Issue: Administrative Review of Hearing Officer's Decision in Case No. 9645; Ruling Date: November 4, 2011; Ruling No. 2012-3065; Agency: University of Virginia Health System; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the University of Virginia Health System
Ruling Number 2012-3065
November 4, 2011

The University of Virginia Health System (agency) has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9645. For all of the reasons set forth below, this Department will not disturb the hearing decision.

FACTS

The procedural history of this case, as set forth in the hearing decision in Case Number 9645, is as follows:

> On May 6, 2011, University of Virginia ("Agency") issued to the Grievant a disciplinary termination for failing to comply with terms and performance expectations from a performance warning issued April 13, 2011. The Grievant is Registered Nurse classified as Clinician III.
>
> Grievant timely filed a grievance to challenge the Agency's action. The outcome of the administrative steps was not satisfactory to the Grievant and she requested a hearing. On June 28, 2011, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. A pre-hearing conference was held by telephone on June 30, 2011. The hearing was scheduled at the first date available between the parties and the hearing officer, July 28, 2011, on which date the grievance hearing was held, at the Agency's facility.[1]

The relevant substantive facts, related conclusions, and decision as set forth in Case Number 9645 are as follows:

> The Agency's Medical Center Human Resources Policy No. 701, Employee Standards of Performance ("SOP"), defines the progressive discipline that must be followed before a termination may occur. Agency Exh. 4. On April 13, 2011, the Agency issued the Grievant a Performance Warning.

[1] Decision of the Hearing Officer in Case Number 9645 issued August 1, 2010 ("Hearing Decision") at 1. Note that the first page of the decision is not numbered but is referred to in this Ruling as page "1." Accordingly, the page numbered "1" is referred to here as page "2," and so on.

The SOP defines work expectations and provides guidance for dealing with performance deficiencies. The SOP, Section C, states as its objective:

> The Medical Center expects employees to meet standards of performance that enable all to work together to achieve the mission of the Medical Center.
>
> Performance issues are addressed through a process of progressive performance improvement counseling as outlined in this policy. The progressive performance improvement counseling process provides positive guidance, appropriate correction, and helps ensure fair and equitable treatment of all employees…

It states further, at Section D, in part, "The following are examples of some performance issues that are appropriate for the progressive performance improvement counseling process:

- Failure to meet performance expectations
- Adversely affecting another's ability to do work
- Misuse of work time
- Failure to report to work as scheduled
- Unauthorized absence from assigned work area
- Failure to meet attendance standard
- Failure to follow supervisor's instructions
- Failure to follow applicable policy

The SOP provides guidance to management officials for handling workplace behavior and for taking corrective action. The policy lists the four-step process as follows: (1) informal counseling; (2) formal written performance counseling; (3) performance warning; and, (4) termination.

More specifically, the SOP provides for a series of steps when Agency staff believes an employee's work performance in inadequate:

> The Medical Center may use a process of performance improvement counseling to address unacceptable performance when appropriate, except in cases of serious misconduct where suspension or termination is warranted. The purpose of the performance improvement counseling process is to correct the problem, prevent recurrence, and prepare the employee for satisfactory service in the future.

***

Performance improvement counseling steps include informal coaching, formal (written) performance improvement counseling, suspension and/or performance warning, and ultimately termination.

***

A. Informal Counseling – Step 1

If performance issues continue after appropriate coaching and training, the supervisor will bring the performance deficiency issues to the attention of the employee in an informal coaching session. This session should take place as soon as possible after the deficiency is noted, and in most cases should be conducted in private.

***

B. Formal (Written) Performance Improvement Counseling – Step 2

If the performance issue persists subsequent to the informal counseling, formal performance improvement counseling shall be initiated. The severity of the performance issue may warrant formal counseling without prior informal counseling.

***

[T]he employee shall receive a Performance Improvement Counseling Form documenting the expectations for performance improvement, the time frame for the improvement, and consequences if the employee fails to achieve and maintain the required performance level.

