Issue: Group II Written Notice with suspension (misuse of state property or records); Hearing Date: 01/04/07; Decision Issued: 01/05/07; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8456; Outcome: Agency upheld in full

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8456

Hearing Date: January 4, 2007
Decision Issued: January 5, 2007

PROCEDURAL ISSUE

Grievant and a co-grievant filed individual grievances from separate but identical disciplinary actions stemming from the same offense. The Director of the Department of Employment Dispute Resolution (EDR) determined that consolidation of the two grievances was appropriate and practical.[1] Accordingly, the hearing officer conducted one hearing and gave each grievant ample opportunity to present her individual case. Because there are some differences in each grievant's situation, and to preserve individual appeal rights, a separate decision is being rendered for each grievant.

APPEARANCES

Grievant
Co-Grievant
Warden
Advocate for Agency
One witness for Agency

[1] *Consolidation Ruling of Director*, Nos. 2007-1465 & 2007-1466, November 13, 2006.

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

Grievant filed a timely grievance from a Group II Written Notice for unauthorized use or misuse of state property or records.[2] As part of the disciplinary action, grievant was suspended for one day. The grievance proceeded through the resolution steps; when the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.[3] The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for two years as a licensed practical nurse (LPN).[4]

Current agency policy dictates that immunizations require an order, signed by a practitioner[5] in the patient's medical record.[6] During a staff meeting, the nurse manager informed her staff of this policy when it was issued. The policy was placed in a medical manual in the nurses' station. The nursing staff is required to read and be familiar with all policies in the medical manual.[7] Prior to issuance of this policy in June 2005, the practice at this facility was that LPNs were administering immunizations to inmates without orders from a physician or nurse practitioner. Policy also requires that a count of syringes and needles be made at the beginning of each shift and recorded on a Syringe/Needle Count Form. The form is also used to document the number of syringes and needles used and/or added to inventory. When employees require an immunization, they are referred to outside facilities, such as a private doctor's office or hospital.

Grievant and co-grievant work on the evening shift from 3:00 p.m. to 11:30 p.m. On August 1, 2006, grievant told another LPN (Co-Grievant) that she was attending classes to work towards earning registered nurse (RN) status and that

---

[2] Agency Exhibit 2. Group II *Written Notice*, issued August 11, 2006.
[3] Agency Exhibit 2. *Grievance Form A*, filed September 8, 2006.
[4] Grievant had previously worked at the facility as a contract LPN for four years.
[5] Agency Exhibit 4. Procedure DOP 715, Pharmacy, July 3, 2000 defines "practitioner" as "a physician, dentist, physician's assistant or licensed nurse practitioner who is licensed to prescribe and administer drugs under the laws of this Commonwealth." LPNs are not "practitioners," and are not licensed to prescribe and administer drugs in Virginia. *See* Va. Code §§ 54.1-2900 et seq. and 54.1-3000 et seq. *See also* 18 VAC 90-20-300, *Regulations Governing the Practice of Nursing*, July 26, 2006, which provides that the license of a nurse may be denied, revoked or suspended for unprofessional conduct which is defined, in part, as performing acts beyond the limits of the practice of practical nursing and, obtaining drugs for personal or unauthorized use.
[6] Agency Exhibit 6. *Standard Treatment Guidelines*, revised June 2005.
[7] This requirement is contained in the Employee Work Profile (EWP) Work Description for all nurses.

a requirement of entry into the program is that she have a current tetanus toxoid immunization. Grievant asked co-grievant if she would administer a tetanus immunization and the co-grievant agreed. Grievant knew that the agency was paying for her RN classes and assumed that, if the immunization was required to attend class, the agency would pay for the immunization as well. The co-grievant used agency tetanus vaccine and needle to administer the immunization at the agency facility. It is generally and widely known that drugs and vaccines in the medical department are for inmate use – not employee use.[8] Neither grievant nor co-grievant recorded the needle usage and disposal on the Syringe/Needle Count Form.[9] Grievant's workload was normal on the evening of August 1, 2006.

