Issue: Group II Written Notice (failure to follow 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 5249; **Administrative Review: Hearing Officer Reconsideration Request received 08/30/01; Reconsideration Decision Date: 08/31/01; Outcome: No basis to amend or reverse decision; Administrative Review: EDR Ruling Request received 08/30/01; EDR Ruling Date: 11/27/01 (Ruling No. 2001-169); Outcome: HO did not abuse discretion or exceed authority; Administrative Review: DHRM Ruling Request received 08/30/01; DHRM Ruling Date: 01/18/02; Outcome: No policy violation – no basis to interfere with decision; Judicial Review: Appealed to the Circuit Court in the City of Staunton on 02/15/02; Outcome: HO decision found to be contradictory to law. Decision reversed; Judicial Review: Appealed to the Court of Appeals; full brief submitted 12/31/02; oral arguments heard 03/19/03; Outcome: Remanded to Circuit Court for decision consistent with Court of Appeals ruling of 04/22/03 [Record No. 2553-02-3]**

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 5249

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

[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.

ISSUES

Was the disciplinary action promptly issued 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 February 17, 2001[2] 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?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued on May 15, 2001 because he failed to comply with established written policy. Specifically, grievant disclosed confidential performance information about an employee to an individual outside the agency. Grievant was discharged from employment because of the cumulative effect of two other active Group II disciplinary actions. 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] When this disciplinary action was issued, grievant had one other active Group II Written Notice that was pending resolution through the grievance process. A third Group II Written Notice was issued on May 15, 2001 for a different offense. 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.

It is the policy of the Commonwealth that personal information such as performance evaluations of an employee may not be disclosed to third parties without the written consent of the subject employee. The policy states, in pertinent part:

> Other personal information may not be disclosed to third parties without the written consent of the subject employee. This information includes, but may not be limited to: performance evaluations; …[4]

On February 27, 2001, grievant authored an e-mail message[5] to the facility's medical director. He sent copies of the e-mail to his supervisor, the facility director, the agency's commissioner and the Inspector General for Mental Health, Mental Retardation and Substance Abuse Services. The memorandum focused on the performance problems of one Physician's Assistant (PA) who is directly supervised by the grievant's supervisor. While grievant provided

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[2] The Written Notice cites the date of offense as February 17, 2001. However, the disclosure of information at issue herein actually occurred in an e-mail message dated February 27, 2001. As both parties based their case on the February 27th e-mail message, it appears that the date on the Written Notice was a typographical error.
[3] Grievant's Exhibit 1. Grievant's evaluations for the performance cycles ending in 1997, 1998, 1999 and 2000.
[4] Agency Exhibit 22. Section III.B, DHRM Policy No. 6.05, *Personnel Records Disclosure*, September 16, 1993.
[5] Agency Exhibit 21. E-mail message from grievant to the medical director, February 27, 2001.

some clinical supervision to this PA,[6] the PA reports directly to grievant's supervisor; grievant's supervisor writes the PA's performance evaluation. [Grievant and his direct supervisor are the only two full-time internal medicine specialists at this facility.]

The memorandum notes specific performance problems of the PA (documented in ten attachments to the e-mail message) but does not denigrate her. In fact, the grievant compliments the PA as an intelligent, hardworking and caring individual. The real message being communicated in this memorandum lies in the thinly-veiled undercurrent in which grievant attributes the PA's performance problems to "a decade of inadequate supervision and obstructions to appropriate supervision that continue to be created by you [medical director] and [name of facility director]."[7] The memorandum goes on to criticize the facility director for giving good performance evaluations to the PA in the past, and failing to adequately supervise the work schedule of all PAs. Grievant then charges that both the medical director and the facility director have undermined the grievant and his direct supervisor.

The agency cited in its Written Notice the Commonwealth's policy on personnel records management. This policy provides that supervisors may maintain employment-related files on employees that include documentation regarding employees' work performance.[8] The language in this policy is sufficiently open-ended to include the memoranda attached to grievant's February 27th e-mail.

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:

> 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.

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[6] Agency Exhibit 24. *Grievant's Position Description*, signed March 1, 2000, indicates that one of grievant's work tasks and duties is, "provides education, mentoring and supervision of physician extenders and extenders-in-training." [Physician extender is a generic term that includes those persons with the title of Physician Assistant].