C. Performance Warning – Step 3

A performance warning is issued to specify a period of time (not to exceed 90 days) during which the employee is expected to improve or correct performance issues and meet *all* performance expectations for his/her job.

A performance warning will typically be applied progressively after at least one formal performance improvement counseling. Suspension will generally accompany the performance warning except in the case of attendance infractions.

Prior to taking any formal disciplinary step, the supervisor must meet with the employee to conduct a predetermination meeting. This meeting is held to review the facts and give the employee an opportunity to respond to the issues or explain any mitigating circumstances. Documentation of the predetermination meeting shall be maintained by the supervisor.

> After reviewing the information provided by the employee, the supervisor will determine if a performance warning is warranted.
>
> The performance warning must be documented on a Performance Improvement Counseling Form and include (1) clear and specific documentation of the performance issue(s), expected behavior and/or performance goals to be met, and (2) the time frame for achieving expectations. The performance warning is a significant step in the process of progressive performance improvement counseling. The performance warning shall document that unsatisfactory progress, or failure to meet all performance expectations at any time during the performance warning period shall normally result in termination.

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a registered nurse with 33 years experience. Her job role was Clinician III and she had been in that role since 2002.

There is reference to a prior substandard performance review resulting in demotion from Clinician III to Clinician II, effective in October 2010. That disciplinary action was reversed during the administrative steps and the Grievant was reinstated to Clinician III on or about March 29, 2011. Agency Exh. 3A; Grievant Exh. 2. There is no clear documentation of the reason for reinstatement, but procedural compliance was mentioned as a factor for the reinstatement.

Following the Grievant's reinstatement to Clinician III, her supervisor met with her on April 13, 2011, to initiate a Step 3 Performance Improvement Plan. The supervisor documented two incidents that occurred on the April 10, 2011, work shift. One concerned monitoring an infant patient's bilirubin level causing a delay in treatment. The other was not documenting a chart assessment in EPIC[2].

The Performance Improvement Plan ("PIP") identified the areas for improvement:

- Clinical competence as a Clinician III

[2] EPIC is a medical records software system used by the Agency and instituted in March 2011.

- Leadership abilities as a Clinician III
- Providing accurate documentation on patient flow sheet to include, but not limited to vital signs and assessments
- Completing patient care effectively and efficiently
- Demonstrating critical thinking and problem-solving abilities
- To be in compliance surrounding medical orders and consulting with Interdisciplinary Team when questioning current orders

Agency Exh. 3E. The PIP was for a 90 day period, with follow up assessments every 30 days.

From auditing the Grievant's performance, the supervisor identified an occurrence on May 3, 2011, regarding a titrate flow for one infant patient and lack of a shift assessment on another. The supervisor scheduled a meeting with the Grievant for May 9, 2011, at which meeting the Grievant, because of suspicions over the Agency motivation, had arranged for the Agency's ombudsman to attend. The supervisor moved the meeting up to May 5, 2011, which meeting included a human resources representative, for the purpose of conducting a pre-determination meeting. The Agency did not contact the ombudsman for the rescheduling of the meeting. At the May 5, 2011, meeting, the supervisor placed the Grievant on paid administrative leave and on May 6, 2011, the supervisor proceeded with termination.

The supervisor testified that charting is an important aspect of the Grievant's responsibilities, and that if something was not charted "it did not happen." The supervisor stressed the significance of charting for continuity of patient care, billing, and legal responsibilities. The supervisor stated she had three concerns from the pre-determination meeting with the Grievant: that the Grievant declined her offer of additional EPIC training; does not fully appreciate the importance of documentation; and stated that documentation is a low priority. The supervisor did not believe the Grievant's account of her charting entry disappearing from the EPIC system, because the supervisor was not aware of other such instances reported by others.

On cross-examination by the Grievant, the supervisor testified that the EPIC software system was started in March 2011, and that the Grievant was placed in Step 3 discipline because she had already been in Step 2.

The supervisor's assistant testified that she conducted the audit of the Grievant's charting entries and found two instances of assessments not being documented. The assistant confirmed the importance of documentation. The assistant admitted to making mistakes herself, and that management does not announce to others disciplinary actions taken against staff.

