Issue: Group II Written Notice (failure to comply with established written policy); Hearing Date: August 13 and 14, 2001; Decision Date: August 20, 2001; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esquire; Case Number: 5247

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of Department of Mental Health, Mental Retardation and Substance Abuse Services
Case Number 5247

Hearing Date: August 13 & 14, 2001
Decision Issued: August 20, 2001

PROCEDURAL ISSUE

Due to availability of the participants, the hearing could not be docketed until the 35th day following appointment of the hearing officer.[1]

APPEARANCES

Grievant
Attorney for Grievant
Four witnesses for Grievant
Facility Director
Attorney for Agency
Seven witnesses for Agency

ISSUES

Was the disciplinary action issued promptly pursuant to the requirements of the Commonwealth of Virginia Standards of Conduct? Did the agency violate any facility or agency policies? Was the grievant's conduct on March 17, 2000 subject to disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Was the disciplinary action retaliatory?

[1] § 5.1 of the *Grievance Procedure Manual* requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued on September 18, 2000 because he failed to comply with established written policy. Specifically, grievant is alleged to have failed to wear gloves while examining a diabetic, MRSA-positive[2] patient. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

The Department of Mental Health, Mental Retardation and Substance Abuse Services (Hereinafter referred to as "agency") has employed the grievant as a mental health physician (internist) for six years. During each of the four most recent performance cycles, the grievant's overall performance evaluation was "exceptional."[3] Subsequent to issuance of this Written Notice but prior to this hearing, two other Group II Written Notices were issued for different offenses. All three disciplinary actions have been adjudicated consecutively during a continuous hearing session and separate decisions for each case are being issued on this date.

The agency's policy for exposure to microorganisms addresses the need for hand protection in Section III (Methods of Compliance), stating:

> Gloves shall be worn in the following situations: When it can be reasonably anticipated that hands will contact blood or OPIM, mucous membranes, and non-intact skin; when performing vascular access procedures; and when handling or touching contaminated items or surfaces.[4]

The hospital at which grievant was employed has promulgated a written policy regarding Infection Control Precautions. This policy has been in effect since 1996 and is based on recommendations from the Center for Disease Control. The policy states, in pertinent part:

> Standard Precautions will be used for the care of all patients regardless of their diagnosis or presumed infection status. Standard precautions apply to: (1) blood, (2) all body fluids, secretions, and excretions except sweat, (3) non-intact skin, (4) mucous membrane.
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> Procedure: Gloves
> 1. Wear gloves when touching blood, body fluids, secretions, excretions, and contaminated items.[5]

The hospital has also promulgated a policy regarding infection control guidelines for MRSA patients. The policy addresses the need for gloves in item number four and states:

> Decisions about the use of gowns and gloves depend in part on the level of patient mobility and general compliance with hygienic practices, and the ability to

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[2] MRSA – Methicillin-resistant staphylococcus aureus.
[3] Grievant's Exhibit 1. Grievant's evaluations for the performance cycles ending in 1997, 1998, 1999 and 2000.
[4] Agency Exhibit 10. *Department of Mental Health, Mental Retardation and Substance Abuse Services Exposure Control Plan.*
[5] Agency Exhibit 5. *[Facility] Infection Control Precautions*, page 1.

> contain secretions, excretions or drainage. When patients are more socially interactive and ambulatory, the need for gloves and gowns is limited to those situations involving direct contact with the contaminated body site. Gloves should be worn for all direct contact.[6]

The grievant had been critical of the wound care of some physician extenders[7] at the facility. In response to this, a registered nurse (RN) arranged for three physician extenders, a human services care worker (HSCW) and a medical student to watch the grievant examine a patient's wound on March 17, 2000. Patient C has diabetic ulcers on both feet. A heel ulcer on the right foot had previously been cultured and was found to be MRSA-positive. The left foot contained a heel ulcer and an ulcer on the left lateral aspect of the foot. The left-foot ulcers had not been cultured and it is unknown whether they were MRSA-positive. On March 17, 2000, prior to the grievant's arrival, a human services care worker had removed dressings from the patient's feet.

