

Issue: Administrative Review/ grievant maintains that agency failed to demonstrate that disciplinary action was warranted; witnesses with critical information were not called; hearing officer improperly interpreted state and/or agency policy; Ruling Date: August 11, 2005; Ruling #2005-1068; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: hearing officer is ordered to reopen the hearing for the purpose of receiving testimony from one witness.

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

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation  
And Substance Abuse Services  
Ruling No. 2005-1068  
August 11, 2005

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8063. The grievant claims that the hearing officer's written decision and conduct at hearing do not comply with the grievance procedure. Specifically, the grievant maintains that: (1) the agency failed to demonstrate by a preponderance of the evidence that its disciplinary action was warranted and appropriate; (2) many witnesses with critical information were not called and the hearing was rushed; and (3) the hearing officer improperly interpreted state and/or agency policy in rendering his decision.

FACTS

The grievant is employed as a Registered Nurse II with the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency). On January 5, 2005, the grievant inadvertently left her keys in the employee bathroom.<sup>1</sup> Because the bathroom door locks automatically upon closing, the grievant borrowed the keys of another registered nurse (the other RN) to unlock the restroom so that she could retrieve her own keys.<sup>2</sup> The grievant claims that she returned the other RN's keys to him after retrieving her own keys from the bathroom, a claim the other RN denies.<sup>3</sup> The other RN's keys subsequently went missing and eventually ended up in the hands of a patient, who used the keys to escape from the facility.<sup>4</sup>

As a result of the January 5, 2005 events, the grievant was issued a Group II Written Notice for "[f]ailure to comply with applicable established policy #021-12 on missing keys, which resulted in a negative impact on patient care outcome." The grievant challenged the disciplinary action by initiating a grievance. At the third management resolution step of the grievance process, the Group II Written Notice was reduced to a Group I Written Notice. The Group I Written Notice charges the grievant with "[v]iolation of [h]ospital [p]olicies 021-12<sup>5</sup> and 053-28<sup>6</sup> for not reporting lost keys or

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<sup>1</sup> See Decision of Hearing Officer, Case No. 8063, page 3.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at p. 4.

<sup>4</sup> *Id.*

<sup>5</sup> Policy EC 021-12 states that "[a]ll employees will keep all keys.....securely on their person, at all times, when not in use." The policy further states that "[w]hen hospital keys are lost or misplaced, the employee

following standard procedures in the event of missing keys. Employee admits to leaving keys unattended.”

The grievance was subsequently qualified for hearing and a hearing was held on June 1, 2005. In his decision dated June 6, 2005, the hearing officer found the Group I Written Notice warranted and appropriate because (1) the grievant “left her keys unattended for a period of time, thus starting a chain of events that led to the escape of a patient;” (2) “when [the grievant] learned that the keys were missing, and that she was purportedly the last employee to have possession of the keys, she did not immediately notify her supervisor;” and (3) “grievant reported that the keys had been found when, in fact, they had not been found.”<sup>7</sup>

In a June 27, 2005 reconsideration opinion, the hearing officer upheld his June 6, 2005 decision finding no basis upon which to reopen the hearing.<sup>8</sup> In the reconsideration opinion, the hearing officer opines that if one were to view the facts in a light most favorable to the grievant and accept the grievant’s testimony that she returned the other RN’s keys to him and he misplaced the keys, the outcome would be the same because the grievant (1) did not keep her own keys in her possession at all times; and (2) incorrectly reported that the other RN’s keys had been found when they had not been found.

#### DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions...on all matters related to procedural compliance with the grievance procedure.”<sup>9</sup> If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.<sup>10</sup>

#### *Preponderance of the Evidence*

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responsible for the missing keys will initiate the following procedure: (a) [t]he employee that is missing the keys will immediately report that information to their immediate supervisor.”

<sup>6</sup> Policy HR 053-28 is the facility’s attire policy and states that “[k]eys will never be worn around the neck of the employee and must remain in the possession of the employee at all times.” If this policy is violated, the employee is counseled and given clear reasons and expectations concerning compliance with the policy. Repeat offenders may incur progressive discipline under the Standards of Conduct.

<sup>7</sup> Decision of Hearing Officer, Case No. 8063, page 6.

<sup>8</sup> See Reconsideration Decision of Hearing Officer, Case No. 8063, page 3.