The human resources consultant testified that he was present during the May 5, 2011, predetermination meeting, as is required by procedures. He was not present at the Grievant's request or as a substitute for the ombudsman she wanted present for the meeting scheduled for May 9, 2011. The consultant confirmed that the Grievant stated her belief that actual patient care was more important than documentation.

Testifying on the Grievant's behalf was a staff registered nurse. She testified to an instance of one of her detailed assessments disappearing in EPIC, and that there are a lot of glitches in the EPIC system. She has had to go back to double and triple checking her charting entries to make sure they have not disappeared. She also testified that the computers often shut down and need restarting on the night shift. The Grievant works the night shift. The staff nurse also shared the belief that patient care was the number one priority and that charting, while important, sometimes has to be done later. She testified that she has observed numerous instances of assessments not being documented in the EPIC system. The staff nurse testified that the Grievant is a well-known and respected resource for other nurses for instruction and advice on high quality care.

The Grievant testified that she was concerned about management's reaction to her reinstatement to Clinician III on or about April 1, 2011, the reaction being an almost immediate placement under a Step 3 Performance Warning and PIP on April 13, 2011. In fact, the Grievant's first meeting with her supervisor following her reinstatement to Clinician III was the April 13, 2011, Step 3 Performance Warning. The Grievant asserts that management's actions leading to termination are retaliatory for her successful challenge of her demotion. The Grievant testified that the Agency ombudsman suggested the action was retaliatory.[3] The Grievant also testified that her comments about documentation are taken out of context—she testified that she only meant that actual patient care came first, and she admitted that she, like everyone, has made mistakes. The Grievant testified other nurses miss charting entries, too, because of the often-

[3] The Grievant requested a witness order for the ombudsman, which the hearing officer issued. The ombudsman declined to appear for the hearing. The Agency advanced the excuse for the ombudsman's refusal was his role that requires confidentiality to be effective. Agency witnesses are not allowed the unilateral prerogative to determine the competency or relevance of their testimony or the propriety of their appearance, and it is impermissibly presumptive to conclude the ombudsman's testimony involved confidential information and that any such information was protected by any recognized privilege. Prior to the hearing, the hearing officer advised the Agency that the hearing rules provide potential sanction for non-appearance of a witness ordered to appear. If a party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as the hearing officer or the EDR Director had ordered, an adverse inference may be drawn with respect to factual conflicts resolvable by the ordered documents or witnesses. *Rules for Conducting Grievance Hearings, § V.B.* At the hearing, the Agency conceded that the ombudsman would verify the Grievant's account of the scheduled disciplinary meeting on May 9, 2011, his plan to attend, and that the ombudsman was not consulted for his availability to attend the meeting moved earlier to May 5, 2011. The Grievant testified that the ombudsman thought the Agency's reaction following her reinstatement to Clinician III suggested retaliation.

irregular occurrences that might happen during a shift. The Grievant testified that on at least one instance, an assessment she entered into the EPIC software system disappeared from view. She also testified that a respiratory therapist had the same experience of disappearing EPIC entries.[4] The Grievant testified that she declined further EPIC training because she felt her training was adequate, that she just needed more experience with using EPIC, and that she could access EPIC "super users" when questions arose.

At the second resolution step, the Agency responded to the grievance by sustaining the termination based on the Grievant's performance issues over the last year, including the charting errors in EPIC.

The circumstances of moving the meeting scheduled for May 9, 2011 (when the Grievant had arranged for the Agency's ombudsman to be present), to May 5, 2011 (without arranging for the ombudsman's presence), is not adequately explained by the Agency. Certainly, the necessity of moving the meeting without coordinating with the ombudsman is not explained. The urgency at which the Agency treated this diciplinary [sic] action is suggestive of a "serious misconduct" offense, yet the Grievant has not been charged with a serious misconduct offense as defined in the SOP.

