

Issue: Group II Written Notice (failure to follow established applicable policies);  
Hearing Date: 06/01/05; Decision Issued: 06/06/05; Agency: DMHMRSAS;  
AHO: David J. Latham, Esq.; Case No. 8063; **Administrative Review: HO**  
**Reconsideration Request received 06/21/05; Reconsideration Decision**  
**issued 06/27/05; Outcome: No newly discovered evidence or incorrect**  
**legal conclusion. No basis to change decision. Administrative Review:**  
**EDR Ruling Request received 06/21/05; Outcome: pending**



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8063

Hearing Date: June 1, 2005  
Decision Issued: June 6, 2005

**PROCEDURAL ISSUE**

Grievant requested as part of her relief that discipline be issued to other employees. A hearing officer does not have authority to take any adverse action against an employee (other than upholding or reducing the disciplinary action challenged by the grievance).<sup>1</sup> 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."

**APPEARANCES**

Grievant  
Representative for Grievant  
Four witnesses for Grievant  
Clinical Nurse Specialist  
Representative for Agency

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<sup>1</sup> § 5.9(b)6. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, August 30, 2004.

Six witnesses for Agency

## ISSUES

Did grievant's actions 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 for failure to comply with applicable established policies on missing keys.<sup>2</sup> At the third resolution step of the grievance process, the facility director unilaterally and unconditionally reduced the discipline to a Group I Written Notice.<sup>3</sup> Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.<sup>4</sup> The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant as a registered nurse (RN) for 12 years.

The agency facility at which grievant is employed houses patients who have, inter alia, substance abuse problems. These patients are not permitted to leave the facility or the buildings in which they are housed, except under supervision. To assure that the safety and security of the facility is maintained, doors are locked at all times and only employees have keys to the doors. Facility policy provides that keys "...must remain in the possession of the employee at all times."<sup>5</sup> Policy also requires that when hospital keys are lost or misplaced, the employee responsible for the missing keys must immediately notify their immediate supervisor.<sup>6</sup>

The employees use a separate restroom from patients. The restroom is supposed to be locked at all times and a key is required to enter. The door closes automatically and is supposed to lock automatically upon closing. However, the door does not always close completely and therefore does not lock every time. On the morning of January 5, 2005, grievant went to the employee restroom.<sup>7</sup> When she left the restroom, grievant forgot that she had left her keys

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<sup>2</sup> Agency Exhibit 3. Written Notice, issued January 20, 2005.

<sup>3</sup> Agency Exhibit 4. Written Notice, issued April 14, 2005

<sup>4</sup> Agency Exhibit 1. *Grievance Form A*, filed February 22, 2005.

<sup>5</sup> Agency Exhibit 8. Policy HR 053-28, *Employee Attire*, November 1, 2002.

<sup>6</sup> Agency Exhibit 7. Policy EC 021-12, *Missing Keys*, October 1, 1998.

<sup>7</sup> Grievant maintains that she went to the restroom at about 4:30 a.m.; the male nurse from whom she subsequently borrowed keys to retrieve her own keys states that grievant went to the restroom shortly after 6:00 a.m.

inside the bathroom. She borrowed the keys of a male registered nurse to unlock the restroom so that she could retrieve her own set of keys.

Grievant avers that she returned the other RN's keys to him after she had retrieved her own keys. The other RN asserts that grievant did not return his keys when he asked for them. Both grievant and the other RN conducted a search but were unable to locate his keys. Other staff were also asked to search for the keys but could not locate them. At some time within the next 90 minutes, a patient came into possession of the keys and used them to escape from the building and the facility.<sup>8</sup> She was subsequently returned to the facility. The patient stated that, after leaving the building, she threw the keys away in a wooded area; the keys have never been recovered.

The nursing supervisor learned at about 6:30 a.m. from a third nurse that keys were missing. She called grievant and suggested they search trashcans. At about 7:10 a.m., the supervisor again spoke with grievant by telephone, at which time grievant assured the supervisor that the keys had been found in the medication room and that there was no need to notify security.<sup>9</sup> In fact, the keys had not been found at that time and were never found. Grievant avers that the male RN told her he had found his keys; the male RN denies ever telling grievant that. The male RN left the facility at about 8:00 a.m. and got home at about 11:00 a.m. He called the facility's police department at about 11:30 a.m. and reported that his keys were missing.

After the patient had later been returned to the facility, she told both a direct service associate (DSA) and a psychiatrist that grievant had given her the keys.<sup>10</sup>

### 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

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<sup>8</sup> Agency Exhibit 19. Facility Police Department Patrol Shift Report, January 5, 2005.

