Issues: Group I Written Notice (unsatisfactory job performance) and Group III Written Notice with termination (willful violation of institutional practices); Hearing Date: 05/04 & 05/17/04; Decision Issued: 05/19/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 666

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 666

Hearing Dates: May 4 & 17, 2004
Decision Issued: May 19, 2004

PROCEDURAL ISSUES

Grievant requested a change of supervision as part of the relief she seeks. Hearing officers may provide certain types of relief including reduction or rescission of the disciplinary action.[1] However, hearing officers do not have authority to reassign employees.[2] Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states, in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

The hearing was docketed for April 29, 2004. Grievant requested a postponement because the agency had not timely provided documents that were ordered by the hearing officer well before the hearing. Accordingly, the hearing officer granted a postponement to May 4, 2004. Because of time constraints on that date, the hearing was continued to May 17, 2004 and concluded that day.

[1] § 5.9(a)2. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.
[2] § 5.9(b)2. *Ibid.*

Grievant proffered as evidence a Virginia Employment Commission "Deputy's determination." Such evidence is inadmissible in any judicial or administrative proceeding other than one arising out of the provisions of Title 60.2 and, therefore, is inadmissible in this grievance hearing.[3]

APPEARANCES

Grievant
Two Attorneys for Grievant
Four witnesses for Grievant
Warden
Advocate for Agency
Three witnesses for Agency

ISSUES

Did grievant's conduct warrant disciplinary action under the 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 grievance from two disciplinary actions issued on the same date - a Group I Written Notice for unsatisfactory job performance and, a Group III Written Notice issued for willful violation of institutional practices by making decisions with blatant disregard for the safety of staff and inmates.[4] As part of the disciplinary action, grievant was removed from employment. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[5]

The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for three years. She has been a Physician I.

Agency policy provides that the head nurse at each correctional facility is the medical authority and that the physician directs health care provided to inmates.[6]

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[3] Va. Code § 60.2-623.B. NOTE: Even if the law did not prohibit admission of such evidence, a deputy's determination would be accorded little or no evidentiary weight since it represents only the results of an interview conducted by the deputy with the claimant and/or the employer. The interview is not a due-process evidentiary hearing and the information obtained from interviewees is not under oath. The hearing officer retained the document as a rejected exhibit.

[4] Agency Exhibit 1. Group I Written Notice and Group III Written Notice, issued January 28, 2004.

[5] Agency Exhibit 2. Grievance Form A, filed February 13, 2004.

[6] Agency Exhibit 5. Section 702-4.0, Procedure Number DOP 702, *Medical Authority and Medical Autonomy*, July 1, 1999.

Decisions and actions regarding the health care services provided to inmates are the sole responsibility of qualified health care personnel. Health care personnel should have no restrictions imposed upon them by the facility administration regarding the practice of medicine. If the head of the facility feels that the health care needs of inmates are not met, she should discuss the problem with the health authority, and, if the problems are not resolved satisfactorily, refer the problems to the Office of Health Services.[7]

During the course of grievant's employment, there have been differences of opinion between grievant and the head nurse. The issues frequently include having one nurse specifically assigned to work with grievant, and a perceived lack of cooperation from the head nurse on grievant's other requests for assistance.[8] In addition, the head nurse has on at least one occasion questioned grievant's decision to change an inmate's medication.[9]

On May 2, 2002, grievant met with the warden and head nurse. The warden directed grievant regarding the procedures she wanted followed when inmate medication was changed. She told grievant that, when changing inmate medication in conjunction with a visit, grievant should advise the inmate of the change during the visit. When grievant did not see a patient but only reviewed the inmate's patient chart (for example, after lab test results were obtained), a nurse could advise the inmate of the medication change. No official records or minutes of the meeting were made; no written memorandum was issued to document the warden's directive. Grievant contemporaneously wrote a detailed description of the meeting in her own daily personal journal. Between May 2002 and January 2004, grievant followed the procedure outlined above. No inmate, security officer, or member of the medical staff complained to the warden regarding medication change notification procedures during this nearly two-year period of time. The head nurse knew that grievant regularly directed nurses to advise inmates of medication changes, but she never told the warden that grievant was doing anything contrary to the warden's directive.

