Issue: Group II Written Notice with Termination (failure to comply with established written policy); Hearing Date: May 9, 2002; Decision Date: May 20, 2002; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esquire; Case Number: 5431; **Administrative Review: Hearing Officer Reconsideration Request received 05/30/02; Reconsideration Decision Date: 06/03/02; Outcome: No basis to change decision; request denied**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5431

Hearing Date:	May 9, 2002
Decision Issued:	May 20, 2002

APPEARANCES

Grievant
Representative for Grievant
Facility Director
Legal Assistant Advocate for Agency
Six Witnesses for Agency

ISSUES

Did the grievant's actions on December 25, 2001 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?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued on February 19, 2002 for failure to comply with established written policy.[1] Grievant's employment was terminated on February 20, 2002 because this Written Notice when combined with another active Group II Written Notice warranted discharge from employment. 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 (MHMRSAS) (Hereinafter referred to as "agency") has employed the grievant as a registered nurse (RN) for five years. The grievant has two active disciplinary actions - a Group II Written Notice issued on March 22, 2001 for failure to comply with written policy,[2] and a Group I Written Notice issued on February 12, 2002 for unsatisfactory job performance.[3] She also has one inactive disciplinary action – a Group II Written Notice issued on February 10, 1999 for failure to follow a supervisor's instructions.[4]

Section 201-1 of MHMRSAS Departmental Instruction 201 on Reporting and Investigation Abuse and Neglect of Clients states, in pertinent part: "The Department has zero tolerance for acts of abuse or neglect." Section 201-3 defines client neglect:

> Neglect means failure by an individual, program or facility responsible for providing services to provide nourishment, treatment, care, goods or services necessary to the health, safety or welfare of a person receiving care or treatment for mental illness, mental retardation or substance abuse.

The agency has a detailed written policy for obtaining medications after pharmacy hours.[5] It provides that the nurse should first call a named local pharmacy during the hours specified in the instruction. Second, if that pharmacy is not open, the training facility's on-call pharmacist is to be notified. Third, if the on-call pharmacist is unavailable, prescriptions are to be called in to a named local 24-hour pharmacy. Grievant understood this policy.

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[1] Exhibit 19. Grievance Form A.
[2] Exhibit 17. Written Notice, issued March 22, 2001.
[3] Grievant filed a grievance from the Group I Written Notice; a Decision of Hearing Officer affirmed the disciplinary action, Case No. 5430, issued May 14, 2002.
[4] Exhibit 18. Written Notice, issued February 10, 1999. [Note: although this Written Notice is inactive for purposes of accumulation of discipline, it is admissible evidence for the purpose of demonstrating a pattern of conduct similar to the offense at issue in the instant case.]
[5] Exhibit 13. Section 2.B, Facility Instruction Number. 8325, *Procedure for Obtaining Medications after Pharmacy Hours*, July 19, 2000.

In December 2001, a female resident had been hospitalized for surgery. She was discharged from the hospital and returned to the agency's facility at 6:30 p.m. on Monday, December 24, 2001 where she was kept in the infirmary overnight. At about 8:30 p.m., the charge nurse contacted the facility's physician who ordered that the resident continue to receive the same medications she had been receiving prior to her hospital confinement. The nurse advised the physician that the hospital had sent some medications in pill form with the patient. He ordered that four specific medicines not be administered until the facility's pharmacy reopened on Wednesday, December 26, 2001 when the patient could obtain her regular medications. These instructions were noted in detail on a physician's order sheet,[6] on the Interdisciplinary Notes,[7] and on the reverse side of the Medication Administration Record (MAR).[8]

One of the resident's regular medications is Tegretol - an anti-seizure drug. The existing physician's order specified the liquid suspension form of Tegretol because the resident has a gastrostomy tube that prevents her from swallowing pills. None of the three medical records cited above contain any mention of Tegretol. After the charge nurse's call to the physician, she "realized the nurses would have to give the Tegretol [pills]…"[9] She told another evening shift nurse, "We'll have to give these to the resident" while holding up the bottle of Tegretol pills for that nurse to see. The charge nurse crushed some pills and administered them with water to the resident.[10] The resident was transferred to his own cottage early the following morning. When the cottage staff realized there was no liquid Tegretol for the resident, they asked grievant to come to the cottage. Grievant went from the infirmary to the cottage and found that only Tegretol tablets were available. She crushed the pills and directed cottage staff to administer them with water. She did not document any medical records to reflect that she had administered a different form of the medication.[11]