<sup>9</sup> Agency Exhibit 17. Written statement of nursing supervisor, January 5, 2005. See also Agency Exhibit 16, written statement of CNA, January 5, 2005 who states that grievant told her that the keys had been found in the medication room. See also Agency Exhibit 14, written statement of a second DSA, January 6, 2005.

<sup>10</sup> Agency Exhibit 15. Written statement of DSA, March 4, 2005. In addition, the psychiatrist testified at the hearing that the patient told her during a discharge interview on May 17, 2005 that grievant had given her the keys on the morning of January 5, 2005. However, see Agency Exhibit 13, written statement of a third DSA, April 1, 2005 in which the patient stated she had taken the keys off a desk; and Agency Exhibit 12, written statement of an RN, January 6, 2005, who was told by the patient that she found the keys in a trash can. The patient subsequently told the same RN that grievant gave her the keys – Agency Exhibit 11, RN's statement of March 13, 2005.

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 the grievant must present her evidence first and prove her claim by a preponderance of the evidence.<sup>11</sup>

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 effective September 16, 1993. The *Standards* 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.2 of the Policy No. 1.60 provides that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.<sup>12</sup> Failure to comply with established written policy is one example of a Group II offense.

The agency has shown by a preponderance of evidence, and grievant has admitted, that she did not keep her keys in her possession on the morning of January 5, 2005. She left them in the bathroom unattended for an unknown

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<sup>11</sup> § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

<sup>12</sup> Agency Exhibit 5. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

period of time, perhaps as long as 90 minutes.<sup>13</sup> Not having possession of keys at all times is a violation of Policy HR 053-28.

Grievant correctly observes that the initial written notice did not specifically include violation of Policy HR 053-28. However, the facility director explained that by the time he decided to reduce the level of discipline, he had more complete information available. Based on the additional information, he concluded that grievant leaving her keys in the restroom was the genesis of the entire incident. In other words, if grievant had not left her keys unattended, she would not have borrowed the male RN's keys, the keys would not have been missing, and the patient would not have escaped. Thus, the entire sequence of events began with grievant leaving her keys unattended. In view of the fact that the discipline level was *reduced*, notwithstanding the inclusion of the Policy 053-28 reference, its inclusion in the written notice has not adversely affected grievant.

The Written Notice also specified that grievant's offense violated Policy EC 021-12, which requires immediately reporting missing keys to the immediate supervisor. Grievant argues that this policy is not applicable to her since the missing keys were the male nurse's keys – not grievant's. In this case, one must look to the language of the policy which states that "the employee responsible for the missing keys" must report. "The employee responsible" can refer not only to the person to whom the keys are assigned but also to any employee who is given temporary care, custody, and control of the keys. Because grievant had possession of the male RN's keys, and because he maintained that grievant had not returned the keys, there was a dispute as to who actually had possession of the keys when they became missing. Under these circumstances, there was a shared reporting responsibility because both employees were responsible for the missing keys. Certainly, the male RN had a responsibility to report the keys since they were his keys. However, as one who had temporary custody of the keys, grievant also had a similar responsibility to report the missing keys.

Grievant did not report to her supervisor that the keys were missing when grievant first knew of the missing keys at about 6:00 a.m. It was later, at 6:30 a.m. when the building supervisor questioned grievant, that she acknowledged that the keys were missing. Thus, grievant knew of the reporting requirement but did not comply with it pursuant to policy. Accordingly, it is concluded that grievant failed to fulfill a responsibility to *immediately* report the missing keys.

Although grievant denies any culpability in this incident, the evidence is preponderant that she left her keys unattended for a period of time, thus starting a chain of events that led to the escape of a patient. Moreover, when she learned that the keys were missing, and that she was purportedly the last

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<sup>13</sup> Grievant is adamant that she went to the restroom at 4:30 a.m.; the male RN is just as adamant that grievant borrowed his keys around 6:00 a.m. Thus, the keys may have been left in the restroom for as much as 90 minutes.

employee to have possession of the keys, she did not immediately notify her supervisor. Finally, grievant reported that the keys had been found when, in fact, they had not been found. Grievant's actions are sufficient to justify the lowest level of disciplinary action – a Group I Written Notice.

When the agency reduced the disciplinary action from a Group II to a Group I offense, it changed the issuance date and the inactive date of the Written Notice. Doing so effectively results in the disciplinary action being active from January 20, 2005 through April 14, 2007 – a period of two years and three months. The Standards of Conduct provides that the “active” period for a disciplinary action is calculated from date of issuance. In this case, the original date of issuance of the disciplinary action was January 20, 2005. The fact that the agency decided to unilaterally reduce the *level* of discipline does not alter the original date of issuance. Accordingly, the active period of the Group I Written Notice may not exceed two years and must end on January 20, 2007.

### DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued for leaving keys unattended is hereby UPHeld. However, the issuance date and the inactive date of the Written Notice are hereby changed to January 20, 2005 and January 20, 2007, respectively.

### APPEAL RIGHTS

You may file an administrative review request within **15 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 14<sup>th</sup> St, 12<sup>th</sup> 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 15 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 15-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.<sup>14</sup> 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.<sup>15</sup>

[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

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<sup>14</sup> 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).

<sup>15</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.





**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

DIVISION OF HEARINGS

**DECISION OF HEARING OFFICER**

In re:

Case No: 8063

Hearing Date:	June 1, 2005
Decision Issued:	June 6, 2005
Reconsideration Request Received:	June 21, 2005
Response to Reconsideration:	June 27, 2005

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 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. 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.<sup>16</sup>

**OPINION**

Grievant requests that the hearing be reopened to permit introduction of a 1994 order of the state Board of Nursing placing on one-year probation an

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<sup>16</sup> § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

employee who was a witness in this case. In this case, the proffered evidence involves actions of the witness which occurred 12-14 years ago, and before the witness was employed by the agency. The evidence has no direct relevance to the instant case. Grievant offers the evidence for the purpose of impeaching the witness's credibility. Because there is no direct relevance to the instant case, the actions are so remote in time, and the witness was not an employee of the agency, the proffered evidence would be given little, if any, evidentiary weight even if admitted into evidence.

Moreover, a more basic issue prevents reopening the case to admit such evidence. Hearings can be reopened to present evidence of *newly discovered* evidence. Grievant knew of this evidence prior to the hearing and acknowledges that the evidence is public information available to the general public through the Department of Health Professions website. Thus, the grievant could, with due diligence, have obtained and presented this evidence at the hearing. Grievant asserts that she did not present the evidence because she had been unsuccessful in obtaining it from the agency.<sup>17</sup> Accordingly, the evidence is not *newly discovered*. Grievant had discovered the evidence prior to hearing but simply had not obtained a copy. Furthermore, during the hearing, grievant did not request a continuance of the hearing to obtain the evidence.

Grievant also requests a reopening of the hearing to further question the witness referred to above as well as two other witnesses. During the hearing, grievant had the opportunity to fully cross-examine the witness. A hearing will not be reopened merely because a party decides after the hearing to ask additional questions that could have been asked during the hearing. As to the other two witnesses, grievant has not shown why the two witnesses could not have testified at the prior hearing. Moreover, she has not proffered what specific testimony each witness would offer at a reopened hearing. Therefore, grievant has not provided a sufficient basis to justify reopening the hearing.

In the alternative, grievant requests that the hearing decision be reconsidered based on the proffered Board of Nursing Order. Since the Board of Nursing Order does not constitute *newly discovered* evidence and is not a basis to reopen the hearing, it similarly may not be used as the basis to reconsider the Decision. In any case, for the reasons stated above, even if admitted into evidence, the Board or Nursing Order would be given very little evidentiary weight and would be insufficient to change the Decision.

If one views this case in the light most favorable to grievant, one would accept her testimony that she returned the other RN's keys to him and that he misplaced his keys after grievant returned them. However, this does not alter the facts that grievant did not keep her own keys in her possession at all times, and that she incorrectly reported that the other RN's keys had been found when they had not been found. Thus, even if grievant's testimony is found more credible

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<sup>17</sup> The agency avers that it did not have this evidence in grievant's personnel file.

than the testimony of the other RN, grievant nevertheless committed offenses separate and apart from whatever the other RN did.

Finally, grievant suggests that the discipline should be rescinded and grievant should receive only counseling as provided in the Employee Attire policy. It is correct that the Attire policy suggests counseling for a first offense. However, the discipline in this case was issued not only for failure to comply with the Attire policy but also for reporting that the keys had been found when, in fact, they have never been found.<sup>18</sup> Thus, given the totality of the facts in this case, a Group I Written Notice is reasonable.

### DECISION

Grievant has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered grievant's arguments and concludes that there is no basis to change the Decision issued on June 6, 2005.

### APPEAL RIGHTS

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

1. The 15 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.<sup>19</sup>

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<sup>18</sup> Agency Exhibit 3. First Written Notice attachment - Pre-disciplinary Notice from nurse manager to grievant, January 11, 2005.

<sup>19</sup> 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).

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David J. Latham, Esq.  
Hearing Officer