<sup>9</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>10</sup> See *Grievance Procedure Manual* § 6.4(3).

The grievant asserts that the evidence presented at hearing failed to establish that the grievant “lost her keys or anyone else’s keys.” Rather, she asserts that the evidence and testimony show that the keys of the other RN were borrowed, and returned. In support of her contention, the grievant offers the following: (1) she knew where her own keys were at all times: locked in a secure bathroom; (2) despite his testimony to the contrary, she immediately returned the keys that she had borrowed from the other RN and thus was not responsible for the loss of the other RN’s keys; and (3) the facility director’s testimony at hearing was that one charge of missing keys does not apply to the grievant since the missing keys were not hers. Further, the grievant claims that she notified others of the missing keys even though the keys were not hers. In support of this contention, the grievant maintains that the record demonstrates that (1) she told all witnesses that the other RN’s keys were missing; and (2) she notified her supervisors of the missing keys within a “very reasonable timeframe of 10 minutes,” while the other RN failed to alert his supervisor of his missing keys until much later. Finally, the grievant argues that at worst her behavior amounted to a violation of the attire policy (Policy HR 053-28) which incurs a penalty of a verbal counseling.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>11</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>12</sup> Further, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.<sup>13</sup> Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses’ credibility, and make findings of fact. Further, as long as the hearing officer’s findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

In cases involving discipline, the hearing officer must determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, “the hearing officer reviews the facts *de novo*” to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency’s discipline was consistent with law and policy and, finally, (iv) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.<sup>14</sup>

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<sup>11</sup> Va. Code § 2.2-3005.1(C)(ii).

<sup>12</sup> *Grievance Procedure Manual* § 5.9.

<sup>13</sup> Va. Code § 2.2-3005(C)(5).

<sup>14</sup> See Rules for Conducting Grievance Hearings, § VI(B).

In this case, the grievant was disciplined for violation of hospital policies EC 021-12 and HR 053-28 for not reporting lost keys or following standard procedures in the event of missing keys and for leaving her own keys unattended.

Not reporting lost keys or following standard procedures:

Policy EC 021-12 states “[w]hen hospital keys are lost or misplaced, the employee responsible for the missing keys will initiate the following procedure: (a) [t]he employee that is missing the keys will immediately report that information to their immediate supervisor.” In his original decision, the hearing officer interprets “the employee responsible for the missing keys” to mean the person to whom the keys are assigned as well as anyone who is given “temporary care, custody and control of the keys.”<sup>15</sup> Accordingly, under the hearing officer’s interpretation of policy,<sup>16</sup> if the grievant (the temporary possessor of the keys), failed to return the other RN’s keys to him, then both she and the other RN (the one to whom the keys are assigned) could each have a duty to report the missing keys. On the other hand, if the grievant did return the keys to the other RN, she would no longer have custody or control of the keys and her duty to report the missing keys would have ceased upon her return of the keys.<sup>17</sup> Therefore, to find that the grievant had engaged in misconduct warranting discipline under the hearing officer’s interpretation of Policy EC 021-12, the agency would have to prove that the grievant (1) had possession of the keys when they went missing; and (2) failed to report the missing keys.

In this case, the hearing officer concludes that the grievant had temporary possession of the other RN’s keys, but cannot determine who actually had possession of the keys when they went missing.<sup>18</sup> Because the hearing officer cannot determine who had possession of the keys when they went missing, it would appear that the agency failed to meet its burden of proving that the employee engaged in misconduct or otherwise violated Policy EC 021-12 as interpreted by the hearing officer. Additionally, it should be noted that the facility director testified at hearing that the policy on reporting missing keys (Policy EC 021-12) did not apply to the grievant because the missing keys were not her keys.

Leaving her own keys unattended and incorrectly reporting:

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<sup>15</sup> See Decision of Hearing Officer, Case No. 8063, page 6.

<sup>16</sup> It should be noted that the soundness of the hearing officer’s interpretation of policy is a question for DHRM, not this Department. As such, this Department makes no conclusions as to the accuracy of the hearing officer’s interpretation of Policy EC 021-12.

<sup>17</sup> One can presume that the hearing officer did not intend to imply that someone with temporary possession of another’s keys has an indefinite duty to report those keys should they ever become missing.

<sup>18</sup> See Decision of Hearing Officer, Case No. 8063, page 6.