On January 14, 2004, a security lieutenant and a captain advised the warden that a few inmates objected to having a nurse tell them about medication changes; they wanted the physician to tell them of such changes. Some inmates had been told of medication changes by the nurse who dispenses medications during the daily lineup of inmates at the pill room. A few had become upset and security officers had to intervene to calm the inmates. The warden convened a meeting with the lieutenant, captain, chief of security, head nurse, staff psychiatrist (who prescribed psychotropic medications to inmates)[10], and grievant. The warden felt that security problems would be reduced if the physicians would personally advise inmates of all medication changes. Grievant

[7] Agency Exhibit 5. Section 702-7.0.B. *Ibid.*
[8] Grievant Exhibit 3. Email correspondence from April 2001 through October 2003.
[9] Grievant Exhibit 5. Email from head nurse to grievant, October 6, 2003.
[10] Part of the problem involved the psychiatrist's decision to end inmate medications abruptly rather than wean them gradually from the medication by reducing the strength and/or dosage. This issue did not involve grievant. Shortly after the meeting, the psychiatrist became more conciliatory, called the warden, and agreed to begin weaning inmates from medications gradually rather than abruptly.

was resistant, pointing out that it would require more of her time. Grievant argued that there was no written policy requiring her to do this. Grievant also opined that security staff were paid to deal with inmates who become upset. Because the warden and the two physicians could not agree, the meeting became nonproductive and the warden ended the meeting without a resolution of the issue.

On January 28, 2004, the warden met with grievant and offered seven examples of situations that purportedly demonstrate grievant's inappropriate decision making. Grievant was not given the names of the inmates, or an opportunity to review the inmate's medical charts. The warden then issued the two disciplinary actions at issue herein and removed grievant from employment.

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. In all other actions, such as claims of retaliation, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[11]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance

[11] § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

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* 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.[12] The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.17 of the DOC Standards of Conduct addresses Group III offenses, which are defined identically to the DHRM Standards of Conduct.[13] The offenses listed in the Standards of Conduct are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head undermines the effectiveness of the agency's activities or the employee's performance should be treated consistent with the provisions of the Standards of Conduct.[14] Inadequate or unsatisfactory job performance is one example of a Group I offense.

Group I Offense

The Group I offense was issued because grievant was argumentative and uncooperative during a meeting on January 14, 2004. The agency has borne the burden of proving its charge. In addition to the grievant, five other people were in attendance during this meeting. Four of the five testified that grievant was argumentative and uncooperative; the fifth person did not testify in the hearing.

Grievant felt that she explained her position to the warden but that the warden was unreceptive to her point of view. Grievant also felt that the warden chastised her in front of other employees and that this was inappropriate. From the totality of the evidence, it appears that both grievant and the warden were polarized on the issue of inmate medication discontinuance. However, the weight of evidence is that grievant was argumentative and uncooperative.[15] Grievant's apparent reluctance to seek some kind of compromise or middle ground is contrary to the mandate of DOP 702, which states that: "Provision of proper health care can be achieved only through mutual trust and cooperation between administrators and health care providers."[16]

Group III Offense

[12] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[13] Agency Exhibit 6. Section 5-10.17, Procedure Number 5-10*, Standards of Conduct,* June 15, 2002.
[14] Agency Exhibit 6. Section 5-10.7.C, *Ibid.*
[15] The warden maintains that grievant has been uncooperative and argumentative in previous meetings and has demonstrated a lack of concern about the security problems attendant to the medical treatment of inmates in a correctional facility. However, the testimony and evidence in this hearing focused only on the January 14, 2004 meeting.
[16] Agency Exhibit 5. Section 702-7.0.E, *Ibid.*

The agency's Standards of Conduct policy provides that, before any disciplinary removal action, the employee *shall* be given oral or written notice of the offense, an explanation of the agency's evidence in support of the charge, and a *reasonable* opportunity to respond.[17] If the offense is clear cut and undisputed (for example, use of alcohol on the job, or unauthorized possession of a firearm), a reasonable opportunity to respond might be relatively brief. However, when the alleged offense is inappropriate decision-making by a physician, the *reasonable* opportunity to respond must be of sufficient duration to permit a meaningful response by the grievant. The agency may not simply allege inappropriate decision-making, fail to even identify the inmates, and then deny grievant adequate time to review the medical records and formulate an explanation.

The agency cited the Health Insurance Portability and Accountability Act of 1996 (HIPAA) as the basis for not identifying inmate names. The invocation of HIPAA as a basis for denying due process is not justified by the HIPAA privacy regulations. The use of protected health information may be disclosed in the course of any administrative proceeding.[18] In this case, grievant should have been given the names of the inmates, a reasonable amount of time to review their medical charts, and a chance to present her response to the allegations. The agency's failure to do so was a violation of the due process required by its own policy. However, because the grievance has progressed through this evidentiary hearing, due process has now been afforded to grievant.