[7] Agency Exhibit 21. *Ibid.*

[8] Agency Exhibit 23. DHRM Policy No. 6.10, *Personnel Records Management*, September 16, 1993.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[9]

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[10] 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].[11] 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.[12] Management should issue a written notice as soon as possible after an employee's commission of an offense.[13] 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 of an offense.

Here, the agency was notified of the alleged offense on February 27, 2001 and effected the disciplinary action on May 15, 2001. However, the grievant underwent surgery in March 2001 and was absent from work from March 23 until May 7, 2001. It would not have been appropriate to issue disciplinary action during sick leave. The sick leave of six weeks' duration constitutes an extenuating circumstance that mitigates the delay in issuance of the disciplinary action. Therefore, it is concluded that the disciplinary action was issued in a reasonably prompt time following the grievant's return to work and that the agency did not violate the Standards of Conduct requirement for promptness in the issuance of disciplinary action.

Violation of Facility Policy

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[9] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2000.
[10] Now known as the Department of Human Resource Management (DHRM).
[11] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[12] Section VI.A. *Ibid.*
[13] Section VII.B.1. *Ibid.*

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."[14] 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.[15] 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.

Failure to Comply with Established Written Policy

During the late 1990s, there was considerable publicity about poor conditions at some of the agency's facilities. The federal Department of Justice (DOJ) became involved and ultimately filed suit against the agency, threatening to shut down at least one facility if certain standards of care were not met. The Governor and the General Assembly determined that an independent authority was needed to oversee the agency. Legislation was enacted that created the Office of the Inspector General for Mental Health, Mental Retardation and Substance Abuse Services to inspect, monitor and review the quality of services provided in agency facilities.[16] The Inspector General is appointed by, and reports directly to, the Governor. Among other things, the Office of the Inspector General has the power and duty to provide oversight and conduct announced and unannounced inspections of agency facilities, in response to specific complaints of abuse, neglect or inadequate care.[17] The Inspector General also has the power to access any and all information related to the delivery of services, including confidential patient or resident information.[18]

Grievant's February 27, 2001 memorandum may well have been a legitimate criticism of the PA named in the e-mail. However, an objective reading reveals that the memorandum was a facile attempt to conceal his much more serious criticism of the facility director and the medical director. Although the putative addressee of the e-mail was the medical director, she is one of the two managers criticized in the memo. Therefore, grievant could not reasonably have expected a favorable response from the medical director. The memorandum was primarily intended for the eyes of the Inspector General in the hope that she would investigate the matter and take some action more in line with grievant's views. Moreover, grievant readily

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[14] Hospital Instruction Number 3110, *Processing Disciplinary Actions*, June 23, 2000.
[15] Compliance Ruling of EDR Director, In re: DMHMRSAS, March 23, 2001.
[16] § 2.1-815. Code of Virginia. (Repealed effective October 1, 2001)
[17] § 2.1-817.1. Code of Virginia. (Repealed effective October 1, 2001)
[18] § 2.1-817.2. Code of Virginia. (Repealed effective October 1, 2001)

acknowledged during the hearing that he disagrees with some of the policies of these two administrators and, that grievant believes he could better manage the facility than the current director does.

The agency issued the disciplinary action because grievant disclosed confidential performance-related information about the PA to a person outside the agency, viz., the Inspector General, and because the grievant had not obtained consent from the PA prior to disclosure of the performance information. It is undisputed that grievant disclosed the performance-related information and that he did not obtain consent from the PA prior to disclosure. However, grievant contends that the disclosure does not violate Policy 6.05 because the Inspector General is in the PA's supervisory chain. Policy 6.05 states, in pertinent part:

> The following individuals/agencies may have access to employee records without the consent of the subject employee. This list is not all inclusive.
> 1. The employee's supervisor and, with justification, higher level managers in the employee's supervisory chain.
> 2. The employee's agency head or designee and agency human resource employees, as necessary.[19]