In his reconsideration decision, the hearing officer states that if he accepted the grievant's testimony that she returned the other RN's keys to him, the Group I would still stand because the grievant (1) left her own keys unattended; and (2) incorrectly reported that the other RN's keys had been found.<sup>19</sup> It is undisputed that the grievant left her keys unattended. Accordingly, the hearing officer's conclusion that the grievant violated Policy HR 053-28 by leaving her keys unattended was appropriate and based upon evidence in the record. However, as alleged by the grievant and as pointed out by the hearing officer in his reconsideration opinion,<sup>20</sup> a violation of Policy HR 053-28 suggests a verbal counseling for a first offense.<sup>21</sup> As such, it appears that in order to uphold the Group I Written Notice, the agency would have to show that the grievant engaged in some misconduct other than violation of Policy HR 053-28. The other basis upon which the hearing officer upholds the discipline in his reconsideration opinion is because the grievant incorrectly reported that the other RN's keys had been found when they had not been found. However, the hearing officer's reconsideration opinion fails to state why the grievant's incorrect reporting, if true,<sup>22</sup> rises to the level of a Group I disciplinary action.

Accordingly, the hearing officer is ordered to reconsider his decision in light of the above evidence, and to clarify in his decision the grounds in the record for his findings.

#### *Failure to Allow Witness Testimony and Rushing the Hearing*

Under the Rules for Conducting Grievance Hearings, "[t]he hearing officer is responsible for limiting the number of witnesses called by either party whenever the testimony would be merely cumulative. However, when limiting the number of witnesses, the hearing officer should be careful not to exclude testimony that may be of greater weight or probative value than that already presented."<sup>23</sup>

The grievant asserts that the hearing officer's refusal to allow testimony from a nursing supervisor (Witness 1) was in error.<sup>24</sup> Witness 1 was not at the June 1<sup>st</sup> hearing, but had agreed to testify by telephone that day. Accordingly, around 1:30 p.m. the hearing officer tried to contact Witness 1 by telephone. When there was no answer, the hearing proceeded with the next witness in the case; the grievant. During the grievant's testimony, Witness 1 returned the hearing officer's call; however, the hearing officer

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<sup>19</sup> See Reconsideration Decision of Hearing Officer, Case No. 8063, page 3.

<sup>20</sup> *Id.* at p. 4.

<sup>21</sup> See Policy HR 053-28, page 3.

<sup>22</sup> As outlined below, testimony from a disallowed witness (Witness1) could shed light on the grievant's contention that she was merely relaying information regarding the whereabouts of the keys as told to her and did not intentionally misinform Witness 1 as to the location of the keys.

<sup>23</sup> Rules for Conducting Grievance Hearings § IV(E).

<sup>24</sup> The grievant alleges that there were other witnesses that were not permitted to testify as well. Specifically, the grievant claims that there were two other supervisors that she wanted to call to testify at hearing. The grievant, however, did not attempt to call these witnesses herself at hearing and made no objection during the hearing to the exclusion of these witnesses.

allegedly disconnected the phone and refused to take her call at that time. Upon the cessation of the grievant's testimony, the hearing officer began questioning the grievant's representative as to the necessity of Witness 1's testimony. Specifically, the hearing officer asked if Witness 1 would be able to provide information not contained in her written statement or in contrast to what he had already heard from other witnesses. After discussing the issue with the grievant's representative for quite some time and while recognizing that they may not be able to reach Witness 1 given her other afternoon commitments, the hearing officer called Witness 1. Witness 1 answered the phone, but advised the hearing officer that she was on her way to an appointment and could not talk at that time.

After hanging up the phone, the hearing officer opined that he is not convinced that the testimony would be all that probative and again asks the grievant to "make a proffer." In response, the grievant's representative requested that they talk to Witness 1 on another day. The hearing officer denied this request stating that the Rules for Conducting Grievance Hearings require hearings to take place on one day. The grievant's representative continued to try and convince the hearing officer as to the importance of Witness 1's testimony. Specifically, the grievant's representative listed several questions that he would like to ask of Witness 1. Despite the grievant's arguments, the hearing officer ultimately disallowed Witness 1's testimony and denied a continuance of the hearing because the information sought by the grievant was (1) either contained in Witness 1's written statement; or (2) had already been provided by other witnesses, thereby presumably making Witness 1's testimony merely cumulative.