The following morning, August 2, 2006, the nurse manager (RN) was advised that there was a discrepancy in the syringe/needle count. She called grievant at home and asked whether she had used a needle the preceding evening. Grievant answered affirmatively and told the manager that she had asked co-grievant to give her a tetanus immunization. The manager said she needed to know so that she could correct the needle count form and told her that tetanus shots are only for inmates.

On August 7, 2006, the nurse manager asked grievant to write an incident report as documentation of why she received the immunization. On August 11, 2006, after consulting with the warden, human resources, and the central region nurse, the manager issued a Group II Written Notice and suspended grievant for one day. Prior to issuance of the disciplinary notice and suspension, the manager did not give grievant: an oral or written notice of the offense, an explanation of the agency's evidence in support of the charge, or a reasonable opportunity to respond.[10] The manager acknowledged that she was not aware of the due process requirement in the *Standards of Conduct* policy.

There have not been any other instances of nurses giving employees unauthorized immunizations. In one case, the central regional nurse had authorized giving influenza vaccine to corrections officers who worked in the medical department. One nurse gave the vaccine to officers before giving it to inmates.

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

[8] There are specified exceptions (For example, diphtheria and hepatitis B) that have been authorized by agency management for staff protection.

[9] Agency Exhibit 3. *Syringe/Needle Count Form*, July 27 through August 4, 2006.

[10] Agency Exhibit 5. Section VIII.A, Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005, requires that prior to any disciplinary suspension, an employee shall be given due process by providing 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.

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, 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 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 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 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 XI of the DOC *Standards of Conduct* addresses Group II offenses, which are defined identically to the DHRM *Standards of Conduct*.[13] Unauthorized use or misuse of state property or records is a Group II offense.

---

[11] § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

[12] Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

[13] Agency Exhibit 5. Operating Procedure 135.1*, Standards of Conduct,* September 1, 2005.

The facts in this case are undisputed. Grievant readily acknowledges that she asked for and received an inoculation from a co-worker using agency tetanus vaccine and needle. She also admits that she did not have authorization either to take the drug and supply, or to receive the inoculation. These actions fit squarely within the Group II offense of unauthorized use of state property. Grievant also acknowledges that she did not read the policy on treatment guidelines - a requirement of her EWP as well as a verbal directive from the manager.

When the nurse manager documented the use of the needle the following morning, the manager had not personally observed disposal of the needle since grievant had disposed of it the preceding evening. While this is correct, the instructions on the form state that the signature documents *only* that the inventory has been physically counted and the total on hand is accurately listed. The instructions do not state that the person signing the form must have personally witnessed disposal of the needle. Rather, the instructions state that disposals must be observed and documented by two staff members. Thus, it is not necessary that the person certifying the inventory count personally observe needle disposal as long as two other staff members did observe the disposal. For the form to be technically correct, grievant and co-grievant should have documented the disposal by initialing in the rightmost column of the form. In this case, the nurse manager relied on grievant and co-grievant's oral statements that they had disposed of the needle and initialed the form for them. Her decision to do so is within the prerogative of a manager given the circumstances herein.

Grievant argues that she did not know that it was wrong to receive the inoculation. Pursuant to the laws and regulation of the Commonwealth, grievant's understanding of the limits of an LPN's authority is erroneous. As stated in footnote 4, an LPN does not have authority to administer drugs, and doing so without proper authorization is unprofessional conduct. Moreover, obtaining drugs and supplies for personal or unauthorized use is also prohibited. If this incident had been reported to the Board of Nursing, grievant would be subject to sanctions up to and including loss of her nursing license.

Concern was expressed during the hearing that ten days between the offense and issuance of discipline was too long. The *Standards of Conduct* provides that as soon as a supervisor becomes aware of an employee's unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior.[14] Management should issue a written notice as soon as possible after an employee's commission of an offense.[15] However, management may not be immediately aware that an offense has occurred or that a particular action constitutes an offense. Once the agency learns of an offense, investigates and evaluates it, corrective action should be taken as soon as possible. In the

[14] Agency Exhibit 5. Section VI.B. Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005.
[15] Agency Exhibit 5. Section XI.C.1., *Id.*

context of all disciplinary cases adjudicated by this hearing officer over many years, ten days is actually a fairly short time between offense and discipline.