The Grievant advances the position that the discipline is too severe and should be mitigated. Her contention is that the EPIC software system was new and others had experienced lost data entries inexplicably. The Agency has the burden of proof of all the elements of the discipline levied. Based on the evidence presented, I find that the Agency has not met its full burden of proof that the Grievant has committed misconduct as charged. I find that the misconduct associated with the EPIC software system is, at least to some degree, related to glitches in the software that were disbelieved by the supervisor, yet corroborated by two witnesses. I also find that the EPIC system, being very new to use (since March 2011), has inherent learning curve aspects that have contributed to the charting deficiencies noted. I also find that the Grievant's inaccurate use or lack of skill with the software program EPIC is a likely contributor. The misconduct was at least compounded by the Grievant's lack of skill or experience with EPIC.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing

[4] The Grievant requested a witness order for the respiratory therapist, and the therapist was on vacation without any telephone service on the hearing date. The Agency stipulated to the singular occurrence of the respiratory therapist's disappearing EPIC entry.

officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Agency had the discretion to elect less severe discipline. 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…." Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive 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."

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. However, if the Agency does not consider mitigating factors, the hearing officer should not show any deference to the Agency in his mitigation analysis. In this proceeding the Agency apparently did not consider mitigating factors in disciplining the Grievant.

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.

The Agency voiced that it has conducted progressive discipline, including the multiple instances of informal counseling for the Grievant before issuing the present termination. In light of the standard set forth above in the *Rules*, 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, even if

he disagrees with the action. However, the Hearing Officer finds that the relatively new EPIC software system started in March 2011 is a mitigating factor for performance charting errors within a month or so. I find both that unexplained glitches in the EPIC system and the newness of the EPIC system played a part in her charting errors. Accordingly, this mitigating factor counters some of the instances used to terminate the Grievant's employment. Because of these mitigating factors, the termination exceeds the limits of reasonableness and compels a reduction of the disciplinary action from a Step 3 Performance Warning Termination to the lesser Formal (Written) Performance Improvement Counseling – Step 2 for unsatisfactory work performance. Accordingly, the Agency shall issue such Performance Improvement Counseling Form ("PIC") documenting the expectations for performance improvement, the time frame for the improvement, and consequences if the employee fails to achieve and maintain the required performance level.

The Grievant asserts that the Agency's termination action is motivated by retaliation. It appears that the grievant's theory of unfair or disparate treatment is in essence the same as her retaliation argument, and challenges the same management actions. As such, her claims of unfair/disparate treatment will be analyzed under a retaliation theory. For a claim of retaliation to succeed, the Grievant must show (1) she engaged in a protected activity; (2) she suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. If the Agency presents a nonretaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case). A claim of retaliation can often hinge on circumstantial evidence.

The Grievant engaged in protected activity by initiating a prior grievance, in which she prevailed in reversing her demotion and gaining reinstatement as a Clinician III. The Grievant asserts that the retaliation she has experienced stems from this prior demotion and reinstatement. The termination certainly satisfies the requirement of a materially adverse action. However, the Grievant faces a challenge showing a causal connection. The Fourth Circuit requires little evidence for a showing of a causal connection between the complaint and the adverse employment action. *See Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 443 (4th Cir. 1998) ("Normally, very little evidence of a causal connection is required to establish a *prima facia* case. . . ."). Indeed, the Fourth Circuit has held

that "merely the closeness in time between the [protected activity] and an employer's firing is sufficient to make a *prima facia* case of causality." *Tinsley*, 155 F.3d at 443 (citing *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989)).

