Issue: Administrative Review of Hearing Officer's Decision in Case No. 9328; Ruling Date: September 7, 2010; Ruling #2011-2709; Agency: University of Virginia Health System; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the University of Virginia Health Systems
Ruling No. 2011-2709
September 7, 2010

The grievant has requested that this Department administratively review the hearing decision in Case Number 9328. In her grievance, the grievant challenged the termination of her employment.[1] The hearing officer upheld the discipline in a June 28, 2010 hearing decision. For the reasons set forth below, the decision will not be disturbed by this Department.

FACTS OF THE CASE

The facts and related conclusions of this case, as set forth in the hearing decision in Case Number 9328, are as follows:

> The University of Virginia Health System employed Grievant as a Registered Nurse Clinician II. She began working for the Agency full-time in August 2008 until her removal from employment February 24, 2010. Grievant worked in the Pediatric Intensive Care Unit. The Job Summary in her Job Description stated:
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> > Capable clinician, focused on expanding knowledge and skills. Consistently provides effective direct care, as part of the interdisciplinary team, to a variety of complex patients. Manages care and implements treatment plans at a refined skill level in collaboration with patients, their families, physicians, and other members of the healthcare team. Seeks as well as provides feedback for improved clinical practice. Assumes a beginning leadership role but seeks mentoring in this process.
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> On February 15, 2010, Ms. G, a Registered Nurse, was working in the Pediatric Intensive Care Unit of the Agency. After her shift began, the Baby was admitted as a patient under her care. The Baby suffered from shaken baby syndrome. The Social Worker told Ms. G that only the great aunt and uncle of the

[1] Decision of the Hearing Officer in Case Number 9328 issued June 28, 2010 ("Hearing Decision") at 1. Footnotes from the original decision have been omitted.

Baby were allowed to visit unsupervised. She said the Baby's mother and father could visit if the great aunt and uncle were present.

The Agency kept Patient's Progress Notes in patient charts located within a short distance of patient rooms. On February 15, 2010 at 12:30 p.m., the Social Worker wrote in the Patient's Progress Notes for the Baby:

> [Social Worker] met with [patient's] father & paternal aunt & uncle. [Patient] is currently in the custody of [the Department of Social Services] from previous admission of 1-14-10 period. Dad reports [Department of Social Service] placed [patient] with his aunt and uncle, however dad & mother of baby can only visit when supervised by aunt & uncle. [PM] is the great aunt and primary caregiver. [Department of Social Services] office closed today due to holiday. [Social Worker] will contact [Department of Social Services] in the morning. [Social Worker] secured room at [location] for dad & foster parents for their stay. Investigation is still going on per dad. Dad has been very cooperative with [Social Worker] & appears to be appropriate & caring when with [patient].

At 2 p.m. the Social Worker wrote, in part:

> [Patient] is in custody of [Child Protective Services] until investigation is completed. *** [Patient's] parents may visit if supervised but not together. Dad has visitation on Wednesdays & [every other] weekend. Mother has all other time. Great aunt [PM] and her husband had been designated as foster care placement and may supervise visitation of [patient].

When Grievant began her shift in the evening at February 15, 2010, Grievant was assigned the Baby and met with Ms. G to obtain a report on the patient's status. Ms. G told Grievant what she had been told by the Social Worker namely that the parents could only visit the Baby if the great aunt and uncle were present. Ms. G told Grievant that the Social Worker had written the restrictions in the progress notes of the Baby's chart. Grievant had been assigned responsibility for a second patient and met with the registered nurse who cared for that patient during the prior shift.

Grievant went to see the Baby at approximately 7:45 p.m. and observed the great aunt and uncle at the Baby's bedside. Grievant knew that the Baby had a history of being a shaken baby. Based on her experience, she knew that a father, mother, or mother's boyfriend were often the person who caused the trauma to the child. Grievant did not read the Social Worker's notes during her shift. At approximately 10 p.m., the Baby's father arrived and the great aunt and uncle were getting ready to leave. They asked if the father could stay. This question

was a "red flag" for Grievant. Based on her experience, it was an issue that needed to be addressed so Grievant asked the father and the great uncle if there were visitation restrictions. The father did not answer. The great uncle asked Grievant if she was going to be there after he left. Grievant said she would be there. The great uncle said that there were no issues that he was concerned about. The great uncle left and the father remained in the Baby's room until 7 a.m. the following morning. During that time period, Grievant left the father alone with the Baby approximately every two hours when she walked to another room to attend to her second patient. Grievant could not observe the father when she was attending to the second patient.