When grievant arrived in the room, he began to examine the patient's feet. He did not wear gloves during his examination of the patient. The patient was 78 years old, debilitated, frail and wheelchair-bound. The patient was in a sitting position during the examination. Grievant felt that placing the patient on a podiatric table would be unnecessarily strenuous for her. He therefore elected to examine the bottom of her foot by lying on the floor on his back and looking up at the heel wound. He examined the wounds visually and touched the intact skin around the wounds with his fingers. During the examination, grievant had a blood-soaked piece of gauze wrapped around his left ring finger.[8] Grievant did not touch the open portion of the wounds nor did he remove skin or necrotic tissue.

Following the patient encounter, the registered nurse "was so angry with [grievant's] overall management of the patient that I could not trust myself to appropriately verbalize my concerns or address the situation in front of the patient and other staff present."[9] The RN was upset because she had arranged this to be a teaching session and she felt that grievant had violated protocol during his examination of the wounds. On March 20, 2000 the RN sent an e-mail message to the medical director stating that she wanted to discuss concerns regarding this patient encounter.[10] At some time between March 20 and April 5, the RN met with the medical director to discuss the incident. On April 5, 2000 the RN sent another e-mail message to the medical director charging that grievant failed to wash his hands prior to the examination, had blood soaked gauze on his left ring finger, failed to wear gloves during the examination and that he pulled skin off ulcerated areas causing them to bleed.[11]

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[6] Agency Exhibit 9. *[Facility] Infection Control Guidelines for the Care of Patients Colonized with Methicillin Resistant Staph Aureus (MRSA).*

[7] Physician extender is a generic term that includes Nurse Practitioners and Physician Assistants.

[8] Grievant has chronic erythematous irritation of some distal digits and is observed to chew at them on occasion. Agency Exhibit 4, Witness statement from a nurse practitioner, May 19, 2000. (This behavior was also observed during the hearing).

[9] Agency Exhibit 1. Memorandum from RN to Risk Management Coordinator, May 9, 2000.

[10] Agency Exhibit 2. E-mail message from RN to medical director, March 20, 2000.

[11] The disciplinary action cites only the failure to wear gloves. The grievant was not disciplined for allegedly failing to wash his hands or for allegedly pulling skin from the wounds.

Following the April 5th e-mail to the medical director, there was apparently no other action taken until on or about May 9, 2000. At that time, the medical director mentioned the incident to the facility director. Although the medical director had not considered this to be abuse, the facility director felt that there was a possibility this incident could fit within the definition of client abuse. The agency's policy regarding abuse and neglect of clients defines abuse:

> Abuse means any act or failure to act by an employee or other person responsible for the care of an individual that was performed or was failed to be performed knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person receiving care or treatment for mental illness, mental retardation or substance abuse.[12]

The facility director assigned this matter to an investigator. At the same time, the central office was advised of the matter. Central office named a physician from an outside facility in another region of the state to conduct a peer review of the incident. The single-paragraph report from the physician peer reviewer indicates that he read the agency investigator's findings and concluded that grievant did not wear gloves, and that he should have done so to prevent the spread of MRSA.[13]

There have not been any other employees (physicians or other health care workers) reported for failing to wear gloves when treating or examining a patient. The HSCW who had removed the dressings on patient C had also failed to wear gloves. He was initially given a Group I Written Notice. Subsequently, the facility director voided this disciplinary action and substituted verbal counseling for the discipline. The HSCW had not previously been trained on infection control procedures. A HSCW is not required to have any formal medical training.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.1-116.05(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

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[12] Agency Exhibit 26. Departmental Instruction 201(RTS)00 – *Reporting and Investigating Abuse and Neglect of Clients*, revised April 17, 2000.

