

Issues: Arbitrary Performance Evaluation and two Group II Written Notices (failure to follow supervisor's instructions and failure to comply with applicable written policy); Hearing Date: September 12, 2001 Decision Date: September 14, 2001; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esquire; Case Numbers: 5273/5374



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Grievance Nos: 5273  
5274

Hearing Date: September 12, 2001  
Decision Issued: September 14, 2001

**PROCEDURAL ISSUES**

This hearing could not be docketed until the 30<sup>th</sup> day following appointment of the hearing officer due to availability of the participants.

Grievant filed a grievance on November 30, 2000 requesting that her 2000 performance evaluation be revised to a higher overall rating. She also filed a grievance on April 12, 2001 contesting the issuance of two Group II Written Notices on that date for failure to follow supervisor's instructions or otherwise comply with established written policy. Because the issues involved in these two grievances are significantly intertwined, the Director of the Department of Employment Dispute Resolution (EDR) consolidated both grievances into one hearing.<sup>1</sup>

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<sup>1</sup> Qualification Ruling of Director, *In the matter of the Department of Mental Health, Mental Retardation, and Substance Abuse Services*, No. 2001-059, 2001-087, August 9, 2001.

However, during the hearing, grievant withdrew her grievance of the 2000 performance evaluation (Docket No. 5274). Therefore, the following decision addresses only the grievance of the two disciplinary actions (Docket No. 5273).

### APPEARANCES

Grievant  
Attorney for Grievant  
Assistant Director of Nursing  
Representative for Agency  
Seven witnesses for Agency

### ISSUES

Was grievant's conduct between November 1 and December 19, 2000 such as to warrant 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? Were the disciplinary actions issued as soon as possible?

### FINDINGS OF FACT

The grievant filed a timely appeal from two Group II Written Notices, both issued on April 12, 2001. One Group II Written Notice was issued for failure to follow a supervisor's instructions because she failed to submit proof of satisfactory completion of her year 2000 competencies. The second Group II Written Notice was issued for committing 33 medication errors between November and December 2000. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

Grievant had two other previous disciplinary actions, both of which were issued on December 19, 2000. Grievant appealed those two disciplinary actions and although one Written Notice was modified as the result of a grievance hearing, two Group II Written Notices remain active as of this date.<sup>2</sup> The hearing decision regarding those two Group II Written Notices was not appealed and has now become final.

The Department of Mental Health, Mental Retardation and Substance Abuse Services (Hereinafter referred to as "agency") has employed the grievant as a registered nurse for seven years. The grievant was absent during the first four months of 2000 due to shoulder surgery. She returned to work on or about May 1, 2000 and worked for about six weeks when she again left work due to disability. She returned to work at the end of August 2000 and worked until

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<sup>2</sup> Decision of Hearing Officer, *Grievance No. 5166*, issued May 4, 2001.

December 19, 2000. On that date, grievant was demoted in conjunction with one of the Written Notices referred to in the preceding paragraph. Grievant left work that day and did not return to work thereafter. When she had still failed to return to work by April 12, 2001, the agency issued the two Group II Written Notices that are the subjects of the instant grievance.

### Medication Errors

From the beginning of her employment, grievant had been a marginal employee receiving performance evaluations of "Fair but needs Improvement" as early as March 1994. She was given a developmental plan to address areas that needed improvement in 1995. During 1996, grievant received verbal and written counseling on several occasions regarding administration and documentation problems. Additional counseling was required during 1997 and 1998 because grievant failed to properly complete documentation.

The agency logs all medication errors in a computerized Medication Variance Database. The information in the database is derived from medication variance forms submitted to a central coordinator by whoever may become aware of the variance. These variances may include actual administration errors as well as variances from procedure that do not involve administration errors. Between the grievant's return to work in late August 2000 and December 19, 2000, the Database reflects a total of 33 variances for medications administered by grievant. One variance occurred in September, none were recorded in October, seven occurred in November and 25 occurred in December. Of the 25 variances in December, the report reflects 21 variances on grievant's last day of work – December 19, 2000.