In her grievance, grievant raised six issues in addition to challenging the disciplinary action. First, she asserts that she has received negligent supervision and training; however, she failed to present any evidence to support these assertions. Moreover, grievant knew, or reasonably should have known, that her offense was contrary to law, regulations, and agency policy. Next, grievant argues that the disciplinary action was unfair; that issue is addressed below in the Mitigation section.

Grievant's fourth issue is an allegation of racial discrimination because her supervisor is a different race from grievant. To sustain a claim of discrimination, grievant must show that: (i) she is a member of a protected group; (ii) she suffered an adverse job action; (iii) she was performing at a level that met her employer's legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee's protected classification.[16] Grievant is white and therefore not a member of a protected racial group. While she meets the second and third prongs of this test because she was disciplined, and was performing at a satisfactory level, there is no credible evidence that the decision to discipline was based on grievant's race. Accordingly, grievant has not met either the first or fourth prong of the four-part test to establish a claim of discrimination. Moreover, it should be noted that the co-grievant, who received an identical disciplinary action, is black and the same race as the manager. Therefore, grievant has failed to prove that the agency discriminated against her.

Grievant's fifth issue is that the disciplinary action was arbitrary and capricious; that issue is addressed by the comments in the Mitigation section, *infra.* Grievant's sixth issue alleges a hostile working environment. To establish such a claim, grievant must prove that: (i) the conduct was unwelcome; (ii) the harassment was based on race; (iii) the harassment was sufficiently severe or pervasive to create an abusive work environment; and (iv) there is some basis for imposing liability on the employer. Grievant cited as unwelcome conduct that the nurse manager had given her written counseling because grievant did not speak with her or a nurse when she called in sick. However, the fact is that the manager had previously spoken to grievant about this requirement. When grievant again failed to follow instructions, the supervisor sent her an e-mail to document the warning. While grievant may find counseling unwelcome, a manager is obliged to counsel employees when they fail to follow instructions. Assuming, for the sake of argument, that any other supervisory conduct was unwelcome, grievant has not shown that her race was a factor, or that the conduct was severe or pervasive. Therefore, grievant has not proven that a hostile work environment existed.

[16] *Cramer v. Intelidata Technologies Corp*., 1998 U.S. App Lexis 32676, p6 (4th Cir.1998) (unpub).

The agency did not follow its own policy when it issued the disciplinary action because the manager failed to give grievant procedural due process before suspending her. However, while the agency erred, that error has now been remedied by this hearing. Prior to this hearing, grievant was given all of the agency's evidence, and during the hearing grievant had ample opportunity to present her case.

Mitigation

The normal disciplinary action for a Group II offense is a Written Notice or a Written Notice and up to 10 days suspension. Grievant acknowledges that she made an error but believes that the disciplinary action was too harsh and that a verbal counseling would have been more appropriate. The policy provides for reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant does not have long service but does have otherwise satisfactory work performance. The agency considered these factors when it imposed only a one-day suspension.

In many cases, the agency can issue either the disciplinary action prescribed by the *Standards of Conduct* or it can issue a lesser discipline or even counseling if circumstances warrant. In this case, the agency considered the offense to be sufficiently serious to warrant imposition of the prescribed discipline - a Group II Written Notice. The agency felt that administering medicine without a physician's order was a significant offense. The agency's position is supported by the fact that this offense is a violation of state law and could result in loss of grievant's nursing license. The agency also concluded that use of medicine intended for inmate use only was likewise a serious offense. Grievant knew, or reasonably should have known, that using state property (inoculation) for personal use is, in reality, theft or unauthorized removal of state property – a Group III offense. Therefore, it is concluded that the agency's decision was within the limits of reasonableness.[17]

DECISION

The decision of the agency is affirmed.

The Group II Written Notice and one-day suspension issued on August 11, 2006 is hereby UPHELD.

[17] *Cf.* Davis v. Department of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.[18] You must file a notice of appeal with the clerk of the circuit court in the

[18] 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).

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[19] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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]

S/David J. Latham

_____

David J. Latham, Esq.
Hearing Officer

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