Issue: Administrative Review of Hearing Officer's Decision in Case No. 10185; Ruling Date: December 17, 2013; Ruling No. 2014-3773; Agency: Department of Juvenile Justice; Outcome: Hearing Decision in Compliance.

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

ADMINISTRATIVE REVIEW

In the matter of the Department of Juvenile Justice
Ruling Number 2014-3773
December 17, 2013

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 10185. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 10185, as found by the hearing officer, are as follows:[1]

> The Grievant is a long time employee for the Agency—a corrections officer with at least 10 years tenure. The Written Notice charged:
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> > On 07/14/13, while assigned to the Behavior Management Unit (BM), you and another officer failed to properly supervise the residents by not conducting fifteen (15) minute room checks from 0713 to 1125 hours. You also falsely documented on the Confinement Monitor Form that the room checks were conducted. You also let a resident out of his room to take a shower and failed to maintain sight supervision of the resident, which afforded the resident the opportunity to stuff his door lock with paper. After tampering with his door lock, the resident was able to break out of his room. Your actions as described in this narrative is a violation of the following: IOP # 212-4.2 (Movement and Supervision of Residents), IOP # 236-4.2 (Isolation), Post Order # 9 (15 minute room checks) and DHRM 1.60 (Falsifying Documents).
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> As for circumstances considered, the Written Notice did not specify any additional circumstances.
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> The Grievant, by counsel, indicated general stipulation to the facts and did not present evidence challenging the essence of the facts stated in the Written Notice.

[1] Decision of Hearing Officer, Case No. 10185 ("Hearing Decision"), November 19, 2013, at 4-7 (citations omitted).

The facility's training lieutenant testified that the Grievant received the prescribed training on the applicable procedures, especially including the fifteen minute checks and the documentation for them. He testified that an officer must look into the residents' rooms and observe them at least every fifteen minutes and document the applicable status. This procedure is for the protection of the residents. The Grievant's transcript of training is Agency's Exhibit 18. The lieutenant testified that the fifteen minute check is a universal requirement for all Agency corrections officers. The lieutenant, based on the Rapid Eye Video of the Grievant's shift on July 14, 2013, testified that the Grievant violated several policies and procedures, including improper sight supervision and not making the required fifteen minute checks of the residents. Specifically, he testified that an officer cannot make such supervision and observations of residents from the office desk as the Grievant's conduct is demonstrated on the video.

The facility's assistant superintendent for security testified to the facts of the Written Notice which were largely captured via the institution's Rapid Eye Video of the post in question. The assistant superintendent testified to the floor plan of the unit and the Agency's investigation report. He testified to the unique and disruptive nature of the residents and the importance of vigilance of supervision and observation of the residents. The assistant superintendent testified that the video showed that during the shift in question, the Grievant never left her desk to do her fifteen minute checks. The Grievant, however, documented her fifteen minute checks on the appropriate form. The assistant superintendent testified that such documentation of a performed duty when the duty was not performed was falsification of documents, conduct alone that merits the Group III Written Notice.

The assistant superintendent testified to the importance of accurate, reliable documentation. Without it, the Agency is at risk for liability. The assistant superintendent testified that it was impossible for the Grievant to observe the residents lying down in their rooms from the desk, without walking over to each door and looking into the rooms. The assistant superintendent testified that the Agency considered the Grievant's documentation indicating that she did the resident checks, when she clearly did not, falsification of documents. Falsification of records is specifically considered under the Standards of Conduct to be a Group III offense. He also testified that mitigation was considered, but the egregious nature of the offense was an aggravating circumstance that stripped away all Agency trust of the Grievant.

The assistant superintendent testified that the current administration at the facility was about two years old, and that during that time the discipline of any employee found to have falsified records has consistently been termination.

On cross-examination, the assistant superintendent testified that incidents lead the Agency to review the applicable Rapid Eye Video. Otherwise, except for random viewings, the storage of video is overwritten by more recent video. He testified that there was much conversation among the management team regarding the level of discipline, and that the falsification was the overriding reason the

Grievant's discipline was termination—consistent with other incidents of falsification. Other disciplinary actions are documented by the Agency.