The Agency's evidence is that virtually all employees who are found to have deficiencies in charting and patient care are disciplined consistently in one form or another. While the Grievant may question this evidence, the record does not show actual instances of disparate treatment. Perhaps the Grievant could have requested documentation of the Agency's discipline in similar instances, but that evidence was not presented. However, the timing of the Agency's disciplinary activity toward the Grievant, having geared up on the heels of her reinstatement from demotion, raises a *prima facia* claim of retailation. The Agency does not show or allege any substandard performance by the Grievant during the period of the claimant's demotion from October 2010 until reinstated in March 2011. Immediately following the Grievant's reinstatement the Agency discovered an instance of alleged misconduct. While all of the instances of misconduct identified by the Agency's charges are not specifically mitigated as discussed above, the Agency's failure to demonstrate any consideration of mitigation in the termination decision, coupled with other questionable actions, raises an inference of retaliation. Once such occurrence is the close timing of the discipline following the Grievant's successful grievance challenging her demotion. Another suspicious factor is the unusual urgency displayed by moving up the pre-determination meeting from the date scheduled with the ombudsman. This conduct raises questions of the Agency's motives. Thus, I find some retaliatory taint to the termination process. However, because of the mitigation exercised as discussed above, even a finding of retaliation would not erase all of the performance deficiencies noted by the Agency and render the Agency concerns totally pretextual. For this reason, the severity of the discipline is mitigated to reverse the termination.

When dealing with patient medical care, the hearing officer recognizes that even the slightest mistake or miscue can possibly have very detrimental consequences. The hearing officer recognizes and upholds the Agency's great responsibilty to ensure patient care, but this Grievant is not charged with a "serious misconduct" offense as defined in the SOP. While the Agency cites a history of performance issues, the prior disciplinary demotion was reversed by the Agency, and the Agency has not shown that Grievant's termination from current discipline was within the bounds of reasonableness.

The Agency's obligation and action to ensure the satisfactory care of its patients is fully recognized, and the Agency may initiate the PIC to ensure that the Grievant has competence in the EPIC software program, even to include mandatory training. The Grievant is advised to assess carefully her skills using EPIC and to take advantage of all training opportunities afforded her to avoid a

record of further EPIC charting mistakes. The Agency is ordered to refrain from even the slightest retaliatory motive in conducting the Grievant's continuing performance evaluation.

DECISION

For the reasons stated herein, the Agency's termination is rescinded and the Agency is ordered to reinstate Grievant to her former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The level of discipline is reduced from a Step 3 Performance Warning Termination to the lesser Formal (Written) Performance Improvement Counseling – Step 2 for unsatisfactory work performance. The Agency may, if it so elects, continue with issuance of a Performance Improvement Counseling Form to ensure that the Grievant develops competence in the EPIC software program and other deficiencies.[5]

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."[6] 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.[7]

Inconsistency with Agency Policy

The agency asserts that the decision is inconsistent with agency policy. In addition to appealing the hearing decision to this Department, the grievant has also appealed to the Department of Human Resource Management (DHRM).[8] DHRM has not yet issued its decision. Under the Commonwealth's grievance procedure, DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[9] Accordingly, this Department will not address the issue of conformance with policy except below as a matter of the scope of the hearing officer's authority to order the particular relief of removal of the performance improvement plan.

---

[5] Hearing Decision at 2-9.
[6] Va. Code § 2.2-1001(2), (3), and (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] The agency also requested that the hearing officer reconsider his decision. The hearing officer issued a Reconsideration Decision on September 5, 2011, in which he upheld his original decision but provided some clarification regarding policy.
[9] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).

Removal of the Performance Improvement Plan/Management Actions Grieved

The hearing officer not only reinstated the grievant but also removed the performance improvement plan. Agency arguments regarding the broader concern of whether the agency met its burden of proof and whether the hearing officer improperly overturned the grievant's placement on a performance improvement plan and subsequent termination are addressed later in this decision. Addressed here is the narrow issue of whether the grievant grieved her placement in a performance improvement plan and thus whether the hearing officer had authority to remove her from such a plan.

Based on the record evidence we disagree with the agency's contention that the grievant did not grieve her Step 3 Performance Warning and placement on a performance improvement plan. First, the grievant lists two dates on her 5/10/11 Grievance Form A as the date(s) the grievance occurred. One is 5/6/11, the day her employment ended and the other was 4/13/11, the day she was presented with the performance improvement plan and given a Step 3 Performance Warning.[10] In addition, the Associate Chief of the hospital, who apparently received the grievance on 5/13/11, states in her 5/23/11 response that the grievant "is requesting reinstatement of her CNIII position without continuation of her step 3 performance improvement plan."[11] Thus, this Department must conclude that the Step 3 performance improvement plan was grieved. Moreover, there is no evidence in the hearing record that the agency expressly challenged the grievant's timeliness in filing her grievance[12] or denied qualification of the Step 3 Performance Warning and its attendant performance improvement plan. Thus, the matters of the Step 3 Performance Warning and performance improvement plan were before the hearing officer and he had authority to order relief if he were to find (which he appears to have) that the performance plan was improperly imposed.