It appears that the hearing officer correctly concluded that much of the information the grievant desired to elicit from Witness 1 was merely cumulative. However, as the grievant pointed out to the hearing officer, there was some crucial information that was not covered in Witness 1's written statement and could potentially corroborate the grievant's earlier testimony. Specifically, in her grievance and at hearing, the grievant claimed that the other RN told her the keys had been found in the medication room. The grievant relayed this information to Witness 1 over the telephone. According to the grievant, the other RN was present during the grievant's telephone conversation with Witness 1 and participated in that conversation. In particular, while on the phone with Witness 1, the grievant allegedly asked the other RN, who was standing nearby, where he had found his keys. The other RN allegedly replied that he had found the missing keys in the medication room. The grievant claims that Witness 1 could have possibly heard the other RN inform the grievant that he had found the keys and thus corroborate the grievant's contention that she was merely relaying information to Witness 1 and did not deliberately misinform Witness 1 as to the recovery of the keys. Witness 1's testimony as to this issue could be crucial given the hearing officer upheld the discipline, in part, based on the grievant reporting that the keys had been found when they had not been found.<sup>25</sup> Additionally, the grievant alleges that Witness 1's testimony

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<sup>25</sup> See Decision of Hearing Officer Case No. 8063, page 6 and Reconsideration Decision of Hearing Officer, Case No. 8063, page 3.

was needed to potentially establish a timeline to determine when the keys went missing and thus, who lost the keys. As stated above, who lost the keys is important in determining whether the grievant engaged in misconduct.

In light of the above, this Department concludes that Witness 1's testimony was relevant and probative and not merely cumulative. Accordingly, the hearing officer had a duty to receive such evidence.<sup>26</sup> However, given Witness 1's unavailability on the afternoon of the hearing, the question remains whether the hearing officer abused his discretion by not continuing or postponing the hearing to another day.

The grievance procedure requires that grievance hearings "must be held and a written decision issued within 35 calendar days of the hearing officer's appointment."<sup>27</sup> The *Rules for Conducting Grievance Hearings* (the *Rules*) and the grievance procedure permit a hearing officer to extend the 35 day timeframe upon a showing of "just cause."<sup>28</sup> "Just cause" in this context is defined as "circumstances beyond a party's control."<sup>29</sup> Examples of "circumstances beyond a party's control" include, but are not limited to, accident, illness, or death in the family.<sup>30</sup> The Virginia Court of Appeals has further indicated that the hearing officer's decision on a motion for continuance should be disturbed only if (1) the hearing officer's refusal to grant the extension was an abuse of discretion;<sup>31</sup> and (2) the objecting party suffered specific prejudice by the refusal to grant the continuance.<sup>32</sup> Further, courts have found that the test for whether there was an abuse of discretion in denying a continuance is not mechanical; it depends mainly upon the reasons presented at the time that request is denied.<sup>33</sup> While not dispositive for purposes of the grievance procedure, the standards set forth by the courts is nevertheless instructive and has been used by this Department in past rulings.<sup>34</sup>

The EDR Director has the authority to review and render final decisions on issues of hearing officer compliance with the grievance procedure, including whether the hearing officer abused his discretion by failing to grant a party's request for an extension

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<sup>26</sup> Va. Code § 2.2-3005(C)(5).

<sup>27</sup> *Grievance Procedure Manual*, § 5.1.

<sup>28</sup> See *Grievance Procedure Manual*, §§ 5.1 and 5.4 and *Rules for Conducting Grievance Hearings*, § V(C).

<sup>29</sup> *Rules for Conducting Grievance Hearings*, § III (B).

<sup>30</sup> *Id.*

<sup>31</sup> "Abuse of discretion" in this context has been defined by the courts as "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *United States v. Bakker*, 925 F.2d 728, 735 (4<sup>th</sup> Cir. 1991) quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983).

<sup>32</sup> Cf. *Venable v. Venable*, 2 Va. App. 178 (1986). "The decision whether to grant a continuance is a matter within the sound discretion of the trial court. Abuse of discretion and prejudice to the complaining party are essential to reversal." *Venable* at 181, citing to *Autry v. Bryan*, 224 Va. 451, 454, 297 S.E.2d 690, 692 (1982). See also *United States v. Bakker*, 925 F.2d 728 (4<sup>th</sup> Cir. 1991) "to prove that the denial of the continuance constitutes reversible error, [the objecting party] must demonstrate that the court abused its 'broad' discretion and that he was prejudiced thereby." *Bakker* at 735 citing to *United States v. LaRouche*, 896 F.2d 815, at 823-25 (4<sup>th</sup> Cir. 1990).

