-34:30; *see* Agency Ex. 5 at 78 ("No one is to perform any task that they have not yet been oriented to in class! No matter how many years you have been in this setting, you need to know how it is done in this hospital.").
[19] Hearing Recording at 2:22:45-2:23:15.

by the Board of Nursing's Decision-Making Model for Determining RN/LPN Scope of Practice. The grievant in his appeal also argues that, contrary to what the agency claimed in the hearing, he was aware that other agency nurses had drawn blood in other circumstances.

EDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's determination that the grievant engaged in the behavior charged on the Written Notice, that his behavior constituted misconduct, and that the discipline was consistent with law and policy. While the grievant might have reasonably believed that he was correctly following policy given the circumstances, an employee's belief or intent to act consistent with policy does not automatically excuse a failure to adhere to policy. The grievant is correct in pointing out that the policy does not explicitly prohibit RNs from drawing blood. However, an ambiguity in policy can be sufficiently explained (and employees informed) by the agency's consistent practices, such as their competency training. The agency provided evidence that the RNs' orientation training explicitly provides that RNs are prohibited from engaging in any practices outside of what they are trained to do, and drawing blood is not a practice included in training. The agency also provided evidence that no other RN at the facility has drawn blood. While the grievant disputes this in the appeal, EDR can identify no evidence in the record that the grievant presented on this point. Conclusions as to the credibility of witnesses are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[20]

To the extent the grievant argues the agency's policy is inconsistent with the position taken by the Virginia Board of Nursing, the hearing officer found that the agency has the right and discretion to further limit the policies and procedures placed by applicable law such as the Board.[21] The grievant argues that the Board's Decision-Making Model, when applied to the grievant's situation, shows that the grievant acted correctly. While the hearing officer did not discuss this Model, EDR does not find that this evidence adequately supports the grievant's claim that he acted pursuant to agency policy. The Model specifically states that an RN's approval to perform the task in question is still premised on following applicable agency policies and procedures.[22] EDR agrees with the hearing officer's findings that the grievant was adequately qualified pursuant to state nursing procedures to draw blood, and due to the patient's aggressive behavior he was acting as a reasonable, prudent nurse in a similar circumstance would act. However, the grievant's act ultimately requires validity pursuant to the agency's relevant policies and procedures – in this case, Policy M-31 and the agency's consistent practice of only allowing phlebotomists draw blood. Therefore, EDR cannot find that the Decision-Making Model contradicts the evidence provided by the agency, nor that there was an abuse of discretion by the hearing officer in not considering the Model in his decision for these reasons.

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[20] *See*, *e.g.*, EDR Ruling No. 2014-3884.
[21] Hearing Decision at 4.
[22] Agency Ex. 7 at 117 ("You may perform the activity/task according to acceptable and prevailing standards of safe nursing care (*with valid order as required and in accordance with agency policies and procedures*)." (emphasis added)).

Although the grievant may disagree with the decision, there is nothing to indicate that the hearing officer's consideration of the evidence regarding the grievant's misconduct was in any way unreasonable or not based on the actual evidence in the record. Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. Because the hearing officer's findings in this case are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EDR declines to disturb the hearing decision on this basis.

Mitigation

By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[23] The *Rules for Conducting Grievance Hearings* ("*Rules*") provide that "a hearing officer is not a 'super-personnel officer'"; therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[24] More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[25]

Because reasonable persons may disagree over whether and to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is high.[26] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[27] and will reverse the determination only for clear error.

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[23] Va. Code § 2.2-3005(C)(6).
[24] *Rules for Conducting Grievance Hearings* § VI(A).
[25] *Id.* § VI(B).
[26] The federal Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can serve as a useful model for EDR hearing officers. *E.g.,* EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein). The Board's similar standard prohibits interference with management's judgment unless, under the particular facts, the discipline imposed is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Serv., 819 F.2d 1113, 1116 (Fed. Cir. 1987) (citations and internal quotation marks omitted). On the other hand, the Board may mitigate discipline where "the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness." Batten v. U.S. Postal Serv., 101 M.S.P.R. 222, 227 (M.S.P.B. 2006), *aff'd*, 208 Fed. App'x 868 (Fed. Cir. 2006).
[27] "An abuse of discretion can occur in three principal ways: 'when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.'" Graves v. Shoemaker, 299 Va. 357, 361, 851 S.E.2d 65, 66-67 (2020) (quoting Landrum v. Chippenham & Johnston-Willis Hosps., Inc., 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011). The "abuse-of-discretion standard includes review to determine that the [exercise of] discretion was not guided by erroneous legal conclusions, because a court also abuses its discretion if it inaccurately ascertains [the] outermost limits of the range of choice available to it." Lambert v. Sea Oats Condo. Ass'n, 293 Va. 245, 253, 798 S.E.2d 177, 182 (2017) (internal quotation omitted) (alterations in original); *see also* United States v. Jenkins, 22 F.4th 162, 167 (4th Cir. 2021) (A tribunal abuses its discretion "when it acts arbitrarily or irrationally, fails to consider . . . recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law.").

In his request for administrative review, the grievant disputes the hearing officer's decision not to mitigate the disciplinary action. In particular, the grievant claims that circumstances surrounding the patient in question were so severe as to amount to an emergency circumstance, which is the type of circumstance the agency mentioned would excuse the act of an RN drawing blood.[28] The hearing officer found in the facts that the patient, upon being informed that the facility was to draw blood, became very irate and agitated, requiring the facility to place them in a restraint chair. The grievant claimed, without objection from the agency, that the patient would not let their blood be drawn by the phlebotomist, who handed the needle to the grievant.[29] The grievant therefore argues that due to the emergency-like situation regarding the patient, he acted as a reasonable, prudent nurse by making the decision to draw the blood pursuant to the patient's wishes. The hearing officer found in his decision that this evidence was not sufficient to conclude that the grievant had no choice but to draw the patient's blood, which was supported by the agency's claim that the situation did not rise to the level of a medical emergency.[30] EDR finds nothing in the record to disturb this factual finding by the hearing officer.

Here, the mitigating factors cited by the grievant on administrative review are not so extraordinary that they would clearly justify mitigation of the agency's decision to issue a Group II Written Notice. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[31] While the grievant's position that he acted properly under the circumstances is understandable, EDR has found no specific evidence of mitigating factors presented in the record that were not adequately addressed in the decision, nor has the grievant identified any on administrative review. Thus, EDR has no basis to conclude that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. Accordingly, we decline to disturb the decision on these grounds.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision.[32] Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[33] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[34] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[35]

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[28] In his request for administrative review, the grievant also cites the ambiguity of Policy M-31 and the Decision-Making Model as mitigating factors, but since these factors have been discussed thoroughly in the Consideration of Evidence, EDR will refrain from discussing those factors again regarding mitigation.
[29] The hearing officer noted in the hearing decision that the agency did not dispute these claims made by the grievant. *See* Hearing Decision at 3.
[30] Hearing Decision at 4.
[31] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.21).
[32] To the extent this ruling does not address any specific issue raised in the grievant's appeal, EDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.
[33] *Grievance Procedure Manual* § 7.2(d).
[34] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[35] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).

Christopher M. Grab
Director
Office of Employment Dispute Resolution