On the evening of December 25, 2001, the other evening shift nurse (see above) crushed Tegretol pills and administered them to the resident with water.[12] After she left the cottage, one of the staff completed a Facility Event Report because administering the medication in crushed pill form was not supported by any written medical order and appeared to be a deviation from policy.[13] This report generated an investigation that ultimately resulted in the central office concluding that grievant was guilty of resident neglect. The facility director

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[6] Exhibit 21. Telephone Order from physician at 8:30 p.m., December 24, 2001.
[7] Exhibit 10. Interdisciplinary Note, 8:30 p.m., December 24, 2001.
[8] Exhibit 12, page 4. Medication Administration Record for resident.
[9] Exhibit 2. Witness statement of charge nurse, January 28, 2002.
[10] The investigation revealed that the charge nurse did not crush the correct number of pills and therefore the resident received an underdose of his anti-seizure medication on the evening of December 24, 2001.
[11] It is a standard procedure that nurses should always document in the medical records, especially in the Interdisciplinary Notes, anything out of the ordinary.
[12] Exhibit 3. Other night shift nurse's witness statement, January 31, 2002.
[13] Exhibit 9. Facility Event Report, December 26, 2001.

evaluated the case, consulted with central office, and issued a Group II Written Notice for failure to follow the physician's written order.[14] The night shift charge nurse and the other night shift nurse were also given Group II Written Notices.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 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 § 2.2-3000 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 § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[15]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training[16] 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*

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[14] Exhibit 14. Written Notice, issued February 19, 2002.
[15] § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*
[16] Now known as the Department of Human Resource Management (DHRM).

of Personnel and Training Manual Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.[17] The agency's policy on patient neglect provides that employees are subject to the full range of disciplinary action, up to and including termination of employment. Failure to follow established written policy is a Group II offense.

It must be noted from the evidence presented in this hearing, that the charge nurse who instructed the other night shift nurse to use crushed pills was significantly culpable in this incident. Since the charge nurse was the only nurse who actually spoke with the physician, it was not totally unreasonable for the other night shift nurse to rely on her instruction and to assume that the physician had directed her to use pills in lieu of liquid. However, it is clear from the charge nurse's signed statement after the call ended, "I realized the nurses would have to give the Tegretol [pills]," that the subject of Tegretol never came up when she spoke with the physician. If she had discussed this medication with the physician during the call, she would not have "realized" after the call that the pills would have to be used. Thus, it must be concluded that the nurse had forgotten to ask the physician about the Tegretol pills and made her own decision to use pills in lieu of liquid.

The evidence established that the medical efficacy of crushed pills mixed with water is equivalent to the liquid suspension form of Tegretol (providing the dosage is the same).[18] Therefore, the fact that grievant gave crushed pills rather than liquid suspension did not in any way endanger the resident. However, the agency's contention is that the grievant's conduct nonetheless warranted discipline because 1) she could have obtained liquid medication by following Instruction Number 8325 and, 2) she did not verify whether the physician had actually ordered the change.

Grievant knew about Instruction 8325, which provides for obtaining medicine from local pharmacies when the facility's pharmacy is closed. Even though the first listed pharmacy was closed on Christmas day, the backup pharmacy is open 24 hours per day, 365 days per year. Accordingly, there was no reason that grievant could not have complied with Instruction 8325 and obtained the liquid suspension Tegretol. Grievant's rationale for not following this procedure was that the day shift charge nurse told her to give the resident his morning medications. However, the charge nurse was not aware that liquid Tegretol was not available. Grievant did not tell the charge nurse that the hospital had sent Tegretol tablets to the facility with the resident. Grievant did not ask the charge nurse whether she should crush the tablets in lieu of obtaining

[17] Exhibit 20. Agency's *Standards of Conduct*.

[18] Tegretol is not water-soluble (Tegretol dissolves only in alcohol or acetone - Physician's Desk Reference, 1999). However, the physician's testimony established that stomach acids would sufficiently dissolve crushed pills so as to make them medically efficacious.

liquid suspension. Grievant did not call the physician for approval and did not ask the day shift charge nurse to call the physician.