The agency alleges that grievant willfully violated institutional practices that could endanger public safety, internal security, or affect the safe and efficient operations of the facility. It is understandable that an inmate could become upset if his medication is changed without his knowledge and, that he could cause a disturbance that might affect safe and efficient operations. However, the agency has not shown what "institutional practice" grievant allegedly violated. The undisputed evidence establishes that grievant's practice has been to have nurses advise inmates of medication changes on those occasions when she only reviews an inmate chart without seeing the inmate. Further, the testimony of a credible witness established that most previous physicians at the facility have asked nurses to discuss medication changes with inmates. Therefore, the established institutional practice is what grievant has been doing.

The warden contends that in the May 2002 meeting she instructed grievant to personally advise every inmate when she makes a medication change. However, the best evidence of what occurred in that meeting are the contemporaneous notes written by grievant immediately after the meeting. Moreover, it is extremely telling that for nearly two years the head nurse never advised the warden that grievant was violating

[17] Agency Exhibit 6. Section 5-10.14.A, *Ibid*.

[18] §164.512(e)(1), 45 CFR Part 164, *HIPAA Standards for Privacy of Individually Identifiable Health Information.* NOTE: It appears that the agency was unnecessarily dilatory in providing inmate charts for grievant's review prior to this hearing. In fact, the hearing had to be delayed for several days because charts were not made available until the first docketed date for this hearing. The agency is reminded that Va. Code § 2.2-3003.E requires that all documents relating to the actions grieved shall be made available, upon request from a party to the grievance, by the opposing party, *in a timely fashion*. (Italicized portion effective July 1, 2004).

any institutional practice. The head nurse was in the May 2002 meeting and knew what was said. She has been grievant's administrative supervisor for the past two years and knows that grievant regularly reviews inmate charts and directs the nursing staff to advise inmates of medication changes. Therefore, the agency has not demonstrated that grievant willfully violated any institutional practice.

The agency also contends that grievant has made decisions that blatantly disregarded staff and inmate safety. Among the seven examples offered by the agency, four involved inmates whom the warden felt were not having their health care needs met (inmate numbers 1, 5, 6, & 7). Agency policy in such cases provides that the warden should refer such problems to the Office of Health Services when they cannot be resolved satisfactorily within the facility.[19] There was no evidence in this case to show that the alleged problems were referred to the Office of Health Services. Thus, the agency did not follow its own Medical Authority policy before taking disciplinary action. Had this policy been followed, it is possible that some or all of the allegations could have been resolved without resorting to discipline.

The written notice in this case alleges that grievant's decision making on inmate care created "havoc" for the security staff. "Havoc" means "wide and general destruction" and "great confusion and disorder."[20] The agency has not presented any evidence of either destruction, or great confusion and disorder. The use of such hyperbole to characterize an alleged offense detracts from the credibility of the charge when there is no evidence to support the charge that grievant created "havoc." It is true that a few inmates became upset about medication changes, and that they required extra attention from security staff to deal with the situations. It is also true that such incidents might have been avoided if grievant had personally told inmates about their medication changes in advance. Nonetheless, grievant was following the policy as she understood it.

The seven examples of alleged unsafe decision making by grievant are discussed below:

Inmate #1: The agency alleged grievant never saw the inmate or advised him of his diagnosis. In fact, grievant had seen the inmate several months earlier, discussed the HIV diagnosis with him, and told him that if his laboratory tests indicated a need in the future, his medications would be changed.

Inmate #2: The agency alleged grievant did not meet with the inmate after prescribing medication for him. In fact, grievant had seen the patient and told him that she would be screening his blood pressure for five days. If warranted after that period, she would prescribe medicine for him.

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[19] Agency Exhibit 5. Section 702-7.0.B, *Medical Authority and Medical Autonomy*, July 1, 1999 states: "If the head of the facility feels that the health care needs of the inmates are not met, he/she should discuss the problem with the health authority, and, if the problems are not resolved satisfactorily, refer the problems to the Office of Health Services."

[20] *Merriam-Webster's Collegiate Dictionary*, Tenth Edition.

Inmate #3: The agency alleged that the inmate was never told he was diabetic prior to the prescription was ordered by grievant. In fact, grievant had seen the inmate and told him that she would have his fasting blood sugar tested over a several-day span. When she received the laboratory results after the several-day testing period, she prescribed medication. Neither the inmate nor anyone else ever complained to the grievant that he had not been told about his condition.

Inmate #4: Grievant changed this inmate's medication because he had been receiving a medicine that is not on the agency's formulary list. Grievant was following policy to reduce agency medical expense by switching inmates to medicines listed on the formulary list whenever possible. Neither the inmate nor anyone else told grievant that the inmate objected to the change in medication.