The agency considers three errors per calendar quarter to be the threshold to alert management to a problem with a particular caregiver. The grievant's excessive number of medication errors was deemed sufficient to warrant issuance of discipline for failure to comply with established written policy. Three errors involved the administration of either incorrect medication or incorrect dosage. The remaining 30 errors resulted from failure to document that medication had been administered immediately following administration to the patient.

During a shift, grievant would typically administer medication to approximately 25 patients, many of whom receive medications at 4:00 p.m. and 8:00 p.m. Rather than documenting the medication administration as soon as it was given, it was grievant's practice to document both the 4:00 p.m. and 8:00 p.m. administrations after the 8:00 p.m. administration. Thus, for a four-hour period, the patient's records did not reflect that medication had been administered at 4:00 p.m. This is considered a medication variance because someone else (physician, other nurse) would be unaware that medication had been administered, when in fact it had been administered. Such a circumstance

could potentially result in a patient being unintentionally overmedicated. In addition, grievant relied on her memory to record what had been administered some four hours earlier when she filled in the records after 8:00 p.m. With 25 patients, reliance on memory of what had been administered hours earlier could result in inaccurate recording of what was actually administered.

Grievant was also observed calling out medications to another caregiver rather than setting up medication by herself; this is contrary to standard nursing practice. The nursing coordinator verbally counseled grievant on November 2, 2000 because grievant had been pre-pouring medication – a prohibited practice about which she had been counseled as early as 1996.<sup>3</sup>

### Annual Competencies

The agency requires registered nurses to complete on an annual basis certain “competencies”<sup>4</sup> required by the institution, the Nursing Department and their specific position. Classes are periodically offered on certain competencies that lend themselves to groups. Other competencies can be satisfied by asking another nurse to observe performance of the competency and obtaining a signature from the observer. Many of the requirements can be completed in 5 to 15 minutes each. Nurses are expected to use their own initiative to take classes and to contact fellow nurses to observe competencies so as to complete the requirements before the end of the calendar year.

Although grievant was absent from work for several months during the year 2000, she did work full time from late August through December. During this period, she had ample opportunity to complete the required 34 competencies. Between August and the end of October, grievant completed only five of the 34 requirements. On October 31, 2000, the nursing coordinator for grievant’s department met with grievant and gave her a Developmental Plan that required, among other things, that grievant:

Will be responsible for own Mandatory training and nursing competencies. Follow policy 9704 Nursing Competencies. Will be compliant in deficient areas by November 17, 2000 or next available classes.<sup>5</sup>

During November 2000, grievant completed 15 competencies. She failed to complete any competencies during the month of December 2000. According to both the agency and grievant, the remaining 14 competencies could have been completed by grievant within a maximum of three hours.

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<sup>3</sup> Exhibit 3. Memorandum from Director of Nursing to grievant, *Pre-pouring Medications*, March 8, 1996.

<sup>4</sup> A “competency” is defined as, “The demonstration of the ability to integrate knowledge, skills, and abilities in the actual performance of services (behavior) in a designated role or area.” See Exhibit 4. Department of Nursing Policy 9704, *Nursing Competencies*, effective November 7, 1999.

<sup>5</sup> Exhibit 4. *Developmental Plan for [name of grievant]*, October 31, 2000.

There have not been any other nurses who have failed to complete their annual competency requirements each calendar year.

### 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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>6</sup>

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 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 (SOC) Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe

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<sup>6</sup> § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.

in nature [than a Group I offense] and are such that an accumulation of two Group II offenses normally should warrant removal. Among the examples of Group II offenses is failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy.<sup>7</sup>

### Medication Errors

The agency did not have an explanation for the fact that 21 of 33 errors occurred on one day. It is also noted that this was the date on which grievant was demoted. It appears highly unlikely, if not impossible, that 63 percent of the errors recorded over a period of four months should have occurred on one day. Therefore, the hearing officer is inclined to discount those errors in evaluating this case. Nonetheless, there are still 12 remaining medication variances – a level significantly above the threshold of acceptable errors for four months. The record in this case reflects that grievant's failure to document properly is a long-standing problem that prior counseling has not resolved.

