UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MARGARET A. GILTNER, Appellant, v. DEPARTMENT OF THE AIR FORCE, Agency.	DOCKET NUMBER DE07528410139-2 DATE: SEP - 5 1991

Gerald D. Sjaastad, Esquire, Colorado Springs, Colorado, for the appellant.

Major Phillip G. Tidmore, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson. Vice Chairman
Jessica L. Parks , Member

Chairman Levinson issues a concurring opinion.

OPINION AND ORDER

The appellant has petitioned for review of the April 27, 1989, initial decision which sustained the agency's removal action. The agency responded and cross-petitioned for review. For the reasons discussed below, the Board GRANTS the appellant's petition for review, DENIES the agency's cross-petition for review, and AFFIRMS the initial decision as MODIFIED by this Opinion and Order. The agency's removal action is NOT SUSTAINED, and a 90-day suspension is ORDERED in its place.

BACKGROUND

The appellant, a Clinical Nurse at the U.S. Air Force Academy Hospital, was removed, effective April 10, 1984, for gross negligence. Specifically, the agency charged that the appellant committed a potentially life-threatening medication error when she gave the wrong intravenous (IV) medication to a patient, and that she committed a breach of sterile technique with regard to the IV tube for a second patient.

The first incident involved a patient who was admitted to the hospital on January 25, 1984, with premature uterine contractions and had been given IV medication for three days to inhibit labor. By January 28, 1984, the patient's contractions had ceased, but on January 29, 1984, she began to again experience labor contractions. Because the Academy Hospital did not have the capability for an immediate cesarean section to deliver the baby or to care for a premature infant, the attending physician arranged for transport of the patient by helicopter to Fitzsimmons Army Medical Center (FAMC) in Denver.

The agency charged that it was discovered at FAMC that the IV was labeled with another patient's name and did not contain the prescribed medication necessary to control the patient's premature labor. When the appellant subsequently was confronted with the alleged error, she admitted it.

The second incident involved an alleged breach of sterile technique on another patient. Because this patient had a medical history of heart murmurs and susceptibility to infection, the hospital staff had been alerted to the necessity of following sterile technique. While the head nurse and the appellant were attempting to restart the IV after the machine pumping the IV had stopped, the appellant allegedly touched part of the IV apparatus with her hand, contaminating it. The agency charged that from the observations of the head nurse and the patient, it appeared that the appellant would have reattached the IV if the head nurse had not stopped her.

In an initial decision dated August 24, 1984, the administrative judge found that the charges were sustained, that the appellant's affirmative defenses of harmful error and prohibited personnel practices were not proven, and that the removal penalty was within the bounds of reasonableness. The appellant filed a petition for review and after remand from the Board, the administrative judge issued another initial decision dated March 20, 1985, finding that the instant performance-based action was properly taken under 5 U.S.C. Chapter 75, and reaffirming the agency's action.

The appellant then filed a second petition for review and the Board again remanded the case to the regional office to allow the parties to submit argument and evidence on whether the appellant should have access to the patients' records under the Privacy Act, 5 U.S.C. § 552. *See Giltner v.*

Department of the Air Force, 39 M.S.P.R. 253 (1988).[1] The administrative judge allowed the appellant access to the medical records and a hearing was held to take further evidence.

In an initial decision dated April 27, 1989, the administrative judge again affirmed the agency's removal action. With regard to the IV medication error, the administrative judge gave little weight to the testimony of the nurse who completed the FAMC records. He, therefore, again found that the appellant attached the wrong medication to the patient's IV infusion pump. He further found that the error was life threatening. The administrative judge also found no basis to change his previous findings concerning the sterile technique violation. Accordingly, he found that the appellant's removal promoted the efficiency of the service.

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[1] The Board found that the administrative judge did not abuse his discretion when he refused to accept into the record a videotaped deposition of the appellant's expert witness because a written transcript of the deposition was accepted and the administrative judge had no facilities to view the videotape. It also found that, although the administrative judge misstated the harmful error rule at the hearing, in the initial decision he applied the correct definition and the appellant did not show that she was prejudiced by the error. Next, the Board found no prohibited personnel practice under 5 U.S.C. § 2302(b)(2) had been committed when the agency deciding official acted on her case without being an eyewitness to the events. Finally, the Board rejected the appellant's contentions that the agency imprcperly removed her under Chapter 75 for performance that met the requirements of her performance standards, and that the administrative judge was biased against her. Thus, to the extent that the appellant's instant petition for review repeats these contentions, they are not again addressed. Rather, the findings on those issues are incorporated herein.

In her petition for review, the appellant contends, inter alia, that the administrative judge made improper credibility findings, and denied her the opportunity to explain her previous admission.

