Issue: Group III Written Notice with termination (failure to prevent patient abuse); Hearing Date: November 20, 2001; Decision Date: November 26, 2001; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esquire; Case Number: 5326

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5326

Hearing Date: November 20, 2001
Decision Issued: November 26, 2001

APPEARANCES

Grievant
Two witnesses for Grievant
Representative for Agency
Legal Representative for Agency
Three witnesses for Agency

ISSUES

Did the grievant's actions on June 15, 2001 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 appeal from a Group III Written Notice issued on September 1, 2001 because he had failed to prevent abuse of a client. The grievant was discharged from employment as part of the disciplinary action. 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 the grievant for 24 years. He is a forensic mental health technician (FMHT). When the disciplinary action herein was taken, he had one active Group I Written Notice for unsatisfactory attendance. The clients at this facility are mentally retarded, physically handicapped, mentally ill or some combination of these conditions.

The grievant received Mandt System® training and was a Mandt® instructor. The Mandt System® is a systematic training program designed to help you de-escalate and co-manage yourself and others, as well as reduce the potential for verbal and physical abuse to yourself and others.[1] The program uses a combination of interpersonal communication skills and physical interaction techniques designed to reduce the potential for injury to participants in an interaction.

Section 201-1 of MHMRSAS Departmental Instruction 201 on Reporting and Investigation Abuse and Neglect of Clients states, in pertinent part: "The Department has zero tolerance for acts of abuse or neglect." Section 201-3 defines client abuse:

> Abuse means any act or failure to act by an employee or other person responsible for the care of an individual that was performed or was failed to be performed knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person receiving care or treatment for mental illness, mental retardation or substance abuse. Examples of abuse include, but are not limited to, acts such as: Use of language that demeans, threatens, intimidates or humiliates the person.[2]

Client B is assigned to the forensic ward by virtue of a plea of "not guilty by reason of insanity" to the charge of felonious assault. He has a reputation of being a malingerer and his general credibility is questionable. He has previously filed two complaints that staff verbally abused him; both cases were found to be

[1] Exhibit 7. Excerpts from the Mandt System® Training Manual.
[2] Exhibit 8. Departmental Instruction 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*. Revised April 17, 2000.

unsubstantiated.[3] Clients who maintain acceptable behavior are granted "Unescorted Courtyard Privileges (UCP)," which allows them to go to a secure outdoor courtyard area during specified hours, weather permitting.[4] In the late afternoon of June 15, 2001, a thunderstorm hit the area. Because of the inclement weather, the Unit Program Director cancelled UCP for the rest of the day. However, by 6:00 p.m. the storm had passed through the area and was no longer a threat. UCP hours had been scheduled from 6:00 p.m. to 8:00 p.m.

Client B is a smoker and wanted to go outside. Between 6:00 and 6:30 p.m., he separately asked two staff members (FMHTs) for permission to go out. Each responded that the Unit Director had canceled UCP for the day and that they could not grant permission. Client B then found a security guard and sought permission from him. The security guard has no authority to grant permission but, observing that the weather had cleared, made a statement to the effect that he did not see any reason why client B could not go outside. At about 6:45 p.m., client B approached a desk where grievant was sitting and asked him for permission to go out. Grievant responded, "Don't you play me fast."[5] Grievant further told client B that he had already approached all other staff and had been told to make his request to the registered nurse clinician (RNC). Client B became frustrated that all the staff had turned him down and became loud, argumentative and disruptive. He yelled at grievant, "If I were black, I'd be able to go out."[6] Grievant yelled back at client B saying, "What's black got to do with it? You just need to wait until you see the doctor."

Grievant then told B to come closer to the desk. Client B came closer, pulled off his shirt and threw it on the desk. Grievant became angry, walked around to the front of the desk and sat on the edge of the desk. Client B told grievant, "you look like you are going to hit me or something," Grievant responded, "I'm not gonna hit you. You don't <u>want</u> me to hit you (client's name); I'll hurt you." Client B said, "You gonna hurt me? Come on and hurt me."[7] At this point a female FMHT stepped between client B and grievant. She placed her hand on grievant's shoulder and lightly pushed him behind the desk. Client B then began insulting grievant's race and threatened to get him fired. There were additional back and forth verbal comments between the two. After one insult, grievant again became angry and got up to come around to the front of the desk. The female FMHT again restrained grievant and pushed him toward the nurses' station door, encouraging him to go in and, "Just write it up." Although grievant was extremely upset by this time, he went into the nurses' station and the confrontation ended. The entire incident lasted between 10 and 15 minutes.

