Issue: Group II Written Notice (failure to perform assigned work); Hearing Date: 06/05/02; Decision Date: 06/06/02; Agency: Dept. of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esq.; Case No.: 5443; **Administrative Review: Hearing Office Reconsideration Request received 06/13/02; Reconsideration Decision Date: 06/17/02; 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: 5443

Hearing Date: June 5, 2002
Decision Issued: June 6, 2002

PROCEDURAL ISSUE

During the pre-hearing conference, both parties were instructed to provide to the opposing party and the hearing officer not later than four working days prior to the hearing, all documents they intended to proffer during the hearing. The agency representative mailed documents to both parties and they were received by the hearing officer prior to the deadline. Grievant had provided only a post office box number as a mailing address. The agency representative obtained a street address from the agency's human resources office and sent documents to that address utilizing a package delivery service to assure that delivery was made. The package delivery service delivered the documents to the address on May 30, 2002, leaving the package on the front porch because no one was home at the time of delivery.

Grievant did not receive the documents. Neither grievant nor her representative contacted the hearing officer about this matter prior to the hearing. Grievant's representative left a telephone message for the agency

representative, which she received on the day prior to the hearing. At the hearing, the hearing officer provided time for the agency to photocopy another set of documents for grievant. Grievant and her representative were then given time to review the documents before testimony was taken from witnesses.

APPEARANCES

Grievant
Representative for Grievant
Three witnesses for Grievant
Legal Assistant Advocate for Agency
Human Resource Generalist
Four witnesses for Agency

ISSUES

Did the grievant's actions on October 26, 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 January 19, 2002 because she failed to perform assigned work.[1] Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2]

The Department of Mental Health, Mental Retardation and Substance Abuse Services (MHMRSAS) (Hereinafter referred to as "agency") has employed the grievant for 13 years. She is a Mental Health Technician (MHT). The patients at this facility are mentally retarded, physically handicapped, mentally ill or some combination of these conditions. Her most recent performance evaluation for the year ending October 18, 2001 rated her a "contributor."[3]

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,

[1] Exhibit 1. Written Notice, issued January 19, 2002.
[2] Exhibit 1. Grievance Form A, filed February 15, 2002.
[3] Exhibit 11. Grievant's Performance Evaluation, signed October 19, 2001.

> 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.[4]

Grievant works on a ward that housed 23 clients. Each hour, on the hour, a client observation form is completed to reflect the location of each patient.[5] Eleven of the clients are designated high-risk because they may be suicidal, violent, escape-prone or seizure-prone. One staff person is assigned to perform location checks on the high-risk patients every 15 minutes on the quarter hour. There is a "precaution sheet" for each high-risk patient on which the assigned staff person must write 1) a code number for the location of the client, and 2) the staff person's initials.[6] These precaution sheets are kept on a clipboard.

Grievant worked a shift that ended at 3:30 p.m. On October 26, 2001, grievant had been assigned to complete both the hourly client observation form and the precaution sheets for the 11 high-risk clients. She completed all of the required checks during the day through 3:00 p.m. At 3:15 p.m. she had completed the checks on nine of the 11 high-risk patients by approximately 3:20 p.m. At that time, while on the second floor, she received a telephone call from her niece advising that grievant's mother had just been taken to a hospital emergency room after sustaining an apparent stroke. Grievant became upset at hearing this news; she immediately sought and found her supervisor coming up the stairs. Grievant's supervisor instructed her to give the clipboard to another MHT. Grievant located and gave the clipboard to another MHT asking her to perform the 3:30 p.m. check.[7] Grievant then prepared to leave work and was last seen in the parking lot at 3:45 p.m. Grievant did not advise either her supervisor or the other MHT that she had not completed the 3:15 p.m. checks. Grievant acknowledges that the news about her mother upset her and that she forgot to complete the checks or tell anyone that she had not completed the checks.

At about the same time as grievant received the telephone call from her niece, a licensed practical nurse (LPN) entered a multipurpose room on the first floor used for equipment storage and found one of the two high-risk clients for whom grievant had not yet completed the 3:15 p.m. check. The client was lying on her back on the floor and had a plastic shopping bag lying on her face. The bag was not over the client's head but just lying on her face.[8] The LPN removed the bag and noted that the client was in no distress. When she called the client's name, the client answered, smiled and stood up with no problem. The client said

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[4] Exhibit 13. Departmental Instruction 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, April 17, 2000.

[5] Exhibit 16. Client Observation form, October 26, 2001.

[6] Exhibit 9. Precaution Sheets for two clients, October 26, 2001.

[7] Exhibit 7. Witness Statement of MHT to whom grievant gave clipboard, signed October 29, 2001.

[8] The LPN's written statement indicates the plastic bag was over the client's head (Exhibit 5). However, under careful examination during the hearing, the LPN clarified that the bag was only lying on the supine client's face. The bag was not over her entire head and therefore did not present any risk of suffocation.

she had put the bag on her face just before the LPN walked into the room. This client has Bipolar Disorder and borderline intellectual function.[9] She often engages in behavior designed to get attention such as banging her head and attempting to put her finger in electrical sockets. The room is supposed to be locked at all time unless a staff person is present. It is unknown how the client entered the room. A hall monitor, who is stationed around the corner from the doors to this room did not see or hear the client enter the room.

