

Issue: Group III Written Notice with termination (actions that seriously undermined the effectiveness of the agency and impaired reputation); Hearing Date: September 20, 2001; Decision Date: September 21, 2001; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esquire; Case Number: 5279



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Grievance No: 5279

Hearing Date: September 20, 2001
Decision Issued: September 21, 2001

APPEARANCES

Grievant
Three witnesses for Grievant
Agency Representative
Legal Representative for Agency
Seven witnesses for Agency

ISSUES

Was the grievant's conduct on July 1, 2001 subject to 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 appeal from a Group III Written Notice issued on July 20, 2001 because he had seriously undermined the effectiveness of the

agency's activities and impaired the agency's reputation by looking through a window while the occupant was unclothed and, by keeping sexually explicit material at his work station. The grievant was discharged from employment effective July 20, 2001. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

The Department of Mental Health, Mental Retardation and Substance Abuse Services (Hereinafter referred to as "agency") has employed grievant as a carpenter for 22 years. His primary job involves furniture repair as well as other general building and grounds maintenance work. On weekend evenings one person from the Buildings and Grounds Department is assigned on a rotating basis to work on the campus to attend to any maintenance problems which may require immediate attention (plumbing stoppages, air conditioning failures, etc.). On the evening of Sunday, July 1, 2001, grievant was the sole buildings and grounds person assigned to work from 4:00 p.m. to 12:00 p.m. When grievant works this shift, he usually works in the carpentry shop repairing furniture unless called out to attend to a maintenance emergency. While on duty, grievant wears dark pants, a light blue agency uniform shirt and a baseball-style cap.

The hospital facility at which grievant is employed includes several buildings in a large, campus-like setting. One of the buildings serves as a dormitory for out-of-area students and interns who are working at the hospital on a temporary basis. On the evening of July 1, 2001, four students and three occupational therapy interns were assigned to this dormitory. At 9:00 p.m., the campus dispatcher received a call from a dormitory resident that his room was too hot.¹ The grievant was directed to go to the dormitory to check the problem. He drove in a white agency pick-up truck from his carpentry shop to the dormitory at about 9:45 p.m. and determined that the air conditioning unit behind the building was operating but he did not go inside to check the room temperatures.

Shortly after 10:00 p.m., an intern walked from the front door of the building to her automobile in the parking area in front of the building. When she reached her car, she saw a black man jump off a picnic table and run toward the back of the building. The picnic table was about three feet from the side of the building and directly below a dormitory window. There is a street lamp in the parking area and a light on the front of the building. The distance from the intern's car to where she saw the man is about 75 feet. She was able only to see a profile of his face but observed that he was of slender build, wearing dark pants, a light blue shirt and a dark baseball cap. The intern returned to the building and went to the room of another intern whose bedroom window was directly above the picnic table on which she had seen the man. That intern had just taken a cold shower because it was very hot. She had come from the bathroom to her bedroom in a towel and then dressed. The venetian blinds on her bedroom window were partially but not totally closed and it was possible to

¹ Exhibit 5. *Maintenance Call-In Log*, July 1, 2001.

peer into the room from outside the window. After telling that intern what she had seen, the second intern immediately called the campus police department.

The police officer on duty received a call from the police dispatcher and immediately drove through the campus toward the dormitory. When he was within one block of the dormitory, he noticed the grievant driving away from the area in his agency white pick-up truck. The officer searched the entire area around the dormitory but did not find anyone. He then drove on several streets in the area surrounding the dormitory and on nearby public roads adjacent to that section of the campus. He did not find anyone matching the description provided by the intern. After approximately 20 minutes of searching, the police officer returned to the dormitory to interview the two interns.²

This matter was assigned to an investigator (a member of the hospital police department). She interviewed the intern who saw the person on the picnic table and ascertained, in addition to the description already provided, that the man was between 5'6" and 5'9" and that he appeared to have a mustache. The investigator drove the intern around campus to see if she could spot the perpetrator. Several buildings and ground employees were working on the grounds that day at multiple locations. The intern observed grievant at one of these worksites and identified him as the person she had seen on the picnic table. At the time of identification, grievant was wearing dark pants, light blue uniform shirt, and a dark baseball cap. Grievant is black, of slender build and has a mustache.

The investigator later interviewed grievant who told her that he had checked the air conditioner at around 10:00 p.m. on July 1, 2001. He denied peeping into the intern's room. Grievant said he had seen a man hanging around the building when he arrived. He described the man as the same height and weight as grievant, with a mustache, wearing dark pants, light blue shirt, and a dark baseball cap.³ Grievant said that he believed this man to be either an escaped patient or someone who was smoking marijuana. When asked why he did not report this suspicious person to campus police, grievant said that because the man didn't bother him, he (grievant) didn't bother the man. Following this investigation, grievant was suspended from work and asked to surrender his keys.

Grievant's carpentry shop area contains a desk and several locked cabinets. Grievant had the only key to his desk and had placed his own personal locks on the cabinets. Following his suspension, grievant's supervisor searched grievant's desk and found several pornographic magazines and several explicit pornographic photographs of nude women. In the cabinets were found several additional pornographic magazines and a pornographic videotape.⁴

² Exhibit 2. Hospital Police *Incident Report for incident of July 1, 2001*, prepared July 10, 2001.

³ Exhibit 3. Hospital Police *Investigative Report*, July 6, 2001.