Finding of Fact and Related Conclusions

The agency challenges the hearing officer's fact findings and essentially argues that the agency met its burden of proof. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[13] and to determine the grievance based "on the material issues and grounds in the record for those findings."[14] Further, in cases involving discipline (and dismissals for poor performance), the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct (or poor performance) and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[15] Thus, with disciplinary actions

[10] Agency Exhibit 1.
[11] Emphasis added.
[12] We are compelled to note as well that if the Associate Chief of the hospital received the grievance on 5/13/11, as she apparently noted on the Grievance Form A, the grievance was timely filed with respect to the 4/13/11 performance improvement plan and Step 3 Performance Warning.
[13] Va. Code § 2.2-3005.1(C).
[14] *Grievance Procedure Manual* § 5.9.
[15] *Rules for Conducting Grievance Hearings* § VI(B).

and dismissals for poor performance 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.[16] 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.

Here, the hearing officer found that "the misconduct associated with EPIC software system is, at least to some degree, related to glitches in the software that that were disbelieved by the supervisor, yet corroborated by two witnesses." Based on this Department's review of the hearing record, two witnesses other than the grievant had experienced problems with the EPIC system retaining entries.[17] Because record evidence supports the hearing officer's findings regarding EPIC, this Department has no basis to disturb his findings.

The agency argues that the grievant was not disciplined solely for EPIC documentation deficiencies. The agency asserts that it "pointed out numerous serious medical errors made by the Grievant which had nothing to do with the use of EPIC, yet the Hearing Officer did not directly address any of them in his Decision." For instance, the agency asserts that testimony from the RN Manager included evidence of poor patient care including events on 4/10/11 and 4/11/11. It is unclear how these events could have been viewed as acts supporting the charge that the grievant failed to meet the requirements set forth in the performance improvement plan because the plan was not issued until 4/13/11. Similarly, as to evidence of a "troubling error" that occurred in July 2010, the grievant was not terminated for the July 2010 incident. She was terminated for her alleged failure to conform to the performance improvement plan initiated on 4/13/11.[18]

A review of the hearing recording affirms that an agency witness, the Assistant Manager, provided testimonial evidence regarding at least two other incidents listed on the performance improvement plan. The hearing decision seems to expressly reference one of them: titrate flow issue/oxygen weaning issue but does not discuss it in any detail. (The other issue concerned the apparent failure to change a diaper.) EDR has long held that a hearing decision need not address every fact raised at a grievance hearing. The absence of any substantive discussion regarding the titrate flow issue or diaper change concern does not constitute error under the particular facts of this case.[19] The failure to address these particular issues is not entirely surprising given the agency's heavy focus at hearing and in it s 5/5/11 predetermination meeting documentation on the issue of the grievant's alleged EPIC documentation shortcomings. Moreover, the hearing

[16] *Grievance Procedure Manual* § 5.8.
[17] As the hearing decision states, the agency stipulated that a respiratory therapist had a single instance of data disappearing. *See* hearing Tape 1, Side A.
[18] Agency Exhibit 3, Written Notice.
[19] At hearing, a different witness, the Nurse Manager refers to the diaper change concern as a "minor thing." Tape 1, Side A at approximately 440.

decision seems to concede that the grievant had some performance deficiencies.[20] Thus, the absence of specific reference to those deficiencies cannot be viewed as error.