The assistant superintendent also testified that, despite a contrary reference in email communication from the Agency's assistant deputy director, all members of management considering the discipline knew the Grievant did not have a prior Written Notice.

A facility sergeant, the manager for the behavioral management unit, testified that the Grievant did not perform the required checks as shown by the Rapid Eye Video, and that the Grievant did not secure the resident's door according to policy and procedure. He testified that, other than this offensive conduct, he had considered the Grievant a top performer.

The facility's captain testified the he was the administrator on call on July 14, 2013, and that he actually made rounds and did a round of fifteen minute checks in the behavioral management unit. He confirmed the important purpose of the checks, to make sure the residents were present and safe, and that observations of the residents cannot be done from the office desk. The captain testified that viewing a resident's entire body may not be required in each instance, but that documenting that a resident is lying down without viewing the resident is falsification.

A facility corrections officer, T.C., testified that the Grievant was considered by her peers as a strong officer. She testified that since the Grievant's discipline, management has emphasized the fifteen minute checks and changed the documentation procedure. The placement of the check sheets has changed. However, the process of actually checking and observing the residents every fifteen minutes has not changed.

Another facility corrections officer, K.E., testified that he was a shift partner of the Grievant. He testified that before July 14, 2013, he would complete the documentation of the resident checks without going on the floor and observing each resident. K.E. testified that he knew such a short cut was wrong, and he confirmed that an officer could not see a resident lying down from the office desk. On re-direct examination, K.E. testified that he had not reported such conduct before his testimony. In response to the hearing officer's questioning, he testified that the administrators on call were unaware of this practice of documenting checks without observing the residents.

Another facility corrections officer, L.C., testified that the Grievant actually trained him on the proper procedures, and that the Grievant is a good officer. He testified that the Grievant trained him to observe each resident during the checks. He testified that if the resident can be seen through the door window, walking up to the window may not be necessary, but that if a resident is not visible or lying down the checking officer must look through the window and see the resident. L.C. testified that he has observed administrators on call perform the

checks, and they would not do so without actual observation. Since the Grievant's discipline, everyone is now more sensitive to this process.

Facility corrections officer S.J. testified to the Grievant's good reputation as an officer. He confirmed the proper procedure for the fifteen minute checks is to observe personally each resident, and that a resident lying down cannot be observed from the office desk.

The Grievant testified on her behalf. She testified to her tenure and good work record, including commendations and bonuses for her contributions. She was selected to work on the facility's audit process and was rated a major contributor. She testified that during the audit preparations, she would complete forms by adding information without knowing whether the information was true, and she was never told that such conduct was falsification.

The Grievant testified that by assuming a resident was lying down and documenting such status without observing the resident was just the way they did it. If the time of day was a typical sleeping hour for the resident, and the resident was not visible, she assumed the resident was lying down and would document the status as such—without observing the resident. The Grievant testified that she had observed administrators on call doing the check sheet the same way—entering the activity from the previous line without observing the resident. The Grievant did not identify such staff by name or timeframe.

The Grievant testified that she understood from supervisors that if the resident can been seen through the window of the resident's door, then approaching each resident's door was not necessary.

The Grievant testified she had no intention of falsifying records, and that she believed the information she put on the forms, specifically noting that residents were lying down, was accurate even though she did not personally observe such residents. The Grievant also testified that she was having to respond to the disciplinary process at the same time she was in need of medical leave.

On cross-examination, the Grievant admitted she repeatedly noted on the fifteen minute check sheets that residents were lying down without observing the residents or their activity. The Grievant testified that she was trained to observe personally the residents for the fifteen minute checks, and that she knew it was improper procedure not to do so.