At 7 a.m. on February 16, 2010, Grievant met with Ms. O, a Registered Nurse, and gave Ms. O a report of the Baby's status. Grievant told Ms. O that the father was not allowed to stay unsupervised with the Baby and that the great aunt and uncle were there to supervise if the father was with the Baby. Grievant told Ms. O that the Social Worker had written a progress note in the Baby's chart. The father was in the Baby's room at that time without the great aunt and uncle being present. Ms. O was concerned that she would be unable to supervise the father and attend to her second patient at the same time. Ms. O notified the Supervisor of her concerns.

CONCLUSIONS OF POLICY

Policy 701 sets forth the Agency's Standards of Performance for its employees. Progressive performance improvement counseling steps include an information counseling (Step One), formal written performance improvement counseling (Step Two), suspension and/or performance warning (Step Three) and ultimately termination (Step Four). Depending upon the employee's overall work record, serious misconduct issues that may result in termination without prior progressive performance improvement counseling include but are not limited to, "[w]illful violation or neglect of safety/security rules."

The Social Worker established a visitation rule for the safety and security of the Baby. The Agency adopted that rule and its staff including Grievant were obligated to implement that rule. Grievant was aware of the rule because she had been told by Ms. G that the father could not have unsupervised visitation with the Baby. During her shift ending on February 16, 2010, Grievant left the father alone with the Baby in the Baby's room unsupervised while she attended to her second patient. By doing so, Grievant violated the Agency's rule for the safety and security of the Baby. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Formal Improvement Counseling Formal with removal for serious misconduct.

Grievant argued that she did not leave the father alone with the Baby because she stayed outside the room watching the father and child sleep. This

argument fails. Grievant was obligated to provide services to a second patient and did so throughout her shift. Grievant left the Baby's room and walked to the other patient's room to provide services to that patient. When Grievant was in the second patient's room, she was unable to observe the father and the Baby. If the father had wished to harm the Baby, he could have done so without being observed by Grievant.

Grievant argued that she did not know that there were restrictions on the father's ability to remain with the Baby unobserved. She stated that she did not read the Social Worker's notes in the Baby's chart because she was too busy that evening. This argument is untenable. It was not necessary for Grievant to have read the Baby's Patient's Progress Notes to learn of the visitation restriction. Grievant was told of the restrictions and of the existence of Patient's Project Notes by Ms. G when Grievant began her shift. Grievant knew the nature of the restrictions because she repeated the restrictions to Ms. O when Ms. O began her shift and assumed responsibility for the Baby.

Grievant argued that the Agency did not consider lesser punishment than removal. Given the severity of Grievant's actions, it was not necessary for the Agency to consider a lesser level of discipline. By failing to supervise the father, Grievant placed the Agency at risk of civil liability in the event the father had caused injury to the Baby. Grievant argued that she had been singled out for discipline because of prior concerns about her work performance by regulatory authorities. No credible evidence was presented to support this assertion. The Hearing Officer does not believe the Agency took action against Grievant for any reason other than her behavior.

Grievant argued that the Social Worker's notes did not require that the father be supervised at all times. When the Social Worker's notes are considered as a whole with emphasis on her entry at 2 p.m., it is clear that the father could not visit with the Baby unless someone supervised him.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…." Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary

action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Formal Improvement Counseling Form with removal is **upheld**.