On the morning of December 25, 2001, grievant knew that there was nothing in the medical records to show that a physician had ordered any change from the standing order for liquid Tegretol. There was a detailed telephonic order documented in three different places, but none of the records contain any mention of Tegretol. The absence of Tegretol in the telephone order should have raised a question in grievant's mind as to whether she could administer crushed pills rather than liquid Tegretol. At the very least, grievant should have asked the charge nurse whether such a change was permissible. A second and more appropriate alternative would have been for grievant to call the physician to personally verify whether pills should be used. Third, grievant could have simply ordered liquid suspension from the 24-hour pharmacy to assure that she was following the written orders to use liquid suspension. Instead, grievant chose to take the course that was most expedient and that involved no controversy - she simply crushed and administered the pills with water. This was not a prudent and reasonable decision under the circumstances. Therefore, corrective action is warranted.

The determination of what type of corrective action should be administered deserves consideration. The agency's central office concluded that grievant's actions constituted neglect (a Group III offense) because grievant made a conscious decision to change the medication from liquid to pills. However, after consultation between the facility director and central office, it was decided that the offense was more appropriately categorized as a failure to comply with established written policy - a Group II offense. Grievant argues that her actions warrant only verbal counseling. Given the potential for harm from changing medications, mere counseling is not an appropriate or sufficient corrective action – disciplinary action is merited.

The Standards of Conduct provide for the consideration of mitigating circumstances in the implementation of disciplinary actions. The Standards of Conduct states, in pertinent part:

> While the disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as:
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> a. conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or
> b. an employee's long service or otherwise satisfactory work performance.[19]

[19] Section VII.C.1, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

In this case, grievant has only five years of state service, and has three prior disciplinary actions for the same or similar offenses – failure to follow instructions, failure to comply with established written policy and unsatisfactory job performance. Moreover, grievant's failure to follow the physician's written orders for medication administration is a serious matter and is more than just inadequate or unsatisfactory job performance. As a trained and experienced RN, grievant should have used her independent judgement to question the absence of any written documentation that countermanded the physician's written order for liquid Tegretol. It would have been a simple matter to call the physician for verification or to order the liquid from a local pharmacy. However, grievant took the easiest route by crushing pills. Even though the resident was not harmed by grievant's action, grievant should have either followed the established written policy to obtain liquid Tegretol or obtained personal confirmation from the physician regarding the change.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued to the grievant on February 19, 2002 for failure to follow established written policy and her discharge from employment are AFFIRMED. The Written Notice shall remain in the grievant's personnel file for the length of time specified in Section VII.B.2.c 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 three 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.

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

COMMONWEALTH *of* VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5431

Hearing Date:	May 9, 2002
Decision Issued:	May 20, 2002
Reconsideration Received:	May 30, 2002
Reconsideration Response:	June 3, 2002

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. 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. A copy of all requests must be provided to the other party and to the Director of the Department of Employment Dispute Resolution.[20]

[20] § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

OPINION

Grievant submitted a request for reconsideration; the agency submitted rebuttal comments. Both parties provided copies to the other party. Grievant's request for reconsideration raises several issues; this reconsideration addresses those issues in the same order as presented in grievant's request.

Statement of night shift charge nurse

Grievant takes exception to the Decision's interpretation of a portion of the night shift charge nurse's written statement and suggests that the entire sentence leads one to a different conclusion. The Decision quoted a portion of her statement rather than the entire sentence in order to emphasize the fact that the night shift nurse had not previously discussed Tegretol medication with the physician. This conclusion is inferred from three facts. First, the night shift charge nurse made no mention of any instructions from the physician about Tegretol when she wrote a detailed telephone order on the physician's order sheet, documented the Interdisciplinary Notes and made a note in the Medication Administration Record (MAR). If the physician had given her instructions about Tegretol, there is no logical reason for the charge nurse to have omitted this from three separate written notes, especially considering that she wrote notes about four other medications.

Second, if the physician had told the charge nurse to crush Tegretol pills, procedure requires her to change the MAR. The fact that she didn't change the MAR suggests that, a) either she was deliberately failing to follow the documentation procedure or, b) the physician had not told her to make such a change. There is no evidence to suggest that the charge nurse deliberately decided to not follow the documentation procedure. It was not until after the telephone conversation with the physician ended that the charge nurse "realized" that the nurses would have to give Tegretol pills. If she had discussed this issue with the physician, she would have simply documented his instruction in the medical records – there would not have been any post-conversation "realization."

Third, the fact that the night shift charge nurse wrote in the telephone order, "resume all previous meds" suggests that, at the time she wrote the note, she was unaware that the previous medication (i.e., liquid Tegretol) was not available.

In her request for reconsideration, grievant speculates about the meaning of the charge nurse's written statement. However, there is no evidence to support such speculation. Grievant did not offer the charge nurse as a witness to explain her written statement. Grievant could have requested an Order for this witness to attend the hearing. Since grievant did not call this witness, speculation about what she may have meant is inadmissible.