The Agency called the assistant superintendent for rebuttal. He testified that the Grievant was under his supervision for her audit work, and that he was unaware, until hearing the Grievant's testimony, of any falsification of forms during that process. He also testified that he has not become aware of any administrators on call falsifying reports as described by the Grievant.

In the hearing decision, the hearing officer assessed the evidence as to whether the grievant failed to follow applicable policy and falsified records, finding in the affirmative, and upheld the agency's issuance of a Group III Written Notice with removal.[2] The grievant now appeals the hearing 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."[3] 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.[4]

Inconsistency with State and Agency Policy

The grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with state and agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[5] The grievant has requested such a review. Accordingly, her policy claims will not be addressed in this ruling.

Mitigation

In her request for administrative review, the grievant asserts that the hearing officer's mitigation analysis was flawed. Specifically, she claims that the hearing officer failed to consider evidence in support of her argument that the agency had not consistently enforced the policies relating to fifteen minute checks prior to her termination.[6]

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]."[7] The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "a hearing officer is not a 'super-personnel officer'" and that "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."[8] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

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[2] *Id*. at 7-10.
[3] Va. Code §§ 2.2-1202.1(2), (3), (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[6] To the extent that the grievant's request may be considered as a challenge to the hearing officer's consideration of her length of service and prior satisfactory work performance, we are not persuaded that these factors should have supported mitigation. While it cannot be said that length of service is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which this factor could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. *See, e.g.*, EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518. While the grievant's reported service of over ten years is not insignificant, there is nothing to indicate that the hearing officer's consideration of her length of service was in any way unreasonable, an abuse of discretion, or otherwise not based upon evidence in the record.
[7] Va. Code § 2.2-3005(C)(6).
[8] *Rules for Conducting Grievance Hearings* § VI(A).

> (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[9]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.[10]

Importantly, because reasonable persons may disagree over whether or 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 a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[11] EDR will review a hearing officer's mitigation determination for abuse of discretion,[12] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In this case, the grievant asserts that she presented evidence to show that agency management was aware of and condoned the practice of logging fifteen minute checks without personally observing the residents under an officer's supervision, and that the hearing officer failed to consider this evidence in making his mitigation determination. In assessing mitigating factors pursuant to the *Rules*, the hearing officer may consider whether the employee "had notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with the rule."[13] The *Rules* further state that:

> [A]n employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee. Proper notice of the rule and/or its interpretation by the agency may also be found when the rule and/or interpretation have been communicated by word of mouth or by past practice. Notice may not be required when the misconduct is so severe, or is contrary to applicable professional standards, such that a reasonable employee should know that such behavior would not be acceptable.[14]

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[9] *Id*. at § VI(B).
[10] *Id.*
[11] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving 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).
[12] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts . . . ." *Id.*
[13] *Rules for Conducting Grievance Hearings* § VI(B)(2).
[14] *Id*. at § VI(B)(2) n.26.

There is some evidence in the record to show that past practices at the grievant's facility may have supported her position that some officers logged fifteen minute checks without personally observing every resident under their supervision. For example, the grievant's shift partner testified that he had not always logged fifteen minute checks properly in the past and that some supervisors also engaged in the same practice.[15] The grievant's supervisor testified that he had not personally observed other officers falsifying fifteen minute check sheets in the past, but assumed they had done so because they did not always leave the office to perform fifteen minute checks.[16]

However, there is also evidence in the record to support the hearing officer's conclusion that the grievant had adequate notice of the rule. The agency presented evidence to show that the grievant had received training in proper procedures, specifically including the practice of conducting and logging fifteen minute checks.[17] Several witnesses testified that they were aware of the proper method for logging fifteen minute checks and consistently did so.[18] One witness stated that the grievant had trained him in how to conduct a fifteen minute check according to policy.[19] The grievant's partner and the facility's assistant superintendent both explained that agency management had not authorized officers to perform fifteen minute checks without personally observing each resident under their supervision and was unaware that this may have been a common practice.[20] Most importantly, the grievant herself testified that she knew that her practice of logging fifteen minute checks without personally observing each resident was improper and did not dispute that she had violated policy by doing so.[21]

