

Issues: Group I Written Notice (abuse of State time), Group II Written Notice (failure to follow policy), Group III Written Notice (falsification of records), and Termination; Hearing Date: 03/16/11; Decision Issued: 04/13/11; Agency: DOC; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 9517; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 04/27/11; Reconsideration Decision issued 05/16/11; Outcome: Original Decision affirmed; Administrative Review: EDR Ruling Request received 04/27/11; EDR Ruling No. 2011-2972 issued 06/07/11; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 04/27/11; DHRM Ruling issued 06/24/11; Outcome: AHO’s decision affirmed.**

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

**In re: Case Number 9517**

**Hearing Date: March 16, 2011**  
**Decision Issued: April 13, 2011**

**APPEARANCES**

Grievant  
Agency Representative  
4 Witnesses for Agency  
1 Witness for Grievant

**ISSUE**

“Was the Group I, II and III Written Notice with termination issued to Grievant for failure to count controlled medication, falsifying a medication count sheet and abuse of state time proper?”

**FINDINGS OF FACTS**

1. Grievant was employed by the Department of Corrections as a Registered Nurse since December 3, 2007.

2. The Grievant was a Registered Nurse at the Department’s facility for criminally impaired. She received a departmental written notice and is grieving a Group I written notice for abuse of State’s time, coupled with a Group II written notice for failure to follow instructions and/or policy; and a Group III written notice for falsifying records.

3. There was no supervisor present after 10:45 p.m., on February 21, 2010. From the record on February 21, 2010, Grievant’s shift was from 4:00 p.m. until 12:30 a.m. She left at 12:00 a.m. without clearing with her Supervisor, having worked through her mandatory 30 minute lunch break. Grievant turned her keys in at 10:45 p.m. and her black box at 11:45 p.m.

4. Neither the key watch system which provided the time of Grievant’s keys turn in nor the TSI system which provided one “black box” for locating employees is

designed to be a personnel timing system, but they provide corroboration for acts prior to a nurse's departure from the facility.

5. Grievant admitted to her nursing supervisor that contrary to policy she did not count controlled substances, pills and sharps and syringes with another nurse because he was out of the building. Grievant signed the count log leaving the second signature block open.

6. The issue of counting controlled substances as set by policy was particularly sensitive because a nurse was found to have taken narcotics. He was dealt with through the court system.

7. Grievant did not report, as she was instructed, that she was leaving early on her shift to the director of nurses by calling her at home and by placing paperwork in the system.

8. Grievant maintained all of her actions were of the type regularly done by other nurses and overlooked.

9. From the Grievant's testimony, sharps, syringes and controlled substances would not be counted simultaneously by on-coming/off-going nurses. The controlled substances would be counted by the departing nurse and signed for and the oncoming nurse would count the controlled substances and sign off.

10. On February 21, 2010, official policy was published requiring counting controlled substances by two nurses present at the same time. Grievant admitted to having violated the policy.

#### **APPLICABLE LAW OR POLICY AND OPINION**

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4<sup>th</sup> Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4<sup>th</sup> Cir. 1997))].

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)].

Operating Policy 720.5, states "Controlled substances shall be counted and documented on the count sheets at each nursing shift change by the nurse going off duty and the nurse coming on duty."

Operating Procedure 135.1 lists abuse of state time as unauthorized time away from work as a Group I offense, failure to follow Supervisor's instructions as a Group II offense and falsifying records as a Group III offense.

## DECISION

The Group I – Abuse of State Time – Grievant admitted leaving early from her shift without permission or documenting such early leave. She believed this to be alright because there was no supervising nurse on duty and she believed she should not call the nursing supervisor at home.

Grievant left work before the end of her shift without permission or filing the required paperwork. This was an abuse of State Time.

Grievant clearly violated Operating Policy 720.5 even after it was published by not adhering to the two nurse count policy.

Grievant admitted she violated policy and supervisor's instructions by not simultaneously dual counting controlled substances and falsified records by signing the medication control sheet so that it appeared there had been simultaneous dual counting.

Grievant's actions have caused the department to question her veracity.

The Group I, II and III Written notices were proper, as was the termination.

## APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

### Administrative Review

This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. 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.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia, 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of DEDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the DEDR Director, Main Street Centre, 600 East Main, Suite 301, Richmond, Virginia, 23219 or faxes to (804) 786-0111.

A party may make more than one type of request for review. All requests 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**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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 DEDR or DHRM, 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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

*S/Thomas J. McCarthy*

---

**Thomas J. McCarthy, Jr.**  
**Hearing Officer**

May 16, 2011

RE: [Grievant]/Department of Corrections Grievance Hearing  
Case No. 9517

Dear [Grievant]:

As you have requested, I have reviewed the evidence presented by you and your advocate at your grievance hearing.

You admitted leaving early from your shift without submitting the proper paper work or notifying your supervisor. This is an abuse of state time. You admitted not following policy at the institution as instructed, not counting controlled substance medication with the nurse on the shift after yours and falsifying the medication count sheet to make it appear the count was properly done according to policy.

For the above reasons you were terminated. After the review, I respectfully refuse to change my opinion upholding your termination.