The matter was investigated by an agency investigator who concluded that grievant's failure to perform the assigned checks on two high-risk patients constituted negligence.[10] The investigator's report was sent to the investigations manager in central office who concluded that this incident was neglect. When central office concluded its review, the finding was transmitted to the facility director who notified grievant that he intended to issue a Group III Written Notice for patient neglect.[11] However, upon consideration of mitigating circumstances, and in consultation with central office, the Director decided to issue a Group II Written Notice for failure to perform assigned work.

At the third resolution step of the grievance process, the Facility Director offered to reduce the disciplinary action to a Group I Written Notice for unsatisfactory work performance. Grievant rejected this offer and opted to request a grievance hearing.

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

[9] Exhibit 15. Client's Functional Assessment, January 23, 2002.
[10] Exhibit 2. Investigator's Summary, November 3, 2001.
[11] Exhibit 17. Letter to grievant from Facility Director, December 19, 2001.

> 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 employment].[14] Group II offenses, which include failure to perform assigned work, are 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. Group I offenses are the least severe and include inadequate or unsatisfactory work performance.

The underlying facts in this case are relatively straightforward and undisputed. Grievant was charged with making 15-minute checks on 11 high-risk patients but failed to complete checks on two of the patients at 3:15 p.m. Grievant has acknowledged this failure. Accordingly, a preponderance of the evidence, as well as grievant's admission, establish that an offense occurred. The issue to be resolved is whether disciplinary action is required and, if so, what level of disciplinary action.

Grievant contends that she should not receive any corrective or disciplinary action for two reasons. First, she implies that someone else was negligent for leaving the bipolar client in the hallway for an extended time. However, whether this assertion is correct or incorrect is irrelevant because it does not alter grievant's requirement to perform the 15-minute check. Second, grievant points out that certain changes in policy and procedure were made shortly after this event occurred. For example, the facility director issued a

[12] § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*
[13] Now known as the Department of Human Resource Management (DHRM).
[14] Exhibit 14. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

written memorandum on October 29, 2001 banning plastic bags from client buildings. In addition, more hall monitors were hired in January 2002. It is very common that events such as this bring to light previously unrecognized opportunities to improve patient safety. However, the fact that these changes were recognized and acted upon does not exonerate grievant from fulfilling her responsibilities. Therefore, these two factors are merely smokescreens that obscure the real issue – grievant's failure to complete the 15-minute checks.

Much of the testimony and evidence in this hearing focused on details regarding the high-risk client who was found lying on the floor. However, this incident has no bearing on the outcome of this case. If grievant had performed the check on this particular client at 3:15 p.m., the client could still have entered the storage room, lain on the floor and placed a bag on her face between 3:15 and 3:20 p.m.. In such a case, the grievant would have fulfilled her obligation by making the 3:15 p.m. check. Grievant is not accountable for what happens to clients who are out of her sight between the 15-minute checks. Therefore, the grievant's only offense was her failure to make the 15-minute checks and that is the sole issue upon which corrective action must be based.

Mitigation

The Standards of Conduct provide for the consideration of mitigating circumstances in the implementation of disciplinary actions. Department Instruction 201 provides that disciplinary action is based on criteria including but not limited to: a) seriousness of the neglect, b) circumstances surrounding the incident and/or, c) the employee's work record. 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.[15]

After careful consideration of the evidence in this case, it is apparent that the above circumstances are present. First, the neglect in this case was less serious than other cases. Certainly, the potential for more serious consequences existed in this case and discipline is necessary to emphasize that potential. However, the grievant was distracted and distraught over the news that her mother had just been taken to a hospital. It is not surprising that she forgot that she had not completed the 3:15 p.m. checks.

[15] Exhibit 14. Section VII.C.1, DHRM *Standards of Conduct Policy No: 1.60*, effective September 16, 1993.

Second, with regard to fairness and objectivity, there is no evidence that grievant intentionally neglected any patients. Her neglect was an unintentional and momentary lapse in memory caused by the untimely telephone call from her niece. Grievant should have advised the other MHT that she had not completed the 3:15 p.m. checks but forgot to do so because her mind was preoccupied by thoughts of her mother. The record in this case also establishes a third mitigating circumstance. The grievant has been employed for 13 years – a significant record of service to the Commonwealth. Moreover, she has a satisfactory performance record and no prior disciplinary actions. The agency acknowledged that she has been a good employee.

Therefore, the above circumstances significantly mitigate the grievant's offense. The agency has recognized these mitigating circumstances by not terminating grievant's employment and, by significantly reducing the discipline from a Group III to a Group II Written Notice without suspension.[16] The hearing officer is persuaded that this level of discipline is the most appropriate level of discipline for the offense. A Group II offense is one that, if repeated, would be cause for termination of employment. Such is the case here. If grievant forgets in the future to complete 15-minute checks (or fails to ask someone else to do them), such failure would warrant dismissal. On the other hand, if this offense were considered only a Group I offense, it would imply that grievant could commit the same offense up to four times before being discharged.[17] Allowing four such offenses would be inconsistent with the seriousness of this type of neglect – whether intentional or unintentional.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued to the grievant on January 19, 2002 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.