<sup>33</sup> See *LaRouche*, at 823.

<sup>34</sup> See e.g. Compliance Ruling of Director ## 2003-130, 2002-213, and 2001-124.



of the 35 calendar day timeframe.<sup>35</sup> In light of the rules and standards set forth above, however, the EDR Director will only disturb a hearing officer's decision to deny a request for an extension of the 35 calendar day timeframe if it appears that (1) circumstances beyond the party's control existed justifying such an extension; (2) the hearing officer's refusal to grant the extension of time was an abuse of his discretion; and (3) the objecting party suffered undue prejudice.

In this case, at the grievant's request, Witness 1 was ordered by the hearing officer to appear at the June 1<sup>st</sup> hearing. The grievant allegedly learned on the day of the hearing that Witness 1 would not be appearing in person, but would be testifying by telephone instead.<sup>36</sup> Around 1:30 p.m., Witness 1 was called for her testimony. When she did not answer the phone, the hearing resumed with the grievant's testimony. When Witness 1 tried to return the hearing officer's call, the hearing officer allegedly disconnected the phone and refused to contact her back until the completion of the grievant's testimony. Upon completion of the grievant's testimony, the hearing officer discussed at length with the grievant's representative the need for Witness 1's testimony, took a four minute break, and then decided to call Witness 1. By the time the call was made, Witness 1 was on her way to an appointment and could not speak to the hearing officer.

Based on the foregoing, it appears that Witness 1's unavailability to testify on the day of the hearing was beyond the grievant's control, thus justifying an extension of the 35 calendar day requirement. Further, the grievant's request to schedule Witness 1's testimony on another day seemed reasonable given the potential importance of Witness 1's testimony and the relatively little amount of time it would have taken to schedule and take Witness 1's testimony by telephone on a subsequent day. Moreover, although most hearings generally should last no longer than 8 hours, hearings may be divided into more than one session and may continue beyond 8 hours if "necessary to a full and fair presentation of the evidence by both sides."<sup>37</sup> Accordingly, it appears that the hearing officer abused his discretion by refusing to allow Witness 1 to testify on another day. Finally, the grievant has suffered undue prejudice by being denied the opportunity to present potentially outcome-determinative evidence.

Accordingly, the hearing officer is ordered to reopen the hearing for the purpose of receiving testimony from Witness 1. After taking such testimony, the hearing officer shall modify his decision accordingly.

### *Policy Interpretation*

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<sup>35</sup> Va. Code § 2.2-1001 (5).

<sup>36</sup> The grievant had no objection to this method of testimony.

<sup>37</sup> See Rules for Conducting Grievance Hearings, § III(B).

The grievant claims that the hearing officer's interpretation of Policy EC 021-12 is unreasonable. The hearing officer's interpretation of state and/or agency policy is not an issue for this Department to address. Rather, the Director of DHRM (or her designee) has the authority to interpret all policies affecting state employees, and has the authority to assure that hearing decisions are consistent with state and agency policy.<sup>38</sup> Only a determination by that agency could establish whether or not the hearing officer erred in his interpretation of state and agency policy. In addition to her appeal to this Department on procedural grounds, the grievant has properly appealed to DHRM on the basis of policy. If DHRM finds that the hearing officer's interpretation of policy was not correct, DHRM may direct the hearing officer to reconsider his decision in accordance with its interpretation of policy.<sup>39</sup>

#### APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this Department orders the hearing officer to reopen the hearing for the purpose of taking testimony from Witness 1 and to reconsider his decision and to clarify in his decision the grounds in the record for his findings. Additionally, Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>40</sup> Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.<sup>41</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>42</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>43</sup>

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Claudia T. Farr  
Director

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<sup>38</sup> Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

<sup>39</sup> *Grievance Procedure Manual* § 7.2 (a)(2).

<sup>40</sup> *Grievance Procedure Manual*, § 7.2(d).

<sup>41</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

<sup>42</sup> *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

<sup>43</sup> Va. Code § 2.2-1001 (5).