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[3] Exhibit 10. Letter from agency administrative staff assistant to Office of Attorney General, November 14, 2001.
[4] Exhibit 3, page 5.
[5] Testimony established that the phrase, "Don't you play me fast," is slang used among some black staff members which means: do not play staff against one another.
[6] Patient B is white; grievant and the other two FMHTs are black.
[7] Exhibit 2. Client B's written statement, June 26, 2001.

The agency's investigator concluded that abuse was not substantiated but that grievant's behavior in this situation was inappropriate and non-therapeutic.[8] A Human Rights Advocate (HRA) read the investigator's report and disagreed with the conclusion. She expressed her disagreement in writing to the facility director and to her supervisor.[9] The advocate then directly contacted the investigator and attempted to persuade her to reverse the report's conclusion to a finding of substantiated verbal/psychological abuse by grievant.[10] After receiving the HRA's memorandum, the agency's central office e-mailed the investigator and directed her to change the report's conclusion.[11]

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 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 § 2.1-116.05(A) 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 § 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[12]

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[8] Exhibit 2. Investigator's Summary report, July 3, 2001.
[9] Exhibit 4. Memorandum from HRA to facility director, July 10, 2001.
[10] The investigator maintains that she reversed her initial conclusion because she was convinced that it was appropriate.
[11] Exhibit 5. E-mail to investigator, July 25, 2001.
[12] § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*

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 Training[13] 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 occurrence normally should warrant removal from employment. One example of a Group III offense is threatening or coercing persons associated with any state agency including patients.[14] The agency's policy on abuse provides that termination from employment is the usual disciplinary action for abuse or neglect of a client.[15]

The agency contends that grievant's solicitation of written statements from staff and client B on August 7, 2001 was, in effect, an attempt to have those persons change their initial statements. Grievant was told on August 8, 2001 that he had 24 hours to provide information in his own defense. He was unaware that statements had previously been obtained from staff. Further, there is no evidence to show that grievant acted improperly in obtaining additional statements or that he attempted to suborn these witnesses. In any event, there are no material or significant differences between the statements provided by staff. The client did change his statement, and then subsequently recanted again, however, given his mental condition and questionable credibility, little weight is given to his second and third written statements.

It is apparent from the testimony and evidence that client B had become frustrated by the time he approached grievant. From the client's own account of the incident, it is also clear that he was deliberately escalating the rhetoric by insulting grievant and by repeatedly challenging him. In fact, client B ultimately challenged grievant to physically fight when he thought that grievant had threatened to hurt him.[16] It cannot be ascertained whether the client was out of control or whether he was deliberately attempting to provoke grievant. Regardless of the client's motivation, grievant allowed the client to escalate the encounter. More significantly, grievant allowed his own anger to escalate to the point where a coworker feared a fight would erupt and she twice found it necessary to step between the two. Therefore, grievant's participation in the encounter was, at the very least, non-therapeutic and inappropriate.

[13] Now known as the Department of Human Resource Management (DHRM).
[14] Exhibit 9. Section V.B.3.k, DHRM *Standards of Conduct*, September 16, 1993.
[15] Exhibit 8. Section 201-8, *Ibid.*
[16] Exhibit 2. Pages 17-20, client B's written statement, June 26, 2001.

However, the issue that must be resolved herein is whether grievant's behavior constituted "abuse" as that term is defined in Departmental Instruction 201. At the beginning of the encounter, grievant admits that he raised his voice in responding to client B's loud allegation of discrimination. Whether this rose to the level of "yelling" cannot be determined. The evidence suggests that grievant spoke as loudly as client B. However, even if grievant spoke loudly enough to be considered yelling, the definition of abuse is not so broad as to include yelling. As there was nothing inappropriate in the content of grievant's response, this particular exchange of words does not support an allegation of abuse.