You have exercised your appeal rights by appealing to the Director of the Department of Employment Dispute Resolution.

---

Thomas J. McCarthy, Jr. - Hearing Officer

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of the  
Department of Corrections

June 24, 2011

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9517. The grievant is challenging the decision because she believes the hearing decision is inconsistent with several policies. For the reasons stated below, we will not interfere with the application of this decision with respect to this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

FACTS

In his discussion of Issues, the hearing officer, asked the following:

Was the Group I, II and III Written Notice with termination issued to Grievant for failure to count controlled medication, falsifying a medication count sheet and abuse of state time proper?

In his Findings of Facts, the hearing officer stated the following:

1. Grievant was employed by the Department of Corrections as a Registered Nurse since December 3, 2007.
2. The Grievant was a Registered Nurse at the Department's facility for criminally impaired. She received a departmental written notice and is grieving a Group I written notice for abuse of State's time, coupled with a Group II written notice for failure to follow instructions and/or policy; and a Group III written notice for falsifying records.
3. There was no supervisor present after 10:45 p.m., on February 21, 2010. From the record on February 21, 2010, Grievant's shift was from 4:00 p.m. until 12:30 a.m. She left at 12:00 a.m. without clearing with her Supervisor, having worked through her mandatory 30 minute lunch break. Grievant turned her keys in at 10:45 p.m. and her black box at 11:45 p.m.
4. Neither the key watch system which provided the time of Grievant's keys turn in nor the TSI system which provided one "black box" for locating employees is designed to be a personnel timing system, but they provide corroboration for acts prior to a nurse's departure from the facility.
5. Grievant admitted to her nursing supervisor that contrary to policy she did not count controlled substances, pills and sharps and syringes with another nurse because he was out of the building. Grievant signed the count log leaving the second signature block open.
6. The issue of counting controlled substances as set by policy was particularly sensitive because a nurse was found to have taken narcotics. He

was dealt with through the court system.

7. Grievant did not report, as she was instructed, that she was leaving early on her shift to the director of nurses by calling her at home and by placing paperwork in the system.

8. Grievant maintained all of her actions were of the type regularly done by other nurses and overlooked.

9. From the Grievant's testimony, sharps, syringes and controlled substances would not be counted simultaneously by on-coming/off-going nurses. The controlled substances would be counted by the departing nurse and signed for and the oncoming nurse would count the controlled substances and sign off.

10. On February 21, 2010, official policy was published requiring counting controlled substances by two nurses present at the same time. Grievant admitted to having violated the policy.

### **APPLICABLE LAW OR POLICY AND OPINION**

\*\*\*\*

Operating Policy 720.5, states "Controlled substances shall be counted and documented on the count sheets at each nursing shift change by the nurse going off duty and the nurse coming on duty."

Operating Procedure 135.1 lists abuse of state time as unauthorized time away from work as a Group I offense, failure to follow Supervisor's instructions as a Group II offense and falsifying records as a Group III offense.

### **DECISION**

The Group I – Abuse of State Time - Grievant admitted leaving early from her shift without permission or documenting such early leave. She believed this to be alright because there was no supervising nurse on duty and she believed she should not call the nursing supervisor at home.

Grievant left work before the end of her shift without permission or filing the required paperwork. This was an abuse of State Time.

Grievant clearly violated Operating Policy 720.5 even after it was published by not adhering to the two nurse count policy.

Grievant admitted she violated policy and supervisor's instructions by not simultaneously dual counting controlled substances and falsified records by signing the medication control sheet so that it appeared there had been simultaneous dual counting.

Grievant's actions have caused the department to question her veracity.

The Group I, II and III Written notices were proper, as was the termination.

\*\*\*\*



## DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In her request to this Department for an administrative review, the grievant asserts that because agency 720.5 was misinterpreted by her agency, she was improperly terminated. That policy, in relevant part, states the following:

- b. Controlled substances shall be counted and documented on the count sheet at each nursing shift change by the nurse going off duty and the nurse coming on duty.

According to the grievant, the above policy was interpreted one way before the incident on February 22, 2010 and another way after February 22, 2010. That issue was raised at the hearing; however, the hearing officer evaluated the evidence and determined that, the grievant had violated policy, namely that the sign off page was falsified. The hearing officer wrote, in part, "Grievant clearly violated Operating Policy 720.5 even after it was published by not adhering to the two nurse count policy. Grievant admitted she violated policy and supervisor's instructions by not simultaneously dual counting controlled substances and falsified records by signing the medication control sheet so that it appeared there had been simultaneous dual counting." For this, she was issued a Group III Written Notice.

In addition, the grievant was charged with abuse of state time and issued a Group I Written Notice. Finally, she admitted to not counting controlled medication with another nurse and was issued a Group II Written Notice. The accumulation of the Written Notices resulted in termination.

In the instant case, it is the opinion of this Department that the hearing officer's ruling is consistent with the provisions of the relevant policies. Based on the above reasons, this Agency will not interfere with the application of this hearing decision.

---

Ernest G. Spratley  
Assistant Director,  
Office of Equal Employment Services