⁴ See Exhibit 10 for an inventory of the pornography.

On July 13, 2001, a due process meeting was conducted by the facility director; also in attendance were the grievant, police chief, investigator and a human resources representative. During that meeting, grievant rhetorically asked, "Why would I want to look at some white woman?" Until that time, the race of the intern had been kept confidential and grievant had not been given either the identity or a description of the intern in the dormitory room. During the same meeting, grievant was confronted with the pornographic material found in

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 § 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁷

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.1-114.5 of the Code of Virginia, the Department of Personnel and Training⁸ promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. 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.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first offense normally should warrant removal [from employment].⁹

A facility policy regarding employee personal property provides, in pertinent part:

Hospital employees are also expected to refrain from bringing personal items to the work area that detract from the professional image that each individual staff member is expected to project to the patients, co-workers, hospital visitors, and the community. . . .

Hospital employees are prohibited from bringing the following items to work . . . personal videos.¹⁰

Grievant contends that he is not the person who looked into the intern's window and that anyone who has provided evidence to the contrary is not truthful. However, the preponderance of evidence demonstrates that it is the grievant's credibility that is questionable, not that of witnesses. In reaching that conclusion, the hearing officer relies on the following reasons.

⁷ § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2000.

⁸ Now known as the Department of Human Resource Management (DHRM).

⁹ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁰ Exhibit 8. Policy Statement HR 053-28, *Employee Attire and Personal Property*, effective March 1, 2001.

First, grievant was present at the dormitory shortly before the incident to check on the air conditioning. During the hearing grievant contended that he went to the dormitory at about 6:00 p.m. rather than just prior to 10:00 p.m. However, this is contradicted by both his own statement to the investigator on July 6, 2001 and by the maintenance log, which shows that the complaint was called in at about 9:00 p.m. Second, grievant was seen leaving the area of the dormitory immediately after the complaint was called in. The responding police officer searched the entire area and could not find anyone else matching the description provided by the intern who reported the incident.

Third, grievant's suggestion that he saw another person in the area who matched his own description of height, weight, build, facial hair and articles of clothing stretches credibility beyond the breaking point. While it is theoretically possible that such an identically dressed and identically sized person could have been in the area, the chances of such a coincidence are practically nil. Grievant was, in fact, the only black hospital employee on duty on the evening of July 1, 2001 dressed in dark pants, light blue uniform shirt, dark baseball cap who has a mustache.

Fourth, because the race of the victim had been kept confidential, the grievant could only have known that she was white if he had seen her. Grievant never asserted that he knew the intern or that he had seen her previously. Since this particular intern had only been on the campus for eight days at the time of the incident, it is highly unlikely that grievant would have had any prior contact with her. Grievant never asserted that he had any prior knowledge about this intern.

Fifth, grievant's previous failure to tell the truth on more than one occasion raises a serious question about his credibility in this case. Moreover, his initial denial that he owned the pornography found in his workstation when some of the material has his name and address printed on it, further taints his credibility with regard to his denial of other key facts. During the hearing, grievant denied having left his workstation between 6:00 p.m. and 12:00 a.m., even though he later admitted to being in his truck near the dormitory minutes after the incident occurred.

Sixth, grievant contended that he was simply holding the pornographic material for an employee who left the facility some two years ago in the event that the employee returned to reclaim the material. This assertion strains credulity. If the employee has been gone for two years, it is highly improbable that he has any intention of reclaiming old magazines.

Finally, the intern who first saw the man on the picnic table specifically identified grievant as the same man. This witness has not been shown to have previously had any connection with grievant or have any reason not to be truthful.

In fact, this intern resides in another state and had only been at the hospital for a short time when this incident occurred.

In summary, the direct evidence in this case places grievant at the scene immediately before and after the incident occurred. The one eyewitness is confident that grievant is the person she saw standing on the picnic table just below an intern's bedroom window. Grievant's denial is not credible based on his previous failure to be truthful in other situations. His assertion that the act was perpetrated by an identically sized and identically dressed person who was allegedly in the area at the same time is also not credible. His knowledge that the victim was white (when such information had been kept confidential) demonstrates that he had seen the victim. Grievant never suggested that he had seen her before or after this incident. Therefore, the only time he could have seen her was when he stood on the picnic table and looked through her bedroom window.

The Standards of Conduct provide that Group III offenses are those of such a serious nature that a first offense should normally warrant termination of employment. This incident clearly falls within that category. The fallout from this incident resulted in one valued intern leaving her position months prior to the end of her scheduled internship. Moreover, because this intern may relate her experience to others, it may become more difficult for the hospital to recruit other interns in the future. Further, the grievant's prior failures to be truthful combined with his denial of convincing evidence in this case, demonstrate that he can no longer be retained in a position requiring trust. As a maintenance employee, grievant had keys to many buildings and almost unlimited access to all areas of the campus. The hospital would be derelict in its responsibility to both patients and employees if it allowed grievant to remain in such a position of trust. Therefore, it is concluded that Group III is the appropriate level of discipline in this case.

DECISION

The decision of the agency is hereby affirmed.

The Group III Written Notice issued on July 20, 2001 and the discharge from employment are AFFIRMED. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set 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 four 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.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. 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.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

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 **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-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 10 days; the day following the issuance of the decision is the first of the 10 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 10 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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer