

**Issue: Group I Written Notice (unsatisfactory work performance); Hearing Date: June 8, 2004; Decision Date: June 16, 2004; Agency: Department of Corrections; Hearing Officer: Thomas J. McCarthy, Jr., Esquire; Case Number: 724**

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

**In re: Case Number 724**

**Hearing Date: June 8, 2004**

**Decision Issued: June 16, 2004**

**APPEARANCES**

Grievant  
Agency Representative  
6 Witnesses for Grievant  
1 Witness for Agency

**ISSUE**

1. "Was the Group I Written Notice, disciplinary action, for unsatisfactory work performance proper under the facts of this grievance?"

**FINDINGS OF FACTS**

The Grievant filed a timely appeal from a Group I Written Notice, violation of Employee Standards of Conduct: 5-10.15 B.4, inadequate or unsatisfactory job performance, issued on November 11, 2003. Grievant was not satisfied with the third grievance level response and the agency head qualified the matter for a hearing.

At all times relevant to this grievance, Grievant, an LPN, was a pharmacy charge nurse. In this position, she was responsible for control of and maintaining a count of surgical instruments, including Number 10 scalpels, which are counted at the beginning and end of each pharmacy charge nurse shift.

On October 9, 2003, a transcription error was made in transferring the number of scalpel blades from the bottom of a full perpetual inventory sheet onto a new perpetual inventory sheet after one of the scalpel blades had been used. The count was incorrect from October 9, 2003, until October 23, 2003. During this period on October 11 and 12, 2003, Grievant signed the perpetual inventory sheet that the count had been made and was correct without physically counting the number of scalpel blades in the box. The end of the box was taped closed and the number "7" without date or initials was written on the tape. This number was accepted as the correct count by the Grievant without actually counting or verifying the number of scalpels in the box.

On October 24, 2003, when a scalpel blade was needed from the box, the tape was opened or removed by Grievant and she discovered the error. Grievant made an actual count of the #10 scalpel blades, the paperwork was corrected and an incident report was filed.

Grievant received Phase I training, which included "tool control", when she went to work at the facility, which emphasized monitoring the count and control of tools, including surgical scalpels. Scalpels were under the control of the charge nurse and were accounted for at the beginning and end of each nursing shift. There was no testimony that any written policy established the use of the number on the tape without counting the contents of the box. In this October 9 to October 23, 2003 inventory incident, five RN's and four LPN's were disciplined. New procedures were set up to require two nurses to initial tapes on items to be counted in bundles or in bulk.

Grievant feels the Group I action was not proper because taking the number on tape sealed bundles or boxes was the way she and other charge nurses always did the count.

The facility houses the worst inmates from the Commonwealth and other states.

### **APPLICABLE LAW AND OPINION**

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 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 the workplace." Murray v. Stokes, 237 Va. 653, 656 (1989).

Code Section 2.2-3000 et seq. sets forth the Commonwealth's grievance procedure and provides, in 2.2-3000A:

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 Section 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.

The nature of the institution and the inmates housed therein made very tight and rigorous control of tools including surgical scalpels mandatory. The process adopted for

counting tools including surgical scalpel blades in which Grievant was trained during her Phase I orientation was not the process used by Grievant and other charge nurses. They placed scalpels and other sharps in boxes and sealed each box with tape with the number of scalpels or other sharps on the tape without confirming signatures or initials. This unverified number was used for subsequent counts. This adaptation of procedures was an easy, but not accurate method of expediting the count. It skipped the double check of a count being done by both the outgoing and oncoming charge nurse at the beginning and end of each shift. In this case, an error was made in transferring the number 10 scalpel count from one perpetual inventory page to the next, which was perpetuated by no actual count from October 9 to October 23, 2003. If a scalpel blade had actually been missing, the consequences of such a blade being out of inventory in a maximum security institution could have been deadly.

### DECISION

The Agency showed by a preponderance of the evidence presented that the Group I Written Notice was warranted and appropriate in this matter.

Failure to maintain an accurate count of surgical scalpel blades in a maximum security institution requires corrective action for the safety of all persons involved. Such failure was clearly unsatisfactory job performance.

The Group I Written Notice was proper and consistent disciplinary action from the evidence presented. The issuance of the Group I Written Notice is sustained.

### 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 hearing decision is subject to four types of administrative review, depending upon the nature of the alleged defect with 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.

Thomas J. McCarthy, Jr., Esquire  
**Hearing Officer**