It is uncontradicted that all of the addressees in the subject e-mail (except the Inspector General) are either directly within the employee's supervisory chain or meet the agency head criterion. The hearing officer concludes that the Inspector General is not within the PA's supervisory chain for the following reasons. There are a number of indices by which one might evaluate whether an individual is in the supervisory chain such as: authority to hire and fire, authority to direct an employee's daily work activities, authority to influence salary decisions, and the writing of a performance evaluation. Clearly, the grievant's supervisor, the medical director, the facility director and the agency head all have the authority to directly or indirectly perform these functions with respect to the PA. However, the Inspector General (IG) may not perform any of these functions because she has no statutory authority to manage or operate agency facilities. While she has significant powers to elicit information from the agency and its facilities, she can only report her findings to the Governor. Only the Governor has the authority to direct the agency to effectuate any changes deemed warranted by the IG's report. Therefore, the Inspector General is not in the PA's chain of supervision.

However, Section III.C of Policy 6.05 also states that the list of individuals/agencies with access to employee records is <u>not</u> all-inclusive (supra). Moreover, the policy provides no guidance on what other agencies or persons are covered within the parameters of this open-ended statement. Without specific guidance, the interpretation of this statement is left to the reader. Obviously, any such interpretation must be reasonable and in keeping with the spirit and intent of the policy. In this respect, the Hearing Officer is guided by the Objective of the policy, which states in pertinent part, "It is the Commonwealth's objective to ensure compliance with the Privacy Protection and the Freedom of Information Acts."[20] Considering this objective, it is not unreasonable to conclude that employee performance information is restricted to those with "a need to know."

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[19] Agency Exhibit 22. Section III.C, DHRM Policy 6.05, *Ibid.*
[20] Agency Exhibit 22. *Ibid.*

Grievant argues that the IG has a need to know because some of the PA's performance problems affect patient care. Certainly the proper protocol for addressing such problems is to first report them to the PA's supervisor. If that proves ineffective, then grievant is justified in reporting problems to the next person in the supervisory chain, up to and including the agency head, and even to the Governor. The IG is not in the supervisory chain. However, if grievant wanted to report the adverse effect on patient care to the IG at any point during this process, he has the right to do so, and the agency acknowledges this right. The agency maintains, however, that it was inappropriate for grievant to report the name of a specific employee to the IG.

The agency is correct is concluding that grievant should not have reported the employee's name because the IG is not in that person's supervisory chain. Grievant observes that if he had reported only the problems without naming an individual employee, the IG has the authority to immediately investigate the matter and obtain any and all information relating to the problems, including the names of employees involved. Thus, the grievant's memorandum bypassed one step in the process and gave the IG a head start on the process. In grievant's view, this renders his policy violation harmless.

The hearing officer cannot concur with grievant. Even though the end result might be the same, the means do not always justify the ends. A fine line exists between the protection of employee privacy and the needs of the IG to obtain information. For example, the grievant apparently failed to consider that the IG could just as easily have decided that grievant's e-mail did not warrant follow-up investigation. In that case, the grievant's disclosure of employee performance information would have been unnecessary and unwarranted. Therefore, while grievant may believe his disclosure to have been justified, it was, in fact, not necessary and not warranted. He could have accomplished the same result by identifying only the problems and leaving it up to the IG to decide whether she needed to investigate further.

Equally significant in evaluating this case is grievant's failure to obtain written permission from the PA before disclosing her personal performance information to a person outside the supervisory chain. Grievant's writing of the February 27th e-mail appears to have been primarily intended to prompt the IG to take some action that would ultimately force the facility director to make changes more in concert with grievant's views. While grievant had bona fide concerns about the PA's performance and about its impact on patient care, his ongoing disagreement with management policies resulted in a violation of the PA's right to privacy. Grievant may express his legitimate concerns about patient care, but in so doing he may not heedlessly trample on the right to privacy of a subordinate employee.

<u>Retaliation</u>

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 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 physician 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.

Level of Discipline

The agency has demonstrated that grievant failed to comply with established written policy by violating Policy 6.05 because he disclosed confidential performance-related information about an employee and, because he disclosed such information without obtaining the written permission of that employee. There are insufficient circumstances to warrant a reduction in the level of discipline specified by the Standards of Conduct for this offense.

DECISION

The decision of the agency is hereby affirmed.