Improper Mitigation

The agency contends the hearing officer erred by mitigating performance deficiencies on the basis of a retaliatory animus. The hearing officer has the sole authority to weigh all of the evidence and to consider whether the facts of the case constitute misconduct and whether there are mitigating circumstances to justify a reduction or removal of the disciplinary action. Under Virginia Code § 2.2-3005, the hearing officer has the 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."[21] EDR's *Rules for Conducting Grievance Hearings* ("*Rules*") 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.[22]

The *Rules* further state that:

> Therefore, 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.[23]

This Department will review a hearing officer's mitigation determinations only for abuse of discretion.[24] Therefore, EDR will reverse only upon clear evidence that the hearing officer failed

---

[20] The hearing decision states that "even a finding of retaliation would not erase all of the performance deficiencies noted by the Agency and render the Agency concerns totally pretextual." Hearing Decision at 10.
[21] Va. Code § 2.2-3005(C)(6).
[22] *Rules for Conducting Grievance Hearings* § VI(B) (alteration in original).
[23] *Id.*
[24] "'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. See also* Bynum v. Cigna Healthcare of NC, Inc., 287 F.3d 305, 315 (4th Cir. 2002) quoting Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999)("[A]n abuse of discretion occurs when a reviewing court possesses a 'definite and firm conviction that . . . a clear error of judgment' has occurred 'upon weighing of the relevant factors.'"; United States v. General, 278 F.3d

to follow the "exceeds the limits of reasonableness" standard or that the determination was otherwise unreasonable. One of the mitigating factors expressly listed in the *Rules* is "improper motive, such as retaliation or discrimination."[25]

In this case, the hearing officer found that a retaliatory animus tainted management's actions. The hearing decision notes the close proximity in time between the grievant's March 29, 2011 reinstatement to a Clinician III, following the apparently successful use of the grievance process, and her April 13, 2011 placement on the performance improvement plan. As the hearing decision correctly states a close proximity in time between a protected activity and a adverse employment action can satisfy a prima facie case of retaliation. Once the grievant establishes the prima facie case, the burden shifts to the agency to provide legitimate non-retaliatory reasons for its actions. If the agency meets this burden the grievant must present sufficient evidence that the stated reason was mere pretext for the action.

Here, the hearing officer noted that there were no deficiencies noted in the grievant's performance from October 2010 until she was reinstated on or about March 29, 2011. As the hearing officer noted almost immediately upon her return she was placed on a performance improvement plan. In addition, the hearing officer found the agency's rescheduling the pre-determination meeting raised questions of motive. While this evidence is not overwhelming, this Department cannot conclude that it is insufficient to meet the grievant's burden of establishing retaliatory intent. The hearing officer points out in his reconsideration decision that at least part of the reason for the grievant's dismissal was due to the EPIC documentation deficiencies, which the agency did not consider could have been due to glitches with the EPIC program itself. In addition, the agency now argues that it was the grievant's obligation to ensure that the ombudsman was aware of the predetermination meeting schedule change. However, the agency did not attempt to provide any explanation of who had the burden of informing the ombudsman when it stipulated to facts regarding his intent to attend the meeting and the lack of notice of the meeting rescheduling. The time for clarification regarding this burden was at hearing.

Ombudsman's Failure to Appear at Hearing

Finally, the agency argues that the hearing officer adopted the Ombudsman's purported suggestion that the agency's action were retaliatory in nature. The hearing officer addressed this point in his September 5, 2011 Reconsideration Decision. He explained that he did not attribute a retaliatory motive based on the Ombudsman's alleged opinion. Rather, it was related to the rescheduling of the predetermination meeting without informing the Ombudsman. As stated above, the time to advance testimony or evidence as to who bore the burden of notifying the ombudsman was at the hearing.

389, 396 (4th Cir. 2002) (observing that an abuse of discretion occurs when discretion is exercised arbitrarily or capriciously, considering the law and facts).

[25] *Rules for Conducting Grievance Hearings* § VI(B).

CONCLUSION AND APPEAL RIGHTS

For all of the reasons set forth above, this Department will not disturb the hearing decision. 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.[26] 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.[27] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[28]

_____

Claudia T. Farr
Director

[26] *Grievance Procedure Manual* § 7.2(d).
[27] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[28] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).