[13] Agency Exhibit 13. Attachment to Written Notice, July 19, 2000.

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[14]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.1-114.5 of the Code of Virginia, the Department of Personnel and Training[15] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal [from employment].[16] One example of a Group II offense is failure to comply with established written policy.

Prompt Issuance of Disciplinary Actions

One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. As soon as a supervisor becomes aware of an employee's unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior.[17] Management should issue a written notice as soon as possible after an employee's commission of an offense.[18] One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. Unless a detailed investigation is required, most disciplinary actions are issued within a few weeks after an offense.

Here, the agency was notified of the alleged offense by April 5, 2000 (if not earlier). The agency did not begin its investigation of this matter until about May 9, 2000 - more than one month after it knew of the incident. The investigator completed his investigation and submitted his report on May 30, 2000. It appears that no further activity on this matter occurred for the

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[14] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2000.
[15] Now known as the Department of Human Resource Management (DHRM).
[16] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[17] Section VI.A. *Ibid.*
[18] Section VII.B.1. *Ibid.*

next three and a half months until issuance of the discipline on September 18, 2000.[19] Thus, the time between notice to the agency and the issuance of discipline was nearly half a year. Such a significant delay does not meet the Standards of Conduct requirement for prompt issuance of disciplinary action.

There are situations in which a delay between notice to the agency and issuance of discipline can be justified by extenuating circumstances. When, for example, an agency is defending collateral litigation, it is not unreasonable to delay imposition of discipline in order to avoid disclosing information in a grievance hearing that might jeopardize a successful defense of the collateral litigation. No such circumstance exists in this case. The month-long delay in starting an investigation suggests that this matter was not viewed very seriously. The three and a half month delay following completion of the investigation reinforces the apparent lack of concern. Even after receipt of the peer review report, two more months elapsed without disciplinary action. The total delay of nearly half a year from incident to discipline suggests that the seriousness of the alleged offense was not commensurate with the level of discipline imposed.

Violation of Facility Policy

Grievant contends the agency violated a hospital instruction regarding the processing of disciplinary actions. However, this policy was not proffered as an exhibit during the hearing. Nonetheless, in the interest of responding to all of grievant's concerns, the hearing officer will address this issue. The relevant portion of the policy cited by grievant states, "Disciplinary actions will be taken only after careful review by the supervisor of the facts concerning the misconduct of an employee."[20] This general statement does not specify that grievant's direct supervisor must review the facts. Rather, it refers to the supervisor taking the disciplinary action; that supervisor may be the primary supervisor, or the second-line supervisor or higher. In any case, the intent of the cited sentence is to assure that whichever supervisor issues the discipline does so "*only after careful review* … of the facts concerning the misconduct." (Italics added)

Moreover, a prior ruling by the Director of the Department of Employment Dispute Resolution (EDR) has established that upper management has the discretion to review the immediate supervisor's decision and to make a determination to award the requested relief or uphold the disciplinary action.[21] Thus even if grievant's immediate supervisor disagreed with the proposed disciplinary action, management may overrule the supervisor and take disciplinary action on its own initiative.

Retaliation

Grievant alleged in the attachment to his grievance that the disciplinary action was retaliatory because of purported disparate treatment. He states that he has reported several other

[19] The peer review report was submitted on July 19, 2000. However, this report appears to have been merely a rubber-stamp endorsement of the agency's investigative report.
[20] Hospital Instruction Number 3110, *Processing Disciplinary Actions*, June 23, 2000.
[21] Compliance Ruling of Director, In re: DMHMRSAS, March 23, 2001.

physicians at the facility for what he considers patient abuse and substandard care. However, during the hearing, grievant proffered no documentation or testimony to support his assertions except with respect to one physician who is alleged to have committed a medication error associated with the death of a patient. This matter is currently in litigation and therefore the agency has delayed possible disciplinary action. It is common practice for state agencies to delay taking disciplinary action during the pendency of a collateral lawsuit because discovery in a grievance hearing could jeopardize defense of the litigation. Therefore, the collateral lawsuit in the medication error incident distinguishes that case from the instant case and will not support the allegation of disparate treatment.