The Group II Written Notice issued on May 15, 2001 for failure to comply with established written policy and the discharge from employment are AFFIRMED. The Written Notice shall remain active pursuant to the guidelines in Section VII.B.2 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 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

COMMONWEALTH *of* VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Grievance No: 5249

Hearing Dates: August 13 & 14, 2001
Decision Issued: August 20, 2001
Reconsideration Request Received: August 30, 2001
Response to Reconsideration: August 31, 2001

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request 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. A request to reconsider a decision is made to the hearing officer. A copy of the request must be provided to the other party. 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.[21]

The Grievance Procedure Manual further provides that a hearing officer's decision becomes final as follows:

> A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such 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.[22]

[21] § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2000.
[22] § 7.2(d) *Ibid.*

OPINION

The grievant failed to comply with the requirement to send a copy of his reconsideration request to the agency. Nonetheless, in the interest of responding to grievant's concerns, the following response is provided. For ease of reference, grievant's concerns are addressed in the same order as presented in his request for reconsideration.

Alleged Errors

1. Grievant contends that he did not state during the hearing that he could better manage the facility than the current director does. In fact, grievant did make a statement to this effect in response to a question posed by the hearing officer. However, even if grievant had not made such a representation, the outcome of the hearing would be unchanged.

2. The grievant disagrees with the hearing officer's interpretation of his February 27, 2001 memorandum. The opinion expressed in the decision is solely that of the hearing officer, and is not grounded in arguments advanced by the agency. The hearing officer assumed that grievant's criticism of the PA was meritorious, well intentioned, and motivated by his genuine concern for patient welfare. Grievant may or may not have intended his memorandum to include a second, underlying criticism of facility management. However, an objective reading of the memorandum reflects that, in fact, a dual message was communicated. The conclusion, as previously stated, will not be disturbed.

3. Grievant contends, notwithstanding statutory language to the contrary, that the Inspector General had actual authority over agency personnel. In support of his contention, grievant now proffers a memorandum dated March 7, 2001 from the medical director to grievant. In pertinent part, that memorandum states:

> Over the past several weeks the Inspector General has completed a secondary inspection of the hospital to review medical care. In her report she has outlined this lack of protocols and compliance with the level of supervision as a major concern that must be corrected immediately.[23]

First, this memorandum is not a directive from the Inspector General. Rather, it is the medical director's assessment of a report prepared by the Inspector General and the conclusion of the medical director that the report uncovered a valid concern regarding a lack of written protocols. Because the medical director apparently concurred with the report's finding, she (not the Inspector General) directed grievant to develop the protocols. As a practical matter, it is recognized that most (but not all) recommendations from any Inspector General will be implemented by the agency without a formal directive from the Governor. The Inspector General typically has significant expertise and reputation in her own field and her recommendations usually carry significant weight. Moreover, because the Governor appoints the Inspector General, it is anticipated that he would endorse almost all reports prepared by his own appointee.

However, if facility management had disagreed with the Inspector General's report, the Inspector General has no authority to formally direct the agency to take action; that authority is

[23] Both the Virginia Administrative Code and the Medical and Nursing Boards of Virginia require written protocols outlining the scope of practice and the role of the supervising physician.

reserved to the Governor. The Governor has the authority to direct the agency either to follow the report's recommendations or to ignore them. In the instant case, the agency decided to voluntarily implement the recommendations because the need was so clear. Under these circumstances, the agency acted promptly because the recommendation was not controversial and because it is obvious that the facility was not in compliance with the statute requiring written protocols.

Second, and equally significantly, the memorandum cited by grievant fails to support his contention that the Inspector General directed the medical director to take the action she did. The sole reference to the Inspector General (IG) reflects that she identified a major concern. The medical director agreed with the concern and preemptively took action to correct the deficiency before it became necessary for the Governor to order such action. The conclusion that the Inspector General is not in the PA's chain of command is affirmed.

4. Grievant takes issue with the hearing officer's opinion that grievant considered his disclosure of the PA's name to the IG to be harmless. The Opinion section of a Hearing Decision expresses the hearing officer's opinion – it is not a recitation of findings of fact (which are found in a separate part of the Decision). The hearing officer concluded, from the totality of the evidence, that the sentence, "In the grievant's view, this renders his policy violation harmless," reasonably expressed the grievant's belief. Grievant notes that he never acknowledged that what he had done constituted a policy violation. Notwithstanding grievant's lack of acknowledgement, it is concluded that his actions did, in fact, violate policy.

