Issue: Group II Written Notice (failure to follow established written policy); Hearing Date: 02/27/06; Decision Issued: 02/28/06; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8276; Outcome: Employee granted partial relief; **Administrative Review: HO Reconsideration Request received 03/15/06; Reconsideration Decision issued 03/16/06; Outcome: Original decision affirmed**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8276

Hearing Date: February 27, 2006
Decision Issued: February 28, 2006

APPEARANCES

Grievant
Representative for Agency
Four 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 grievance from a Group II Written Notice for failure to follow established written policy.[1] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.[2] The Department of Mental Health, Mental Retardation

[1] Agency Exhibit A. Group II Written Notice, issued November 30, 2005.
[2] Agency Exhibit A. *Grievance Form A*, filed December 20, 2005.

and Substance Abuse Services (hereinafter referred to as "agency") has employed grievant for 15 years as a utility worker.

Facility policy provides for one maintenance employee to be on call at all times in order to provide a response to urgent problems or emergency situations during off-duty hours.[3] The policy states that the on-call maintenance person shall respond to all emergencies when requested by providing service necessary to correct the problem. The on-call maintenance person is generally expected to come to the facility, assess the problem, correct the problem if possible, or call some one with the necessary expertise to correct the problem. For example, if the on-call person is a grounds worker and receives a call about a non-functioning elevator, the on-call person may call an elevator repair expert who has the training, knowledge, and experience necessary to address the elevator malfunction. Grievant's supervisor testified that if the problem is trivial, the on-call person does not necessarily have to come to the facility but, if patient safety is jeopardized, the on-call person should assess the problem in person.

Shortly after 1:00 a.m. on the morning of November 24, 2005 (Thanksgiving Day), an employee had raised an electrically operated bed which accidentally knocked an electrical outlet loose from the wall.[4] When the box pulled loose, wiring separated and arced causing burn marks on the box and wall. A registered nurse (RN) directed staff to move the patient to another room for his safety. The nurse notified an on-duty security officer and both went to the room to view the electrical box. There were no sparks coming from the box and no odor of anything burning.[5] The RN spoke with the RN nurse supervisor who told her to inform maintenance in the morning. Someone placed a sign on the wall advising that the outlet should not be used until repaired by maintenance.

During the week of November 18-25, 2005, grievant was the assigned on-call maintenance employee.[6] Grievant works in the grounds department and repairs mowers and other vehicles. Grievant had a beeper pager assigned to him for his on-call week. At about 7:00 a.m., the RN called grievant at his home and informed him of the situation. Grievant said he was not an electrician. The nurse said it [the problem] can probably wait. Grievant did not say that he would not come in. Once the RN had informed grievant she assumed he would take responsibility from that time forward. At about 8:00 a.m., at the suggestion of another nurse and the day shift security officer, the RN also called the on-call administrator to inform him of the situation.[7]

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[3] Agency Exhibit C. *Physical Plant Services Communications via Beeper Page during Off-Duty Hours*, effective July 1, 1999.
[4] Agency Exhibit F. Photographs of electrical box.
[5] Agency Exhibit G. Written statement of RN, November 29, 2005.
[6] Agency Exhibit D. Memorandum from Director to Nursing units, November 18, 2005.
[7] Agency Exhibit H. Notes of on-call administrator.

When the day shift security officer arrived for work at about 8:00 a.m., he learned that the RN had called grievant but that he had not yet come to the facility. At about 8:30 a.m., the security officer attempted to contact grievant but did not get an answer on either home phone or pager. At about 9:00 a.m., the security officer called the physical plant manager who came to the facility and repaired the outlet.[8] The plant manager called grievant who acknowledged that the nurse had called him. Grievant told the plant manager that he understood from the nurse's call that he didn't need to come in. The following week, following the long Thanksgiving holiday weekend, grievant's supervisor spoke with grievant. Grievant said the nurse did not specifically ask him to come in.

Grievant has been on-call many times during his several years of employment. He has been called in approximately 15 times during that period and has always either come to the facility or contacted someone else to respond to the problem. Grievant has a good performance record and has functioned dependably when on-call in the past.

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

[8] Agency Exhibit E. Security Officer Daily Activity Report, November 24, 2005.

circumstances. In all other actions the grievant must present his evidence first and prove his claim by a preponderance of the evidence.[9]

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 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 results in removal from employment. Failure to follow established written policy is one example of a Group II offense.

The basic facts in this case are generally undisputed. An electrical outlet was accidentally pulled loose from the wall, exposing live wires and creating a potential safety hazard. An RN secured the area by removing the patient from the room, posting a warning near the outlet, and notifying a security officer. After the security officer viewed the area, and the RN discussed the situation with her supervisor, it was concluded that the problem did not require immediate attention. A decision was made to wait several hours until day shift began before notifying maintenance. Because this accident occurred on a holiday, the maintenance department was off work and not scheduled to work. Accordingly, the RN called grievant because he was the on-call maintenance employee.