New evidence

With her request for reconsideration, grievant included a copy of Facility Instruction Number 8325, as revised on March 21, 2002. The general rule is that new evidence is deemed admissible only if the party making the proffer could not have discovered such evidence through the exercise of due diligence. Here, the grievant has not demonstrated that the evidence she now seeks to present could not have been presented during the hearing. The hearing took place on May 9, 2002. Grievant could have proffered the revised instruction during the hearing but failed to do so. Therefore, this new evidence will not be considered.

However, even if the revised policy were deemed admissible, it would carry no weight for three reasons. First, the event that precipitated discipline in this case occurred on December 25, 2001 – well before issuance of the revised policy. Therefore, the revised policy was not in effect at the time of the incident at issue in this case. Second, even if the policy had been in effect in December 2001, grievant did not follow its instructions to document the substituted form of medication in the MAR. Third, the issue is not whether it was safe to administer crushed pills with water. The agency did not allege, and there was no evidence to conclude, that administering crushed pills was unsafe. The issue is whether grievant failed to follow the policy that was in effect in December 2001.

Physician's testimony

Grievant seeks support for her position from the testimony of the physician in another grievance hearing for a different employee. It is not only axiomatic but also a basic tenet of evidence that an adjudicator may consider only evidence presented during the hearing. The rules for grievance hearings mandate that, "the hearing officer should deliberate on the evidence admitted at the hearing."[21] (Underscoring added). This rule holds even where, as here, the same hearing officer conducted both hearings. Accordingly, evidence from another hearing is not admissible in this case. Therefore, the hearing officer may not and will not consider testimony presented in another hearing.

Written witness statement

Grievant contends that it is unfair to give evidentiary weight to a written witness statement because that witness did not testify during the hearing. Grievant's contention fails for three reasons. First, there is no requirement that a witness who writes a statement in connection with an investigation must testify during the hearing. A party may elect to submit a written witness statement in lieu of personal appearance for various reasons, usually because the witness is unavailable to testify in person. The witness' written statement is admissible evidence but, of course, is assigned less evidentiary weight than sworn

[21] Section V.A, *Rules for Conducting Grievance Hearings*, effective July 1, 2001.

testimony. Second, the statement was properly marked and entered into the record as part of the documentary evidence. Third, when one party presents evidence (either oral or written), the burden of disproving that evidence shifts to the opposing party. Here, the agency proffered a witness statement but the grievant failed to rebut that statement either with other evidence or with testimony from the witness who authored the statement.

Moreover, the witness statement was given to the grievant prior to the hearing in accordance with the discovery practice used in all grievance hearings.[22] Thus, grievant had the opportunity to request the presence of this witness and cross-examine her about the meaning of her written statement. When the grievant fails to rebut evidence presented by the opposing party, it is presumed that the evidence is undisputed, and it will be admitted as fact and given appropriate evidentiary weight.

Documentation error vs. failure to comply with policy

Grievant contends that the facility director testified that a documentation error warrants counseling. In fact, the director said that documentation errors are treated as performance issues. Performance issues can be dealt with through a range of corrective action including counseling or disciplinary action. However, this is a moot issue because this case involves not just a documentation error but also grievant's failure to follow established policy by not obtaining the liquid Tegretol or calling the physician to determine with certainty that he authorized the crushing of pills.

Day shift charge nurse

Grievant contends that the day shift nurse told her to use Tegretol pills. In direct contradiction, the day shift charge nurse testified that she only told grievant to administer the resident's morning medications; she did not mention the pills supplied by the hospital because she was unaware that liquid Tegretol was unavailable. She also stated that grievant did not tell her that liquid Tegretol was not available. Moreover, grievant admitted that she did not tell the charge nurse that liquid Tegretol was unavailable. The day shift charge nurse testified credibly, and grievant offered no evidence to show that the charge nurse had any reason to falsify her testimony.

The evidence and arguments proffered in the reconsideration request are insufficient to conclude that a different decision should be issued.

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[22] The policy and practice of the Department of Employment Dispute Resolution Hearing Division is to require both parties to provide to the opposing party four working days prior to the hearing, a copy of all documents that will be proffered during the hearing.

DECISION

The hearing officer has carefully reconsidered grievant's arguments and concludes that there is no basis to change the Decision issued on May 20, 2002.

APPEAL RIGHTS

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

3. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. 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