5. With regard to the timeliness of the disciplinary action, grievant's reliance on Grievance No. 5247 is misplaced. He has quoted only a portion of the decision; the entire relevant passage states:

> Thus, the time between notice to the agency and 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.[24]

In the instant case, the elapsed time between notice to the agency and issuance of discipline (less intervening sick leave) was less than one month. Half a year's delay is not prompt; one month <u>is</u> reasonably promptly.

<u>Exclusion of evidence</u>

It must first be observed that a hearing decision does not necessarily address all evidence elicited during a hearing. This is especially true when, as in this case, the hearing required more than 20 hours over two days. In almost every hearing some testimony and evidence is either not relevant to the issue being decided, or is not significant enough to warrant inclusion in the decision. However, all evidence is given consideration by the hearing officer in evaluating the case. If an issue is assigned relatively little evidentiary weight, it may or may not be deemed worthy of inclusion in the written decision.

Grievant correctly observes that the decision did not address the fact that this was not the first instance in which grievant had reported other employees by name to the IG without repercussion. However, grievant's conclusion that the agency's failure to discipline prior offenses is a non sequitur. The facility director testified that he considered grievant's superiors

[24] Grievance No. 5247, issued August 20, 2001.

(facility director, medical director) to be fair game for criticism. Thus, the facility director did not consider grievant's criticism of agency management to be a violation of the policy.

Grievant asserted that he also reported other employees by name to the IG. The mention of this during the hearing was brief and grievant's attorney did not cross-examine agency witnesses regarding the lack of action taken in these cases. Thus, there is no conclusive evidence that the agency was aware of such instances. However, even if the agency was aware of such instances, the failure to discipline one offense does not preclude taking disciplinary action for a subsequent repeat offense.

Alleged Policy Violations

1. Grievant asserts a misapplication of the two policies (6.05 and 6.10) cited by the agency on the Written Notice. First, grievant contends that the performance-related information he disclosed was not part of the PA's supervisory file. However, the language[25] in Policy 6.05 is sufficiently broad to include all performance-related information regardless of the genesis or location of such information. Second, grievant suggests that Policies 6.05 and 6.10 do not apply to him because he is not a supervisor. However, Section III.B. of Policy 6.05 does not mention the word supervisor. Therefore, an objective reading of this policy makes it clear that the disclosure of information prohibition applies to all state employees who acquire access to, or knowledge of, performance-related information. Grievant clearly falls within this category.

Grievant also cites that portion of the statute that provides for the powers and duties of the Inspector General, pointing out that the IG has "access to any and all information" related to the delivery of services to patients or residents in facilities operated by the Department. However, the IG's access to information is not the issue; it is unchallenged that the IG has the power to initiate an investigation and obtain such information. The issue in this case is grievant's violation of Policy 6.05 by disclosing confidential information without written permission of the affected employee. An analogous situation involves the right of law enforcement authorities to obtain this same information (with an appropriate warrant). However, the fact that police have access to the information does not confer on grievant the right to disclose confidential information in the absence of such a warrant. Similarly, grievant had no right to disclose the name of the PA unless the IG specifically requested such information.

Grievant suggests that this interpretation of Policy 6.05 frustrates the statute that created the Office of Inspector General. In fact, this interpretation has no effect whatsoever on the powers delegated to the IG. Her powers to obtain any information she deems necessary remain totally unhindered.

2. Grievant also alleges that Hospital Instruction 3110 was misapplied. Grievant correctly notes that the supervisor issuing the disciplinary action did not discuss details of the offense with grievant prior to issuing discipline. However, grievant has not pointed to any portion of the policy that would require such a discussion with him prior to issuance of discipline. The language cited by grievant only requires that the supervisor carefully review the facts before issuing discipline. The grievant provided no evidence to rebut the agency's contention that this matter was carefully reviewed before the discipline was issued. Thus, grievant's allegation that HI 3110 was violated is without merit.

[25] Cited at the bottom of page 2 of the Decision.