ANALYSIS

Agency's Cross Petition For Review

The agency's cross-petition contends that the appellant's petition for review is defective because it did not include an executed certificate of service required under 5 C.F.R. § 1201.114(h), and therefore should be rejected as untimely. The appellant's petition, however, was mailed on May 31, 1989, and contains a certificate of service showing that a copy of the appellant's petition was mailed to the agency on May 31, 1989. The Board considers the postmark date of the appellant's petition to be the filing date. *See* 5 C.F.R. § 1201.114(d); *Beer v. Department of the Army*, 2 M.S.P.R. 53, 56 (1980). We therefore find that the appellant timely filed her petition for review in compliance with the Board's regulations.

Appellant's Petition For Review

In reviewing an initial decision, the Board is free to substitute its own determinations of fact for those of the administrative judge, giving the administrative judge's findings only as much weight as may be warranted by the record and the strength of the administrative judge's reasoning. See *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (*per curiam*). Further, when documents or objective evidence contradict a witness' story, the Board may find clear error in the purported credibility determinations. *See Marotta v. Department of Health and Human Services*, 34 M.S.P.R. 252, 257-58 (1987), *aff'd*, 837 F.2d 1096 (Fed. Cir. 1987), cert. *denied*, 108 S. Ct. 1737 (1988), *reh'g denied*, 108 S. Ct. 2918.

In *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458-62 (1987), the Board listed numerous factors[2] that must be considered in making and explaining credibility determinations. In general, the administrative judge must identify the factual questions in dispute, summarize all of the evidence on each disputed question of fact, state which version he believes, and explain in detail why the chosen

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[2] These factors include the following: (1) the witnesses' opportunity and capacity to observe the event or act in question; (2) the witness' character; (3) any prior inconsistent statement by the witness; (4) a witness' bias, or lack of bias; (5) the contradiction of the witnesses' version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness' version of events; and (7) the witness' demeanor. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

version was more credible than the other version(s) of the event. *Id.* at 458. We find that the administrative judge erred in the credibility determinations and inferences from such determinations which led to the finding that the agency established the medication error by preponderant evidence. *See* 5 C.F.R. § 1201.56(a)(1)(ii).

In the instant case, the administrative judge did not cite *Hillen* or make specific reference to most of the relevant factors.[3] Nor did he rely specifically on the demeanor of Pauline Johnson, the nurse who cared for the patient and completed the records upon the patient's admittance to the FAMC. *Cf. Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985).

The administrative judge noted Ms. Johnson's testimony that while the incorrect bag of IV was hanging from the pole of the patient's litter, it was not hooked up, and that the correct IV bag with the proper medication was hooked up. *See* Hearing Transcript (H.T.) (April 18, 1989) at 12-13. *See also* Appeal File, Tab 18, Appellant's Exhibits 21-23 (FAMC medical records). Nonetheless, the administrative judge gave little weight to Ms. Johnson's recollection of the incident, which occurred in January 1984, because she could not recall the name of the attending physician to whom she gave the incorrect

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[3] There is no requirement that the administrative judge discuss every *Hillen* factor. *Cf. Marques v. Department of Health and Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985), *cert. denied*, 476 U.S. 1141 (1986).

IV bag or the name of the person for whom that IV medication was prescribed. In addition, the administrative judge doubted that the improper IV bag was unused and full, as maintained by Ms. Johnson, because he speculated that if it had been full, the attending physician and the appellant would have realized that it had not been used and the appellant immediately would have challenged the claim that she connected the wrong bag.

We find, however, after complete review of the record, that the administrative judge erred in assessing the testimony of Ms. Johnson. We find that Ms. Johnson's explanation of her thought process in recalling the incident is believable, particularly since she testified that only one patient arrived with the medication associated with the same IV pole, and that she was the individual who asked what the medication was all about and "caused the commotion in the room." *See* H.T. (April 18, 1989) at 34-35. Of even greater significance is the fact that Ms. Johnson's testimony is fully corroborated by her contemporaneous nursing notes. *See* Remand Appeal File, Tab 18, Appellant's Exhibit 21 (Nursing Notes dated January 29, 1984). Moreover, the record contains no direct contradiction of her testimony. The attending physician never testified that he actually saw the wrong IV medicine infusing into the patient, *see* H.T. (August 17, 1984) at 32, while Ms. Johnson, a nurse with thirty-years of experience, testified that the proper IV was hooked up and infusing into the patient. *See* H.T. (April 18, 1989) at 13. Further, there is no indication of erroneous medication in the patient's medical records.

