

Issue: Group I Written Notice (failure to follow procedures); Hearing Date: 08/03/05;
Decision Issued: 08/04/05; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 8110



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8110

Hearing Date: August 3, 2005
Decision Issued: August 4, 2005

PROCEDURAL HISTORY

On January 20, 2005, Grievant was issued a Group II Written Notice of disciplinary action. During the Step Process, the Agency reduced the Written Notice to a Group I for "Failure to follow the procedure for lost keys as per policy #021-12, missing keys."

Grievant filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 23, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 3, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action for failure to follow the procedure for lost keys.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Mental Health, Mental Retardation, and Substance Abuse Services employs Grievant as a Registered Nurse II at one of its facilities. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

Residents living at Grievant's Facility require continuous care and may not leave the Facility without following appropriate procedures. Many doors are locked and may be opened only by employees with assigned keys.

On January 5, 2005, Grievant worked the night shift ending at 7 a.m. Grievant worked with another Registered Nurse named Ms. F. Grievant and Ms. F reported to Ms. C who reported to Ms. D. Ms. F was not Grievant's supervisor. During the shift, Ms. F lost her assigned key. She asked Grievant for his key so that she could enter the bathroom where she believed she had left the key. Grievant lent her his key. Shortly thereafter, Grievant asked Ms. F for his key. Ms. F replied that she had returned the key to Grievant. Grievant disputed this. Ms. F began looking for a key. She was observed looking for the key by Ms. D, who then asked what she was doing. Ms. F replied that she was looking for a key. At approximately 6:30 a.m., Ms. D contacted Ms. C and said keys were missing. Ms. D said she wanted to be informed when the key was found. Ms. C contacted Ms. F who confirmed keys were missing.

At approximately 7:10 a.m., Ms. F spoke with Ms. C by telephone and said that the key had been found in the medication room. Grievant was standing nearby and overheard Ms. F when she made this statement. Grievant knew that Ms. F's statement about finding the key was untrue. Ms. C said to Ms. F, "So you are telling me that you have found [Grievant's] keys in the [medication] room ...?" Ms. F replied, "Yes." Ms. C

then telephoned Ms. D and told Ms. D that the keys had been found in the medication room.

At the end of the shift, Ms. F used a key to open a door to permit her and Grievant to exit the Facility. Grievant left without his key and without specifically telling anyone that his key was missing. Shortly thereafter, Agency staff realized a client had escaped. Agency police concluded the client had obtained a key and let herself out of the Facility. Grievant's key was never found.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).¹ Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Agency policy #021-12 governs missing keys. The objective of this policy is:

When an employee loses any hospital keys, immediate action will be taken to locate the keys and ensure that the building is still secure. Accordingly, appropriate steps will be taken to assure that the security and safety of the facility is maintained.

The policy sets forth a required procedure:

When hospital keys are lost or misplaced, the employee responsible for the missing keys will initiate the following procedure:

The employee that is missing the keys will immediately report that information to their immediate supervisor. The immediate supervisor will notify [Agency] Police.

¹ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

[Agency] Police and building staff will conduct a search for the missing keys in accordance with [Agency] Policy Statement #021-01 (if in a patient care building).²

Grievant was assigned responsibility for a key. At the time Grievant left the facility, he knew (1) he did not have his key in his possession, (2) Ms. F denied having his key, and (3) no other employee claimed to have his key. Grievant knew or should have known that his key was missing at least as soon as he left the Facility. Upon realizing that his key was missing, Grievant should have reported this information to Ms. C, his immediate supervisor. By failing to do so, Grievant failed to comply with Policy #021-12 thereby justifying the issuance of a Group II Written Notice, which the Agency reduced to a Group I Written Notice.³

Grievant argues that he should not be disciplined because he lent his key to Ms. F and she is the one who failed to return it to him. In Grievant's view, Ms. F is the person who lost or misplaced a key. Grievant's argument fails. No evidence was presented showing that by lending the key Grievant was somehow free of responsibility for the key.⁴ Lending a key is not the same as reassigning a key.⁵ Thus, Grievant remained responsible for the key. Once Grievant lent his key to Ms. F and she failed to return the key, Grievant's key was missing.⁶

Grievant argues that at the time he left the facility, he believed Ms. C and Ms. D were aware that the keys were missing. Testimony presented during the hearing, however, showed Grievant overheard Ms. F tell Ms. C that the key had been found even though Grievant knew the key had not been found. Grievant did not speak to Ms. C or Ms. D to tell them the key was missing. Thus, no credible evidence was presented to support Grievant's belief that Ms. C and Ms. D knew the key was missing.

When the Agency reduced the disciplinary action from a Group II to a Group I Written Notice, it changed the issuance date from January 20, 2005 to May 3, 2005. The effect of this is to extend the active life of the Notice. Nothing in the *Standards of Conduct* permits this extension.

² Agency Exhibit 5.

³ No credible evidence was presented to justify further mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

⁴ The Agency could argue that both Grievant and Ms. F became responsible for the key.

⁵ The Agency assigned the key to Grievant. There is no reason to believe Grievant had the authority to reassign his key.

⁶ Thus, Grievant should have reported the missing key to his supervisor at the time Ms. F failed to return the key to him. To the extent Grievant delayed reporting the missing key while he and Ms. F looked for the key, that reason for delay ended at the time Grievant left the Facility.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. The Group I Written Notice issued May 3, 2005 is revised so that its issuance date is January 20, 2005 with an inactive date of two years from its date of issuance.

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that 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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 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. 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.⁷

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.