3. Grievant alleges a violation of Department Instruction (DI) 201(RTS)00 relating to the reporting of abuse and neglect of clients. He correctly notes that instances of alleged abuse and neglect may be reported to the IG. However, it is interesting that grievant now elects to emphasize this particular policy, for three reasons. First, up to this point, grievant has not suggested that his disclosure of performance-related information was intended to report an instance of alleged abuse or neglect. Rather, he has maintained that his sole purpose in the February 27th e-mail was to focus attention on and correct perceived deficiencies in the performance of the physician assistant. Second, neither the February 27th e-mail nor any of the attachments thereto discuss allegations of patient abuse or neglect. Rather, they discuss the alleged deficiencies in the PA's performance over a period of several months. If grievant had actually considered these incidents to be abusive or neglectful, he would have articulated such in his February 27th e-mail.

Third and most significantly, if grievant now contends that he was actually reporting an allegation of client abuse or neglect, then he has clearly violated the requirement in DI 201 that such abuse or neglect be reported immediately. The policy defines immediately as acting without delay.[26] Some of the memoranda attached to grievant's e-mail related to incidents occurring as much as 10 months earlier. The fact that grievant did not report these incidents as abuse or neglect, taken in conjunction with the absence of allegations of abuse or neglect in the memoranda, suggest that grievant never viewed the incidents as abuse or neglect. Grievant's raising of this issue now is therefore deemed spurious and without merit.

Alleged Violation of Va. Code § 2.1-116.05

This issue was addressed in the decision. The Director of the Department of Employment Dispute Resolution issued a Compliance Ruling that management may overrule a supervisor and take disciplinary action on its own initiative. This ruling is binding on the hearing officer. If the grievant's immediate supervisor were to have the final authority on the issuance of discipline, agency management would be powerless. Common sense dictates that in any hierarchical structure, authority is delegated from top management to those below. When authority can be delegated, it can also be revoked. In this case, agency management exercised its right to revoke the decision of grievant's immediate supervisor.

Postponement Request

Grievance hearings can be postponed beyond 30 days only upon a showing of just cause.[27] Just cause is defined as, "A reason sufficiently compelling to excuse not taking a required action in the grievance process."[28] During the prehearing conference on July 13th, grievant's attorney requested the hearing be delayed until mid-September. Because the witness' testimony was available by telephone, such a lengthy postponement was denied. However, partially at the request of grievant's attorney, this case was delayed to the 35th day to provide sufficient preparation time.

The witness testified by telephone for nearly one hour. Thus, grievant's attorney had ample opportunity to elicit testimony from this witness. Grievant had one full month between the prehearing conference and the hearing to send to the witness any documents considered essential for his testimony; the grievant did not take advantage of this opportunity. Because the

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[26] Section 201-3, *Definitions,* Department Instruction 201(RTS)00.
[27] § 5.1, *Grievance Procedure Manual*, effective July 1, 2001.
[28] Definitions, *Ibid.*

credibility of this witness was not challenged, his demeanor was not a factor that would have changed the decision in this case. The decision explains the factors deemed most relevant to affirming the disciplinary action. Even if the witness had testified in person and had exemplary demeanor, the outcome of this hearing would be unchanged.

DECISION

After careful consideration of the grievant's request for reconsideration, it is concluded that there is no basis to amend or reverse the Decision issued on August 20, 2001.

Grievant has concurrently filed a challenge with the Director of the Department of Employment Dispute Resolution. A copy of this Reconsideration Decision is being sent to the Director who will then issue his Ruling.

APPEAL RIGHTS

A hearing officer's decision becomes a final hearing decision with no further possibility of administrative review when all timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.[29]

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 of the Department of Employment Dispute Resolution before filing a notice of appeal.

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David J. Latham, Esq.
Hearing Officer

[29] § 7.2(d). *Ibid.*

POLICY RULING OF DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of the Department of Mental Health, Mental
Retardation and Substance Abuse Services
January 18, 2002

The grievant, through his representative and independently, has appealed the hearing officer's August 31, 2001, reconsideration decisions in Grievances Nos. 5248 and 5249, respectively. The grievant objects to the reconsideration decision in Grievance No. 5248 on the bases that the decision: (1) creates issues, misconstrues facts and arguments and fails to respond to issues raised in the grievant's request for reconsideration; (2) directly contradicts a precedent decision by this hearing officer regarding Grievance No. 5247[*] and violates State and Agency policy; (3) persists in violating VA Code 2.1-116.05. More specifically, the grievant contends that the hearing officer's reconsideration decision violates the grievance procedure and therefore should be reversed which would result in the removal of one Group II Written Notice.