[16] Group II offenses can include up to 10 days of unpaid suspension.

[17] The Standards of Conduct requires an accumulation of four Group I Written Notices before removal from employment.

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: 5443

Hearing Date:	June 5, 2002
Decision Issued:	June 6, 2002
Reconsideration Received:	June 13, 2002
Reconsideration Response:	June 17, 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.[18]

[18] § 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 other party. Grievant's request for reconsideration raises three issues; this reconsideration addresses those issues in the same order as presented in grievant's request.

Issue for which discipline was issued

Grievant correctly observes that a significant portion of the hearing focused on the incident in which a patient placed a plastic bag on her face, but that grievant was not disciplined for this incident. The grievant was disciplined only because of her failure to perform assigned work by failing to document the whereabouts of two high-risk patients at 3:15 p.m.

The hearing decision necessarily discussed the plastic bag incident in order to address all major facts presented during the hearing. However, the Opinion section of the decision (third paragraph on page 5 and the first full paragraph on page 6) makes abundantly clear that the only issue upon which discipline was based was grievant's failure to complete the 15-minute checks on two patients. In making this decision, the hearing officer gave no evidentiary weight to the fact that one of the two patients was found in a potentially harmful situation. As the hearing officer noted on page 6, the plastic bag incident at 3:20 p.m. could have happened even if grievant had made the 3:15 p.m. check on this patient.

Accordingly, grievant cannot be held accountable for a patient's behavior after she physically records their location and moves on to the next patient. Therefore, the hearing officer is in complete agreement with grievant that the discipline is based solely on her failure to perform assigned work.

First- and second-step respondents' disagreement with discipline

Grievant notes that the first- and second-step respondents in the grievance process disagreed with the discipline issued but either were told they could not change the discipline or believed they could not change the discipline. The Commonwealth's grievance process is based on the fact that, in most agencies, the offender's immediate supervisor issues disciplinary action. Thus, the first step respondent is usually grievant's immediate supervisor giving grievant an opportunity to present additional facts for consideration. Generally, the second-step respondent is a management person above the first-level supervisor who has the authority to overrule the supervisor's discipline.

However, in this case, the facility director issued the disciplinary action. Since all other employees in the facility are subordinate to the director, it would be wholly inappropriate for any subordinate to overrule the director's decision.

Thus, even when the first- and second-step respondents disagree with the level of discipline, they have no authority to overrule the facility director's decision. 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.[19]

Grievant's argument, in essence, is that the first and second steps of the grievance process have been rendered ineffectual because the facility director's issuance of discipline precludes subordinates from overruling him. While this is the net result, the fact is that grievant has waived her right to raise this issue. The grievance process provides a remedy when the opposing party fails to comply with any requirement of the process. However, all claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one may forfeit the right to challenge the noncompliance at a later time.[20] In this case, grievant did not timely raise the issue of noncompliance but instead proceeded with her grievance. Therefore, it is held that grievant has forfeited her right to challenge the alleged noncompliance. It should be noted that, in any case, the hearing officer does not conclude that noncompliance occurred. However, if grievant wished to raise possible noncompliance as an issue, she should have raised this issue in a timely manner as required by § 6.3 of the Grievance Procedure Manual.

Grievant's failure to notify coworker that she had not completed 3:15 p.m. checks

Grievant contends that the telephone call from her niece should completely exonerate her from discipline. It is understandable that, at the time she received the telephone call, she would be momentarily distracted from fulfilling her responsibility to perform patient checks. However, when the telephone call ended, grievant had ample time to reflect upon the status of her checks and to advise the relief employee that two checks had not yet been made. The evidence demonstrated that grievant received the telephone call at 3:20 p.m., her shift ended at 3:30 p.m. and she was then at the worksite until 3:45 p.m. when she was seen in the parking lot. Thus, grievant had 25 minutes to collect her thoughts and assure that someone else handled all of her responsibilities before she left work. While grievant's momentary lapse at 3:20 p.m. is understandable, her failure to assure completion of the checks during the next 25 minutes is a failure to perform assigned work.

Both the agency and the hearing officer agree that the telephone call is one of the circumstances that warranted mitigation in this case. The discipline was substantially mitigated - from a Group III Written Notice with termination of employment down to a Group II with no suspension. However, mitigation is not synonymous with complete exoneration. In this case, the Group II Written Notice

[19] Compliance Ruling of Director, In re: DMHMRSAS, March 23, 2001.
[20] § 6.3, Grievance Procedure Manual, *Party Noncompliance,* July 1, 2001.

is intended to serve as a serious reminder of the necessity to complete checks on all high-risk patients every 15 minutes.

DECISION

The hearing officer has carefully reconsidered grievant's arguments and concludes that there is no basis to change the Decision issued on June 6, 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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Hearing Officer