The hearing officer addressed the grievant's arguments on this point, and concluded that she had "provided insufficient proof of mitigating factors that permit [him] to reduce the level of discipline."[22] He further noted that "[h]er allusions to other administrators either knowing of or doing the same thing lack the specificity required to find that the procedure was not enforced or condoned by management."[23] While the grievant correctly notes that the hearing officer did not refer to the testimony of her supervisor in the hearing decision, there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each witness who testifies at a hearing. Thus, mere silence as to a witness's testimony does not constitute a basis for remand in this case. Further, it is squarely within the hearing officer's discretion to determine the weight to be given to the testimony presented.

In this case, the grievant's claims do not indicate that the hearing officer abused this discretion with respect to his consideration of mitigating factors. Rather, it would appear that the hearing officer did not discuss the supervisor's testimony because he did not find it to be credible and/or persuasive on the issue of whether agency management was aware of and condoned the

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[15] Hearing Recording at Track 1, 4:14:51-4:15:50 (testimony of Witness E).
[16] *Id*. at Track 1, 3:23:30-3:24:14, 3:28:43-3:29:16, 3:30:18-3:31:50, 3:32:20-3:33:02, 3:35:16-3:35:36 (testimony of Witness H).
[17] *Id*. at Track 1, 22:42-24:47 (testimony of Witness B); *see* Agency Exhibit 18-4.
[18] *Id*. at Track 1, 3:48:12-3:48:50 (testimony of Witness J), 4:04:06-4:05:09 (testimony of Witness C1), 4:40:09-4:40:40 (testimony of Witness C2).
[19] *Id*. at Track 1, 4:45:41-4:45:46 (testimony of Witness C2).
[20] *Id*. at Track 1, 4:34:08-4:34:20 (testimony of Witness E), Track 1, 5:56:06-5:56:34 (testimony of Witness G).
[21] *Id*. at Track 1, 5:44:42-5:45:20 (testimony of grievant).
[22] Hearing Decision at 9.
[23] *Id*.

falsification of fifteen minute check sheets. Based on a review of the record, it appears that the evidence presented at the hearing was sufficient to support the hearing officer's mitigation determination and that his determination was otherwise not arbitrary and capricious. Accordingly, we will not disturb the hearing decision on this basis.

The grievant's request for administrative review also seems to allege that the agency did not apply disciplinary action to her consistent with other similarly situated employees and that the hearing officer erred by failing to consider this evidence in his mitigation analysis. Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include "whether the discipline is consistent with the agency's treatment of other similarly situated employees." As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[24] The evidence presented by the grievant regarding other employees who were allegedly not disciplined for similar conduct does not appear to show that these individuals had engaged in conduct that was similar to the grievant's.[25] Furthermore, those employees who have falsified fifteen minute check sheets after the incident involving the grievant have received Group III Written Notices.[26] While the hearing officer did not address the grievant's claims on this point at length, he did state that she had "provided insufficient proof of mitigating factors" to show that "similar practices [had] gone undisciplined."[27] Based on a review of the record, it does not appear that the hearing officer's consideration of the evidence relating to mitigation was an abuse of discretion or that his mitigation analysis was flawed in this respect. Accordingly, we decline to disturb the decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR will not disturb the hearing decision in this case. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[28] 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.[29] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[30]

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[24] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).
[25] *See* Agency Exhibit 21. Although one employee was previously disciplined for falsification of records, his conduct was not similar to the grievant's. That employee filled out portions of the fifteen minute check sheet in advance, conducted each fifteen minute check through direct observation, and completed the rest of the check sheet at the conclusion of each fifteen minute check. *See* Hearing Recording at Track 1, 2:32:03-2:33:55; Agency Exhibit 21-1.
[26] *See* Agency Exhibit 22.
[27] Hearing Decision at 9.
[28] *Grievance Procedure Manual* § 7.2(d).
[29] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[30] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a); *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).