Based on the information given him by the RN, grievant concluded that the problem did not require immediate attention. He based this on the fact that the nurse and security officer had taken reasonable precautions to remove the patient from the room, posted a warning, and waited for several hours before calling him. In fact, if it had not been a holiday, the RN more likely than not would just have reported it to the maintenance department that morning. But because maintenance was off that day, she instead reported it to the on-call maintenance person. Further, the RN did not request grievant to come in but said the problem probably could wait. Thus, the totality of the information grievant received led him to conclude that the problem was not an emergency.

There were also some extenuating circumstances. Grievant's girlfriend and his children had been driving from out of town during the night at issue herein. His girlfriend had called him three times during the night to keep herself awake while driving, resulting in reduced sleep for grievant. The girlfriend and

[9] § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

children arrived early that morning; the girlfriend went to sleep because she was exhausted. Grievant tended to the children and was feeding them breakfast when the RN called him. Based on what he understood was an apparent lack of an emergency, grievant decided to continue feeding the children and go to the facility at midmorning (about 10:30 a.m.) to check out the problem. While these circumstances do not excuse grievant from fulfilling his call-in duty, they must be considered as a factor in grievant's decision-making process that morning.

Grievant's supervisor testified that it is not always necessary to come to the facility if one is able to determine that the problem is trivial or does not present a threat to patient safety. Accordingly, the on-call employee has discretion to assess a problem based on information he receives during the call and determine whether the problem merits immediate attention. Grievant made such an assessment based on the apparent lack of urgency of the employees on site. The hearing officer does not conclude that grievant made a correct assessment. To the contrary, grievant knew, or reasonably should have known, based on the description of bare wires, sparking, and some burn marks that live wires were exposed. At the very least, it would have been prudent for grievant to come to the facility, personally view the site, and cut off electricity to the outlet. That would have rendered the outlet safe until it could be repaired.

Nonetheless, from the totality of evidence in this case, one must conclude that grievant did not *deliberately* fail to follow established written policy. Grievant had demonstrated in many past call-in situations that he was willing to, and did, come to the facility when called in or notify someone else to resolve the problem. There was no reason for grievant not to come in on this occasion but for the fact that he made a decision that the situation was not an emergency requiring his immediate presence. When an employee makes a willing and conscious decision not to follow established written policy, such an act is properly considered a Group II offense. However, when an employee uses discretion permitted by the both written policy and actual practice, and makes a poor judgment, that does not constitute a *deliberate* failure to follow policy. Rather, poor judgment under these circumstances is considered unsatisfactory job performance – a Group I offense.

DECISION

The disciplinary action of the agency is modified.

The Group II Written Notice issued on November 30, 2005 is hereby REDUCED to a Group I Written Notice for unsatisfactory job performance. The agency shall remove the Group II Notice from grievant's personnel file and issue a Group I Written Notice with the same 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. 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 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.[10] 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.[11]

[10] 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).

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

[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

DECISION OF HEARING OFFICER

In re:

Case No: 8276

Hearing Date:	February 27, 2006
Decision Issued:	February 28, 2006
Reconsideration Request Received:	March 15, 2006
Response to Reconsideration:	March 16, 2006

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.[12]

OPINION

Grievant requested that the hearing officer reconsider four points which he maintains support a conclusion that the situation for which he was called in did not become urgent until 8:00 or 8:30 a.m.

[12] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

First, grievant notes that the situation did not become urgent until 8:00 or 8:30 a.m. It is correct that the nurse who called grievant at 7:00 a.m. told him that the situation probably could wait. However, the fact is that grievant knew that a live electrical outlet had been ripped loose from the wall and that there had been sparking and some burning of wire and the wall. Therefore, he knew that live wires were exposed even though they were not sparking or burning after the incident was over. Live electrical wires are hazardous at any time. They are particularly hazardous in a geriatric hospital where patients, many of whom have dementia or Alzheimer's disease, are free to move about. Therefore, even though grievant is not a licensed electrician, his experience in maintaining vehicles affords him a sufficient knowledge of electricity to know that exposed, live electrical wires present a real hazard that should be promptly corrected.

Second, grievant disputes the security officer's testimony that he attempted to contact grievant by telephone and pager; grievant maintains that only the nurse called him. Assuming that grievant is correct, this issue is a red herring. Whether or not the security guard contacted him is irrelevant; the undisputed fact remains that the nurse did contact grievant and gave him sufficient information to know that a hazardous situation existed.

Third, grievant states that he did not know that three other patients remained in the room after the box was ripped loose. This is irrelevant because grievant knew that patients in the hospital are able to move about. There was nothing to prevent a patient from another room from coming into the room where the live wires were exposed.

Finally, grievant points out that the supervisor called him at 9:00 a.m. to advise that he was going to the hospital to address the problem. Grievant fails to recognize that the supervisor was going to the facility *only* because grievant had not responded to the call. Had grievant responded when called, or least advised that he was on the way, there would have been no need for the supervisor to come to the hospital.

Grievant has not identified any constitutional provision, statute, regulation, or judicial decision as a basis to challenge the hearing officer's conclusions of law. Grievant takes issue with certain Findings of Fact, and with the hearing officer's Opinion. His disagreements, when examined, simply contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, or the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

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 February 28, 2006.

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.[13]

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David J. Latham, Esq.
Hearing Officer

[13] 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).