DISCUSSION

By statute, this Department 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."[2] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[3]

Hearing Officer's Findings of Fact and Conclusions

The primary grounds for appeal appear to be challenges to the hearing officer's findings and conclusions. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[4] and to determine the grievance based "on the material issues and grounds in the record for those findings."[5] 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 upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

Based upon a review of the hearing record, evidence supports key findings. While the grievant asserts that she was unaware of any visitation restriction,[6] at least three witnesses testified that she had knowledge of the restriction.[7] Furthermore, while the grievant asserts that she was "there during her entire shift and provided care to the baby," at least one witness stated that the grievant admitted that she left the baby unsupervised and alone with the father while she

[2] Va. Code § 2.2-1001(2), (3), and (5).
[3] *See Grievance Procedure Manual* § 6.4(3).
[4] Va. Code § 2.2-3005.1(C).
[5] *Grievance Procedure Manual* § 5.9.
[6] Agency Exhibit 1, February 22, 2010 Grievance Form A.
[7] Despite assertions to the contrary by the grievant, Ms. G testified that the Social Worker informed her of the visitation restrictions and that she (Ms. G.) shared those restrictions with the grievant through the hand off of care report. Hearing Recording at 2:10:00-2:14:00. In addition, the RN who was beginning her shift as the grievant was finishing hers, testified that the grievant informed her of the visitation restriction through the hand off of care report. Hearing Recording at 1:55:00-2:01:00. Finally, a Clinician 3 ("Shift Manager"), testified that the grievant explained to her, as the shift was changing, that the father needed to be supervised. Hearing Recording at 1:23:00-1:26:00.

was checking on her other patient.[8] Thus, there is sufficient record evidence to support the charge against the grievant: she was instructed not to leave the child alone with the father and she failed to follow that directive. Thus, we find no grounds to disturb the decision on this basis.

Mitigating Circumstances

The grievant claims that the discipline against her exceeds the limits of reasonableness. Under 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 the Department of Employment Dispute Resolution."[9] EDR's *Rules for Conducting Grievance Hearings* provides 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."[10] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (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.[11]

[8] Hearing Recording at 1:58:00-2:00:00. Indeed, the only way that the grievant could have provided supervision of the father for her entire shift was if she ignored her other patient. However, as explained further in this ruling, the agency's position is that the appropriate action for the grievant to have taken was to tell the father that he needed to leave when the grievant had other duties to tend. *See* "Mitigation" below.

[9] Va. Code § 2.2-3005(C)(6).

[10] *Rules for Conducting Grievance Hearings* VI(A).

[11] *Rules for Conducting Grievance Hearings* VI(B). The Merit Systems Protection Board's ("Board's") approach to mitigation, while not binding on this Department, can be persuasive and instructive, serving as a useful model for EDR hearing officers. For example, under Board law, which also incorporates the "limits of reasonableness" standard, the Board must give deference to an agency's decision regarding a penalty unless that penalty exceeds the range of allowable punishment specified by statute or regulation, or the penalty is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Service, 819 F.2d 1113, 1116 (Fed. Cir. 1987). *See also* Lachance v. Devall, 178 F.3d 1246, 1258 (Fed. Cir. 1999) (the Board may reject those penalties it finds abusive, but may not infringe on the agency's exclusive domain as workforce manager). This is because the agency has primary discretion in maintaining employee discipline and efficiency. Stuhlmacher v. U.S. Postal Service, 89 M.S.P.R. 272, 279 (2001). The Board will not displace management's responsibility in this respect but instead will ensure that managerial judgment has been properly exercised. *Id. See also* Mings v. Department of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987)(the Board "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all the factors").

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.

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 for that of agency management.[12] Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets "exceeds the limits of reasonableness" standard set forth in the *Rules*.[13] This 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,[14] abusive,[15] or totally unwarranted.[16] This Department will review a hearing officer's mitigation determination for abuse of discretion,[17] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. The grievant has the burden to raise and establish any mitigating factors.[18]

First, the grievant appears to assert that she was presented with a situation which no person could possibly comply: being at two places at once, supervising the father in one room and a second patient in another. However, an agency witness essentially testified that this was an impossible situation which the grievant alone created.[19] This witness testified that the grievant

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[12] Indeed, the *Standards of Conduct ("SOC")*gives to agency management greater discretion in assessing mitigating or aggravating factors than the *Rules* gives to hearing officers. An agency is relatively free to decide how it will assess potential mitigating and aggravating circumstances. Thus, as long as such decisions are consistent, based on legitimate agency concerns, and not tainted by improper motives, an agency's weighing of mitigating and/or aggravating circumstances must be given deference by the hearing officer, and the discipline imposed left undisturbed, unless, when viewed as a whole, the discipline exceeds the bounds of reasonableness.

