Issue: Group II Written Notice (failure to comply with established written policy); Hearing Date: May 15, 2002; Decision Date: May 20, 2002; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esquire; Case Number 5435; **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: 5435

Hearing Date: May 15, 2002
Decision Issued: May 20, 2002

APPEARANCES

Grievant
Representative for Grievant
Three witnesses for Grievant
Facility Director
Legal Assistant Advocate for Agency
Two 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] 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 16 years.

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.[2] 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.

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

[1] Exhibit 15. Grievance Form A, filed March 12, 2002.
[2] Exhibit 11. Section 2.B, Facility Instruction Number. 8325, *Procedure for Obtaining Medications after Pharmacy Hours*, July 19, 2000.

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,[3] on the Interdisciplinary Notes,[4] and on the reverse side of the Medication Administration Record (MAR).[5]

One of the resident's regular medications is Tegretol - an anti-seizure drug. The existing physician's order specified that the liquid suspension form of Tegretol be given to the resident because she has a gastrostomy tube that prevents her from swallowing a pill. 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]…"[6] She told grievant, "We'll have to give these to the resident" while holding up the bottle of Tegretol pills for grievant to see. The charge nurse crushed some of the pills and administered them with water to the resident.[7] Normally, when giving a telephonic order, the physician dictates his order into a recorder for documentation purposes. On this occasion he did not dictate an order regarding the substitution of pills for liquid Tegretol. The following morning, another nurse on the day shift followed the same procedure of crushing the pills and administering them with water. The resident was transferred from the infirmary to his cottage that morning.

On the evening of December 25, 2001, grievant crushed Tegretol pills and administered them to the resident with water.[8] The dosage she gave to the resident was equivalent to the prescribed dosage of liquid suspension. Grievant did not document any medical records to reflect that she had administered a different form of the medication.[9] After she left the cottage, one of the cottage 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.[10] This report generated an investigation that ultimately resulted in the central office concluding that the grievant was guilty of resident neglect. The facility director evaluated the case, consulted with central office, and issued a Group II Written Notice for failure to follow the physician's written order.[11] Two other nurses, including the nurse who told grievant to use the tablet form of Tegretol, and the day shift nurse who worked on December 25, 2001 were also disciplined with Group II Written Notices.

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[3] Exhibit 9. Telephone Order from physician at 8:30 p.m., December 24, 2001.
[4] Exhibit 8. Interdisciplinary Note, 8:30 p.m., December 24, 2001.
[5] Exhibit 10, page 4. Medication Administration Record for resident.
[6] Exhibit 2. Witness statement of charge nurse, January 28, 2002.
[7] The investigation revealed that this 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.
[8] Exhibit 5. Grievant's witness statement, January 31, 2002.
[9] It is a standard procedure that nurses should always document in the medical records anything out of the ordinary, especially in the Interdisciplinary Notes.
[10] Exhibit 7. Facility Event Report, December 26, 2001.
[11] Exhibit 14. Written Notice, issued February 19, 2002.

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.[12]

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[13] 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 III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from

[12] § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*
[13] Now known as the Department of Human Resource Management (DHRM).

employment.[14] 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 nurse who instructed grievant to use crushed pills was also 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 grievant 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).[15] 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 her belief that the physician had given a fellow nurse a telephonic order to use pills. Based on the available evidence of what occurred on December 24, 2001, it was not unreasonable that grievant had this belief on that date. She knew that the other nurse was engaged in a telephone conversation with the physician but grievant was busy with another task and did not intently listen to the entire conversation. When the call ended, the charge nurse told grievant they would have to use the pills. Therefore, on December 24, 2001, it was reasonable for grievant to conclude that the physician had approved the use of pills in lieu of liquid suspension.

[14] Exhibit 16. Agency's *Standards of Conduct*.
[15] 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.

However, the circumstances were different on the evening of December 25, 2001. By then, grievant knew that the physician's telephonic order to substitute pills for liquid should have been recorded in the medical records. However, while there was a detailed telephonic order documented in three different places, 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 the physician had actually said anything about Tegretol. At the very least, grievant should have questioned the nurse who had told her to use pills on the prior evening. 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 followed the lead of the nurse who told her to administer crushed pills. 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 that the potential for harm can be significant when 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:
>
> 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.[16]

In this case, the grievant has 16 years of state service, has performed satisfactorily and has no prior history of discipline for medication errors. However, grievant's failure to follow the physician's written orders for medication

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

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 following the charge nurse's example. 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 is 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: 5435

Hearing Date:	May 15, 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.[17]

[17] § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

OPINION

Grievant submitted a request for reconsideration and provided a copy to the opposing 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 with 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.

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 was 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

The physician testified during the hearing that he now recalled telling the night shift charge nurse that it was permissible to crush pills and administer them with liquid. However, the testimony of the investigations manager revealed that the physician told the investigator that he did not recall stating this to the night shift nurse. The physician's statement to the investigator was made soon after the event and is more likely to be an accurate recollection of what the physician actually said. The inconsistency between the physician's statement to the investigator and his testimony during the hearing taints the credibility of his testimony to some degree.

However, assuming for the sake of argument that the physician did give permission to the night shift charge nurse to crush pills, that does not excuse grievant's actions on the following night. For the reasons stated in the Decision (beginning with the last paragraph of page 5 and continuing on page 6), grievant should have questioned the absence of any documentation of such permission in the resident's medical records.

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 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.[18] 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.

Telephone conversation between physician and night shift charge nurse

Grievant asserts that she heard the telephone conversation between the physician and the night shift charge nurse. In fact, grievant testified during the hearing that she was not on the telephone during this conversation. Thus, she was able to hear only one side of the conversation – the charge nurse's side. Moreover, grievant testified that she was busy with other responsibilities during the conversation and was not paying full attention to what was said by the charge nurse. Further, grievant testified that she did not hear the night shift charge nurse ask the physician about Tegretol.

[18] 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.

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

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

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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