All evidence presented in this hearing establishes that grievant is an exceptional performer, a well-respected clinician and, one whose paramount concern is the welfare of his patients. However, grievant disagrees with some of the hospital's policies and with the facility director. He has been an outspoken critic of hospital practices and management for at least three years. He has taken his complaints to the agency's top management, the Inspector General, the Governor, the federal Department of Justice and the news media. Grievant now contends that his discipline was retaliatory because the agency did not appreciate the adverse publicity generated by his activism.

Two of the complaints made by grievant have been addressed by the agency, and the changes that have been effected are largely responsive to his suggestions. One suggestion has not yet been implemented to grievant's satisfaction. Nonetheless, given the grievant's persistence and high-profile manner of making complaints, it is not surprising that some people in the agency may have been irritated. However, the grievant has provided no testimony or evidence that would substantiate that this disciplinary action was retaliatory. There is more to proving retaliation than making a mere allegation.

Failure to Comply with Established Written Policy

The disciplinary action herein focused exclusively on grievant's failure to wear gloves during the examination of diabetic ulcers. It is interesting to note that grievant was not charged either with failing to wash his hands prior to the examination or with pulling skin from the wound. Since grievant could have washed his hands immediately prior to entering the examination room, it is presumed that the evidence on this issue was insufficient to make the charge. (This issue was mentioned only briefly and tangentially during the hearing).

The allegation that grievant pulled skin from the wound is, at best, a questionable charge. In addition to the grievant and the RN, there were five other people in the room who were present for the express purpose of watching grievant perform this examination. The agency did not proffer four of those witnesses. The RN alleges grievant did pull skin from the wound; the one nurse practitioner who testified did not see grievant pull any skin from the wound. Thus, only one of six eyewitnesses alleged that grievant pulled skin from the wound. This lack of corroborative testimony from five other people who were supposed to be closely watching the examination raises a serious question about the credibility of this allegation. When weighed against the grievant's adamant assertion that he always wears gloves when actually touching a

wound, it must be concluded that the agency has not borne the burden of proof with regard to this allegation.

If any of the relevant policies cited above had said, "gloves shall be worn at all times when examining or changing dressings on decubitus ulcers," the grievant would clearly be in violation of the policy. The peer-reviewing physician opined that gloves should be used during dressing changes. However, two other physicians (both of whom are internists and one of whom is a board-certified infectious disease specialist) have expressed their firm opinions that gloves are only required if the physician actually has contact with non-intact skin. Given this divergence of views, the hearing officer must look to the relevant policies to resolve the issue.

The agency has acknowledged that gloves are not required when one is only touching unbroken skin.[22] The agency has not shown, by a preponderance of the evidence, that the grievant touched any non-intact skin during this patient encounter. Accordingly, the remaining question is whether the grievant's failure to wear gloves when conducting a visual examination and touching only unbroken skin violated any written policy. An objective reading of the three policies confirms the statement of the facility director that gloves are not required when there is no direct contact with non-intact skin. Therefore, it is concluded that the grievant did not violate any written policy on March 17, 2000.

DECISION

The decision of the agency is hereby reversed.

The Group II Written Notice issued on September 18, 2001 is VACATED. The Group II Written Notice shall be removed from the grievant's personnel file and retained by the agency pursuant to the procedure outlined in Section VII.B.4.b of the Standards of Conduct.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite

[22] Grievant's Exhibit 8. E-mail message from facility director to agency commissioner, November 28, 2000. Moreover, the three cited policies all support this proposition.

to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision.** (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

Section 7/2(d) of the Grievance Procedure Manual provides that a hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

David J. Latham, Esq., Hearing Officer