[13] While hearing officers make *de novo* fact-findings under the *Rules*, a hearing officer's power to *mitigate* based on those fact-findings is limited to where his or her fact-findings support the "exceeds the limits of reasonableness" standard established by the *Rules*. Also, where more than one disciplinary action is being challenged in a hearing, the hearing officer's mitigation analysis should consider both whether each individual disciplinary action exceeds the limits of reasonableness and whether the challenged disciplinary actions, in the aggregate, meet this standard.

[14] *See Parker*, 819 F.2d at 1116.

[15] *See Lachance*, 178 F.3d at 1258.

[16] *See Mings*, 813 F.2d at 390.

[17] "'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.*

[18] *See e.g.*, EDR Rulings 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also* Bingham v. Dept. Of Veterans Affairs, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to Kissner v. Office of Personnel Management, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

[19] Testimony beginning at 1:33:00.

should have sent the father home and not assumed the responsibility of full-time supervision of the father and child.[20]

Next, the grievant asserts that the agency did not follow the normal protocol for informing staff of the special visitation restrictions in this case. Assuming that was the case, however, at least three witnesses testified that the grievant was aware of the restrictions. Thus, any objection based on a lack of awareness of a restriction fails.

The grievant asserts that she was disciplined, in part, for not having read the patient record. She asserts that the nurse who communicated the restriction admitted that she had not read the restriction in the patient's chart because she was too busy. According to the grievant, that individual received no discipline, which, the grievant indicates, was inconsistent discipline that should mitigate the grievant's discipline. However, from the totality of the hearing record, it appears that the agency's primary objection was not so much about the failure to review the record as it was the grievant having allowed the father and child to be unsupervised after having received instruction that supervision was required.

The grievant also contends that Ms. G's description of the visitation restriction in her e-mail statement differs from the restriction contained in the patient's chart. This argument fails as well. The two descriptions are not inconsistent. The instruction in the chart consisted of two entries, one made at 12:30 p.m. and a second at 2:00 p.m. The first entry states, in pertinent part, that "Dad reports DSS placed pt with his aunt & uncle, however dad & mother of baby can only visit when supervised by aunt & uncle." The second entry states that "Pt's parents may visit if supervised but not together . . . great aunt [] & her husband have been designated as foster care placement & may supervise visitation of pt." Ms. G's recollection of the visitation restriction and instruction that she shared with the grievant as the shift changed is as follows:

> I stated, "the legal guardians of pt [] were his great aunt and uncle and that the mother and father could visit; but, only if the great aunt and uncle were present and the curtains were drawn back and others were observing.
>
> The oncoming night nurse stated that previously, when the patient had been hospitalized before, the father was allowed to visit alone. I said that I was not sure if that was the case prior but now the social worker said the great aunt and uncle had to be present when either the father or mother visit. I also stated the social worker had written a note in the chart and that she could read the note.[21]

The two directives in the chart do not substantially differ from the directive contained in Ms. G's statement. Ms. G added an additional detail regarding the supervision--the curtain had to be pulled--but in other regards they are consistent. The Clinician 3 testified that her understanding of the import of the 2:00 p.m. entry is that while the great aunt and uncle could supervise the father, they were not necessarily the only individuals who could provide that

[20] *Id.*
[21] February 21, 2010 written statement of Ms. G.

supervision.[22] However, the 2:00 p.m. entry did nothing to diminish the necessity for someone to supervise the father at all times.[23] Evidence suggests that the grievant did not provide supervision the entire time the father was with his son.

Finally, the grievant suggests that the agency singled her out for discipline because of prior concerns about her work performance by regulatory authorities. The hearing officer held that the grievant provided no credible evidence to support this assertion and that he "does not believe the Agency took action against the grievant for any reason other than her behavior." The grievant has not presented any evidence that would suggest that the hearing officer abused his discretion in reaching this determination.

For all of the above reasons, this Department declines to disturb the hearing decision.[24]

APPEAL RIGHTS AND OTHER INFORMATION

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.[25] 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.[26] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[27]

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Claudia T. Farr
Director

[22] Testimony beginning at 1:33:00.
[23] *Id.*
[24] While this ruling may not expressly address each point raised in the request for administrative review, all have been carefully considered. None of the reasons advanced warrant disturbing the hearing decision.
[25] *Grievance Procedure Manual* § 7.2(d).
[26] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[27] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).