In addition, the grievant objects to the reconsideration decision in Grievance No. 5249 on the bases that the decision: (1) directly contradicts a precedent decision by this hearing officer regarding Grievance No. 5247 and violates Standards of Conduct; (2) is based on misapplication of State and Agency; (3) persists in violating VA Code 2.1-116.05. More specifically, the grievant contends that the reconsideration decision violates State and Agency policy and the Code of VA. Based on his belief, he is requesting that the hearing officer decision in the reconsideration decision be reversed which would result in the removal of a second Group II Written Notice. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this appeal.

FACTS

The Western State Hospital, a facility of the Department of Mental Health, Mental Retardation and Substance Abuse Services, employed the grievant before he was terminated. On May 15, 2001, the employing agency issued a Group II Written Notice to the grievant for failure to comply with written policy. On that same date, the employing agency issued to the grievant a second Group II Written Notice for committing an unrelated offense. These two Group

II Written Notices, along with a third Group II Written Notice issued on an earlier date, resulted in his termination.

The grievant filed three grievances and the same hearing officer heard them consecutively. The grievant appealed to the hearing officer to reconsider his original decisions. The hearing officer accepted his appeals and issued his reconsideration decisions on August 31, 2001, on Grievances Nos. 5248 and 5249, respectively. After the hearing officer issued his reconsideration decisions, the grievant challenged the decisions in separate appeals to the Department of Human Resource Management and to the Department of Employment Dispute Resolution.

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[*] The grievant did not request that the Department of Human Resource Management (DHRM) review the hearing
officer's decision on Grievance No. 5247.

The relevant policy, the DHRM's Policy 1.60, Standards of Conduct, states in part that, it is the Commonwealth's objective to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions those agencies may impose to address behavior and employment problems. Similar to that policy, MHMR&SAS has a policy, and procedures, which address work behavior and corrective actions when necessary.

In addition, the DHRM'S Policy 6.05, Personnel Records Disclosure, establishes guidelines for access to and release of personnel information on employees, which is maintained by state agencies. In accordance with this policy, it is the Commonwealth's objective to ensure compliance with the Privacy Protection and the Freedom of Information Acts. The objectives of the DHRM's Policy, 6.10, Personnel Records Management, are to maintain complete and accurate records regarding each employee and position, to comply with legal requirements regarding retention and release of personnel records, and to preserve the confidentiality of personnel records.

DISCUSSION

A hearing officer is authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions of the grievant constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, the Department of Human Resource Management has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this agency or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure. The Department of Employment Dispute Resolution is responsible for the administration of the grievance procedure and issues ruling on the propriety of the grievance proceedings, including the conduct of the hearing officer.

Grievance No. 5248

In the case of Grievance No. 5248, the hearing officer concluded in his original decision and upheld in his reconsideration decision that the grievant had committed the violation with which he was charged and upheld the agency's disciplinary action. By letter dated November 27, 2001, the Department of Employment Dispute Resolution (EDR) addressed all non-policy issues. Our review of the hearing officer's decision regarding the timeliness of issuance of the written revealed that the decision does not violate any written policy or procedure. While it is ideal that an agency always taken disciplinary action immediately after an alleged violation of a policy or procedure occurs, circumstances may exist which may delay such. Thus, we find no basis to interfere with the implementation of the decision.

Grievance No. 5249

In the case of Grievance No. 5249, the hearing officer concluded that the grievant violated DHRM Policy No. 6.05, Personnel Records Disclosure, and upheld the agency's disciplinary action. The grievant also requested that EDR review the hearing officer's decision to determine if his ruling violated, among other things, the grievance procedure and the Code of Virginia. In a ruling dated January 4, 2002, EDR addressed five of the eight issues raised by the grievant on appeal. Therefore, DHRM's ruling will address whether the hearing officer's decision violated (1) agency policy on reporting patient neglect and abuse; (2) state personnel records policy; and (3) policies on the timeliness and procedure for taking disciplinary action.