The verbal encounter went on for at least 10-15 minutes; grievant stated that it lasted from 15-20 minutes. Clients described the confrontation as a "war of words" and as a "heated altercation."[17] The back and forth verbal comments included insults and racial epithets by the client and alleged "unkind words" by grievant.[18] Client B's escalating provocation was successful to the extent that grievant allowed himself to be sucked into the verbal altercation for nearly a quarter of an hour. As an instructor in the Mandt System®, grievant should have recognized that he was not practicing the principles taught by the system to de-escalate the confrontation. Rather, he was fueling the fire by continuing to loudly argue with the client. Grievant's reaction to this situation was clearly non-therapeutic, however, his failure to properly de-escalate the situation does not rise to the level of abuse as defined by DI 201.

Client B alleges that grievant threatened to, "beat your ass," however, this allegation was not corroborated by any of the staff or clients from whom statements were obtained. Since client B did not testify in person, he could not be cross-examined about this issue. Given client B's reputation for a lack of credibility, it is concluded that grievant did not threaten to beat client B. When grievant entered the nurses' station, he said to other staff inside the room, "I am about sick of this mother fucker." However, there is no evidence that any client heard this comment.[19] The statement appears to have been made out of frustration but it is nevertheless an inappropriate comment. However, since there is no evidence that client B heard the comment, it cannot be considered abuse.

The most serious allegation against grievant is that he threatened to hurt and/or attempted to intimidate the client. The most reliable evidence of what was said is the client's version because it is the most detailed and because it is not in the client's best interest. It was the client who first raised the issue of fisticuffs when he accused grievant of "looking like" he was going to hit client B. Grievant denied any intent to hit the client and then, in an apparent show of masculine

[17] Exhibit 2. Written statements from clients.
[18] Exhibit 2. Page 18 of Client B's written statement, June 26, 2001.
[19] If client B had heard this comment, he most certainly would have included it in his highly detailed, 21-page written statement. Since Client B did not mention this comment, it is more likely than not that he did not hear it.

bravado, said, "You don't want me to hit you (because) I'll hurt you." The client perceived this to be threatening because he then challenged grievant to fight by responding, "You gonna hurt me? Come on and hurt me!" At least one staff person also perceived this interchange as the prelude to a physical altercation because she promptly stepped between grievant and client and pushed grievant back toward the nurses' station.

In evaluating this verbal exchange, one must consider not only the spoken words, but the tone, inflection, physical demeanor and appearance of the grievant. The available evidence and testimony leads to a conclusion that grievant was quite angry when he made the statement and that the client apparently perceived the grievant to be threatening. However, even if grievant did not intend to threaten the client, there is no doubt that the words he used were intended to intimidate the client. Therefore, the agency has shown, by a preponderance of the evidence, that grievant attempted to threaten and/or intimidate client B. Such behavior is, by definition, abuse of a client.

The Standards of Conduct policy provides for the consideration of mitigating circumstances in the implementation of disciplinary actions and states, in pertinent part:

> While the disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as:
>
> a. conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or
> b. an employee's long service or otherwise satisfactory work performance.[20]

The grievant has been employed by the agency for 24 years. While he has one active disciplinary action, it is for an unrelated offense (absenteeism). Given the grievant's long length of service, and his generally satisfactory work performance, termination of employment appears to be an unnecessarily harsh discipline in this case. Because abuse is substantiated, the issuance of a Group III Written Notice is appropriate and will remain active for a period of four years. However, in lieu of discharge, the grievant should receive a 30-day suspension without pay and be reinstated with back pay for the remaining time.

DECISION

The disciplinary action of the agency is modified.

[20] Exhibit 9. Section VII.C.1, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

The Group III Written Notice issued to the grievant on September 1, 2001, is AFFIRMED. However, the grievant is reinstated to employment, subject to a 30-day suspension without pay. He shall receive back pay for the period from the completion of the 30-day suspension to the date he is brought back on active duty. 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 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.
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.

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.

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David J. Latham, Esq.
Hearing Officer