There were additional unsafe medication actions attributed to grievant, some of which she denied. However, a preponderance of the evidence demonstrates that grievant's handling of medication was, at best, not fully in compliance with both policy and practice. Given the nature of the documentation failures and other problems, grievant's actions had the potential for a serious threat to patient well being. Since prior counseling had apparently not been effective, it was entirely appropriate for the agency to escalate the corrective action from counseling to disciplinary action.

### Annual Competencies

As grievant notes in her appeal letter, she had been able to complete her competencies in previous years. Therefore, she understood the process and knew what was required to initiate and complete the competency certification process. It is acknowledged that grievant was out for a portion of the year due to her shoulder surgery. However, she had over four months from late August to the end of December in which to complete her competency requirements. She completed only 5 of 34 requirements in the period from late August to the end of October. Even after the Nursing Coordinator brought this to grievant's attention with a formal Developmental Plan on October 31<sup>st</sup>, grievant only completed only half of the remaining competencies. She did not complete a single competency during December even though the remaining 14 competencies could have been completed in less than half a day. It must, therefore, be concluded that grievant could have timely completed her annual competency requirements but for her lack of due diligence.

### Prompt Issuance of Disciplinary Action

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<sup>7</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

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.<sup>8</sup> Management should issue a written notice as soon as possible after an employee's commission of an offense.<sup>9</sup> 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 one or two weeks of an offense.

Here, the offenses occurred in November and December 2000; discipline was issued on April 12, 2001. While the discipline was not issued immediately, there was an extenuating circumstance. Grievant did not return to work after being notified of a demotion on December 19, 2001. It is the normal practice of state agencies not to issue disciplinary actions while an employee is on leave. In this case, grievant failed to ever return to work. After four months, the agency could no longer delay imposition of discipline and therefore issued the written notices on April 12, 2001. Given this intervening circumstance, it is concluded that the delayed issuance of written notices meets the requirement of "as soon as possible."

### Conclusion

Grievant has contended that the agency "just wants to get rid of her because she was absent due to shoulder surgery for several months." However, grievant has presented no evidence to support this assertion. The hearing officer takes administrative notice of the fact that nurses have been in short supply in the United States for nearly a decade and that there are currently over 2,800 budgeted positions for nurses in the Commonwealth of Virginia that cannot be filled due to a lack of qualified nurses. Moreover, many hospitals are now offering nurses substantial signing bonuses in an effort to recruit sufficient personnel to staff their facilities. It therefore stands to reason that a hospital is not going to dismiss a competent nurse merely because she incurred a long absence due to surgery.

Given this backdrop, it must be concluded that the disciplinary action in this case was not taken for the reason asserted by grievant. Rather, the evidence supports the conclusion that grievant was appropriately disciplined for recurrent, serious medication errors and for failure to complete the annual competency requirements. Had the agency continued to employ grievant in the face of this evidence, and had a patient suffered an adverse medication event as

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<sup>8</sup> Section VI.A. DHRM Policy No 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>9</sup> Section VII.B.1. *Ibid.*



a consequence of grievant's error, the hospital would have been held liable. Therefore, the agency's disciplinary action must be affirmed.

### DECISION

The grievant withdrew her grievance of the 2000 performance evaluation. Therefore, that grievance is now settled and may not be appealed.

The decision of the agency with regard to the disciplinary actions is hereby affirmed.

The Group II Written Notice issued on April 12, 2001 for failure to follow established written policy by making repeated medication errors is AFFIRMED. The Group II Written Notice issued on April 12, 2001 for failure to follow established written policy by failing to complete the annual competency requirements is AFFIRMED. The termination of grievant's employment due to having two or more active Group II Written Notices is AFFIRMED.

The two Group II Written Notices 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.

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.

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David J. Latham, Esq.  
Hearing Officer