Inmates 5 & 6: The agency cited grievant for prescribing medication to an inmate without a medical problem. Investigation revealed that a staff person had filed laboratory test results in the wrong patient chart. When grievant reviewed the test results, she prescribed the medication based on the test results. When the misfiling was discovered, the error was promptly corrected. Medication was discontinued for the inmate who did not need it and was started for the inmate who does require it.

Inmate #7: The agency alleged grievant did not see this inmate for his initial entry physical examination within the requisite ten days. Grievant did not receive the inmate's chart until after the time limit. As soon as she received the chart, she saw the inmate at the next earliest opportunity.[21]

In summary, four of the examples involve inmates who wanted to hear from the doctor personally if their medication changed. Grievant was willing to see any inmate who objected to medication changes. However, the procedure that grievant followed was that a nurse should first explain the change to the inmate. If the inmate insisted on hearing if from the physician, the nurse was to add the inmate to the physician's appointment schedule and grievant would then discuss the change with inmate. Since most inmates would accept the nurse's explanation, it was a more efficient use of the physician's time not to have to see every inmate for each medication change. Two of the examples involved one inmate receiving medication that should have been given to a different inmate. The error was caused by a filing error of someone other than grievant. It must be acknowledged that grievant probably should have detected the misfiling when she reviewed the chart. However, this incident amounted to an unintentional error, not blatant disregard for inmate safety. The seventh example appears to have been a communication problem with the physician not being timely notified of the need for an inmate examination.

There is no doubt that the warden has primary responsibility for both administration of the medical authority policy and the security regulations of the facility.

[21] To date, the agency has still failed to produce the inmate chart for review by grievant in conjunction with this hearing.

If the warden determines that it is in the best interest of facility security to have the physician personally speak with each inmate before changing medications, it is within her prerogative to implement such a procedure. If the agency had put such a policy in writing (even if just a memorandum to grievant), the decision herein would be different. In this case, the warden testified that such an arrangement had been agreed to in 2002. However, the grievant's understanding was that she need not see every inmate to explain a medication change if a nurse could successfully advise the inmate. Grievant's recollection of the warden's instruction is corroborated by her notes, written contemporaneously with the meeting. The agency has no written memorialization of the meeting. Moreover, as noted earlier, the head nurse never questioned grievant's actions regarding medication changes even though she had participated in the May 2002 meeting. Since the head nurse allowed grievant to continue this practice for nearly two years without bringing it to the warden's attention, the head nurse apparently had no disagreement with the practice.

Retaliation

Grievant alleged that this disciplinary action was motivated by the warden's desire to retaliate because of a prior grievance filed by grievant in March 2002. Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.[22] To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Generally, protected activities include use of or participation in the grievance procedure, complying with or reporting a violation of law to authorities, seeking to change a law before the General Assembly or Congress, reporting a violation of fraud, waste or abuse to the state hotline, or exercising any other right protected by law. In this case, grievant demonstrated that she engaged in a protected activity and suffered an adverse employment action (discipline and removal). However, grievant failed to present any evidence that would show a nexus between the protected activity and her discipline. Therefore, grievant has not proven retaliation.

Summary

The head nurse does not get along well with grievant. Her dislike of grievant was apparent from her demeanor in the hearing, and was corroborated by the testimony of a witness to whom the head nurse had said the facility would be better off if grievant was not there. It is also apparent that grievant and the warden do not communicate in the spirit of "mutual trust and cooperation" discussed in policy 702. Grievant feels that the warden "does not seem to want to hear her point of view."[23] The warden finds grievant "argumentative and uncooperative."[24] She contends that such behavior has been ongoing; however, there is no documentation that grievant had been previously

[22] EDR *Grievance Procedure Manual*, p.24
[23] Grievant's testimony during the hearing.
[24] Agency Exhibit 2. Second Resolution Step response, February 25, 2004.

counseled about such behavior. All of the above factors underlie the disciplinary actions in this case. It is apparent that grievant is a very capable physician but also a very strong-willed individual with firm ideas about how to conduct her practice. In a correctional setting, some of grievant's views may not be consistent with the realities of inmate security. Thus, there is real potential for conflict between grievant and facility management. For there to be peaceful coexistence, it is crucial that both grievant and the warden attempt to understand each other's point of view and work to achieve a practical middle ground.

DECISION

The decision of the agency is modified.

The Group I Written Notice issued on January 28, 2004 is hereby AFFIRMED. The disciplinary action shall remain active for the period specified in Section 5-10.19.A of the Standards of Conduct.

The Group III Written Notice and termination of grievant's employment issued on January 28, 2004 are hereby RESCINDED. Grievant is reinstated to her position with full back pay (from which interim earnings must be deducted) and the restoration of full benefits and seniority.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the

specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[25] You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[26]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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David J. Latham, Esq.
Hearing Officer

[25] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[26] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.