The administrative judge's comments regarding whether the incorrect IV bag was full and to the effect that no extra bag of medication was needed on the flight, are highly speculative and do not provide persuasive reason to question Ms. Johnson's credibility. The administrative judge also questioned Ms. Johnson's credibility because she failed to remember the name of the accompanying physician and the patient's name on the incorrect medication. First, we note that it is not clear that she ever took note of such names and we find no compelling reason for them to merit her attention. See H.T. (April 18, 1989) at 14-15, 34. Secondly, we venture to say that most people would not remember a name that they saw on one occasion five years ago. Finally, and of most importance, what she did remember is supported by the medical records.

To find that Ms. Johnson lacked credibility, we would have to find that she not only mistook the medication, but that she twice recorded her error and yet no other medical personnel corrected the record errors or filed an incident report at FAMC indicating that there had been a medical error. *Id.* at 57. We find no basis on which to do so. Rather, we find that Ms. Johnson's testimony five years later is persuasive and verified. See Appeal File, Tab 18, Appellant's Exhibit 21.

In finding that the agency proved the medication charge, the administrative judge relied heavily on the appellant's admission. See Remand I.D. at 8. The appellant claims, however, that the admission was not based on any actual

knowledge on her part, and the record supports this assertion. When confronted by her superior, the attending physician, after his return to the Academy Hospital, he told her that she made the error. *See* H.T. (August 17, 1984) at 35, 202. By then, it was too late to check the patient to see what was infused, and the appellant had no reason to think that she was being wrongly informed. There is no allegation of intentional error here, nor is there any evidence of the appellant's having personal knowledge of the alleged error. We therefore find that the admission was based solely on the representation of the attending physician and the appellant's knowledge that she had attended the patient prior to her departure.

On the basis of the whole record, we find that the credible testimony of nurse Johnson, as supported by FAMC medical records, outweighs the agency's evidence. Accordingly, we find that the agency has not proven the charge that the appellant committed a medication error on January 29, 1984, by the preponderance of the evidence.

The appellant's argument that the administrative judge erred in finding the sterile technique charge sustained, is, however, without merit. In determining that the agency established this charge, the administrative judge found that: (1) The IV apparatus came apart in a manner it was not designed to do; (2) the appellant contaminated part of the IV apparatus with her hand; (3) both the head nurse and the patient testified that the appellant's attempt to reconstruct the apparatus would have placed the patient at risk from

bacterial infection; and (4) the appellant would have accomplished this reassembly, with the contaminated pieces, if the head nurse had not intervened. Notwithstanding that the appellant was well aware of sterile technique and her assertion that she would not have made such an error, the record testimony supports this charge. *See* H.T. (August 17, 1984) at 72-114, 116-132; Agency File, Tabs 2 and 4.

Since only one of the two agency charges has been sustained, the Board must make an independent evaluation to determine whether the sustained charge merited the penalty imposed by the agency. *See Cook v. Department of the Navy*, 34 M.S.P.R. 26, 28 (1987); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 308 (1981). The appellant's violation of sterile technique was serious and potentially life threatening. As noted by the charge nurse (the proposing official), however, the appellant's act was a technical error, see Agency Appeal File, Tab 10, and the IV apparatus was never reassembled. Moreover, the I-Med infusion pump was turned off all the time that appellant handled the apparatus, and it was not possible for contamination to get into or for the fluid to flow into the patient's bloodstream when the machine was turned off. H.T. (Aug. 17, 1984) at 95. Hence, the apparent life threatening potential and seriousness of the appellant's action was diminished since the patient was not in imminent danger and, in fact, suffered no injury, albeit through the intervention of the charge nurse.

Balanced against the seriousness of the offense, the appellant had approximately twenty-two years of satisfactory service with the agency and no past disciplinary record. Thus, under the circumstances, we find that removal is not warranted. We find that a 90-day suspension is the maximum reasonable penalty to promote the efficiency of the service. *See Davis v. Department of the Treasury*, 8 M.S.P.R. 317, 320-21 (1981); *Douglas*, 5 M.S.P.R. at 306

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c). We ORDER the agency to cancel the appellant's removal and to replace it with a 90-day suspension retroactive to the date of the improper removal. The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a

check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your

representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

for Robert E. Taylor
Clerk of the Board

Washington, D.C.

SEPARATE OPINION OF
DANIEL R. LEVINSON, CHAIRMAN
CONCURRING IN THE RESULT

In

Giltner
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(DE075284101392)

While the penalty question is a close one, I concur in the majority's decision to mitigate. I do so on the basis that only one of two charges brought against the appellant was sustained, and that the appellant had approximately twenty-two years of satisfactory service and no past disciplinary record.

Daniel R. Levinson
Daniel R. Levinson
Chairman

SEP - 9 1991
Date