(1) Violation of the agency policy on reporting neglect and abuse

This Department has determined that the hearing officer's decision is not in violation of the agency's policy regarding reporting patient neglect and abuse. Department Instruction 201 of the agency's patient neglect and abuse policy clearly states that instances of alleged abuse and neglect may be reported to the Inspector General.

In the instant case, the hearing officer determined that the grievant initially did not suggest that the performance related information was intended to report an instance of alleged abuse or neglect. Rather, the hearing officer concluded that the sole purpose and intent of the February 27th e-mail was to focus attention on and to correct perceived deficiencies in the performance of a certain physician assistant. In addition, the hearing officer noted that the e-mail and attachments discuss the alleged deficiencies in the physician assistant's performance over a period of several months. Finally, he added, that if the performance of the physician's assistant could have been categorized as patient neglect and abuse, the grievant did not report those incidents "promptly" as directed by a requirement in DI 201. Thus, based on these events the hearing officer concluded that the grievant never viewed the incidents as abuse or neglect. To the hearing officer, raising the issue as neglect and abuse during the request for reconsideration was deemed to be spurious and without merit.

This Department has determined that the hearing officer's decision is not in violation of either state or agency policy. Rather, it appears that the grievant disagrees with the outcome of the grievance hearing. Thus, based on the authority granted this Agency under the Code, we have no authority to interfere with the implementation of this decision.

(2) Violation of state personnel records policy

This Department has determined that the hearing officer's decision is not in violation of DHRM's policies 6.05 and 6.10, Personnel Records Disclosure and Personnel Records Management, respectively. Policy 6.05 states, in part, that it is the Commonwealth's objective to ensure compliance with the Privacy Protection and Freedom of Information Acts. This policy establishes guidelines for access to and release of personal information on employees, which is maintained by state agencies. Policy 6.10 states, in part, that it is the Commonwealth's objective to maintain complete and accurate records regarding each employee and position, to comply with legal requirements regarding retention and release of personnel records, and to preserve the confidentiality of personnel records. Accordingly, this policy sets forth agency requirements for the retention and transfer of employees' records, the release of personnel information, and the reporting of employee and position changes within each agency.

Policy 6.05, though not all-inclusive, enumerates those documents that normally are considered personnel type information. In the instant case, the information submitted to the

Inspector General was performance-related and normally is information that supervisors use to evaluate and rate their employees. Additionally, it was determined that the Inspector General is not in the chain of command in that she has no impact on the physician's assistant employment future and had no need to possess such information. Thus, the hearing officer deemed her a third party, being outside the chain of command. This Department concurs with this interpretation and has no reason to disturb that part of the hearing officer's decision.

Policy 6.10 enumerates steps for maintaining and releasing personnel records. Again, this policy is not all-inclusive. However, the hearing officer determined that the performance, data on the employee was personnel-type data and the Inspector General had no need to possess such information. Given that the grievant is familiar with the standard procedure for reporting alleged neglect and abuse of patients, the hearing officer concluded that there was no reason for the grievant to release the name of the physician's assistant to the Inspector General. This Department concurs with the decision and has no reason to interfere with that decision.

(3) Violation of the Policies on the Timeliness and Procedure for Taking Disciplinary Action

This agency has determined that the hearing officer's decision did not violate state and agency policy regarding the timeliness and procedure MHMR&SAS officials used when issuing him disciplinary actions. While it is the intent of the policy that agency officials take disciplinary action immediately after a violation of policy or procedure, circumstances may not permit that to occur in each instance. Thus, we find no reason to interfere with this decision.

Finally, the MHMR&SAS, through is representative, has asked that this Department reject the appeal concerning this issue because the grievant requested that this Department reverse the hearing officer's decisions rather than revise his decision. This Department has no authority to dismiss the appeal on that basis. To dismiss the appeal on this basis would be in violation of Section 7.2 (a) (2) of the Grievance Procedure Manual, in that this Department is obligated to respond to any alleged violation of policy as identified by the appellee.

In summary, this Department will not interfere with any part of the decisions, on Grievances 5248 and 5249. If you have any questions regarding this correspondence, please call me at (804) 225-2136.

Sincerely,

Ernest G. Spratley, Manager
Employment Equity