Issue: Group III Written Notice with termination (verbal abuse of a client); Hearing Date: January 24, 2002; Decision Date: January 25, 2002; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esquire; Case No.: 5358

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5358

Hearing Date: January 24, 2002
Decision Issued: January 25, 2002

PROCEDURAL ISSUE

Due to availability of the participants, the hearing could not be docketed until the 37th day following appointment of the hearing officer.[1]

APPEARANCES

Grievant
Representative for Grievant
Facility Director
Legal Assistant Advocate for Agency
Four witnesses for Agency

[1] § 5.1 of the *Grievance Procedure Manual* requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

ISSUES

Did the grievant's actions on September 12, 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 24, 2001 because he had verbally abused a client.[2] 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.[3]

The Department of Mental Health, Mental Retardation and Substance Abuse Services (MHMRSAS) (Hereinafter referred to as "agency") has employed the grievant as a direct service care worker for four years. He met expectations on his most recent performance evaluation.[4] Grievant has two active disciplinary actions.[5] He received a Group II Written Notice on April 26, 2001 for leaving the work site without permission during working hours. He received a Group II Written Notice on August 8, 2001 for failure to report to work as scheduled without proper notice to supervision. Neither of these disciplinary actions was grieved.

The grievant received Mandt System® training on April 8, 1998, March 25, 1999, April 28, 1999, June 14, 2000, and May 2, 2001.[6] 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.[7] 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:

---

[2] Exhibit 10. Written Notice, issued September 24, 2001.
[3] Exhibit 11. Grievance Form A, filed October 24, 2001.
[4] Exhibit 6. Grievant's Performance Evaluation, signed December 6, 2000.
[5] Exhibit 5. Written Notices issued to grievant.
[6] Exhibit 2. Grievant's Training File.
[7] Exhibit 3. Excerpts from the Mandt System® Training Manual.

> Abuse means any act or failure 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.[8]

Grievant worked with two other employees as a direct client care worker in a cottage that houses ten clients with mental retardation. One client – client F – had made periodic unfounded complaints about employees or conditions. The staff considered client F to be annoying and irritating. On the morning of September 12, 2001, clients had been awakened at the usual time of between 6:30 a.m. and 7:00 a.m. When client F came out of his room at about 7:30 a.m., he had dressed himself in a jogging sweatsuit. Because it was a warm day, staff considered this to be an inappropriate outfit. A discussion ensued between some staff and client F to the effect that client F should return to his room and change into clothes more appropriate for the warm day. After throwing his breakfast tray across the floor, client F went to his room but returned several times to curse at staff.[9]

Later, at about 8:30 a.m., client F picked up a telephone in the dining room and attempted to call the Patient Advocate to register a complaint. However, client F had erroneously dialed the telephone number of the Assistant Program Manager (APM) who is in charge of four cottages, including that of client F. The APM was not in her office and client F's call activated her answering machine. Client F then started talking, asking that charges be filed against staff. At this point, grievant overheard client F and realized what he was doing. Grievant picked up the cordless telephone in the living room, walked away from other staff and started talking to client F. Grievant immediately began cursing at client F and then identified himself as the Patient Advocate.[10] Grievant continued cursing at the client and threatened to beat the client with a cane. Grievant was not aware that the answering machine had been activated.

At about 11:00 a.m. that morning, the APM checked her answering machine for messages and found the threatening conversation. She promptly reported this to the Facility Director who immediately assigned an investigator to the case. By the following day, the investigator had completed his interviews and

---

[8] Exhibit 9. Departmental Instruction 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, revised April 17, 2000.

[9] Exhibit 1. Interdisciplinary Note for client F, September 12, 2001.

[10] Exhibit 1. Investigator's Summary, page 2. See transcript of answering machine recording. Grievant identified himself as "S_____"; (S_____ is the facility's Patient Advocate).

filed his report. Central Office in Richmond determined that the allegation of patient abuse was founded and, on September 24, 2001, the Facility Director issued a Group III Written Notice and discharged grievant from employment.

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 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.[11]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training[12] 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

[11] § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*
[12] Now known as the Department of Human Resource Management (DHRM).

provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. The agency's policy on patient abuse provides that an employee found to have abused a client would normally be discharged.[13]

The language used in this case clearly fits within the definition of patient abuse. It demeaned, threatened, intimidated and humiliated the client. It included vulgar language and three separate threats to physically beat the client. Therefore, there is no doubt that the verbal abuse proven herein warrants a Group III Written Notice and removal from employment.

Grievant has denied being the abuser. However, by a preponderance of the evidence, the agency has demonstrated that grievant was the person who verbally abused client F. First, three coworkers who have known grievant, either since they began employment or for several years, all identified the voices on the recording as those of client F and grievant. All three listened to the recording during this hearing. Their identification of grievant was immediate, positive and unambiguous. All three witnesses testified very credibly. None had any doubt that grievant was the person recorded and none could think of anyone else who sounds like the voice on the tape.

Second, there is no evidence that anyone else falsified the recording on the answering machine. The Assistant Program Manager (APM) locks her office when she is not present. Although her supervisor and other APMs have keys, it has not been shown that anyone else had any motivation to threaten client F. The unrebutted testimony of the investigator established that the tape recording has been in his sole possession since September 12, 2001.

Grievant points out that a scientific voice analysis was not performed in this case. If this had been a criminal case, where the burden of proof is beyond a reasonable doubt, such a voice analysis would have been warranted. In this case, however, the burden of proof is a preponderance of the evidence. The evidence proffered by the agency demonstrates that it is more likely than not that grievant was the perpetrator in this case; that level of proof does constitute a preponderance of the evidence.

Grievant objects to the fact that the agency would not allow him to listen to the tape prior to his discharge from employment. The agency countered that allowing grievant to hear the tape would have been a pointless exercise because grievant had already adamantly denied that it was his voice. It would appear that the agency could have allowed grievant to hear the tape recording without compromising its case. However, the fact that grievant didn't hear the tape until this hearing does not change the underlying evidence. The facts and evidence discussed above are more than ample to prove grievant's culpability.

[13] Exhibit 8. DMHMRSAS Employee Handbook, *Standards of Conduct and Client Abuse*.

At this hearing, grievant asserted – for the first time – that he had left the cottage and gone to the workshop at 8:30 a.m. Thus, he contends he could not possibly have been on the telephone with client F. Grievant's assertion is not credible for three reasons. First, grievant never previously raised this defense, either during the investigation or during his due process meeting with the facility director. Second, grievant provided no corroboration to support this assertion. Third, the times in witness statements are only approximations. Thus, even if grievant had gone to the workshop at 8:30 a.m., the telephone call could have taken place a few minutes prior to 8:30 a.m.

Grievant suggests that the APM and his team leader may have had motivation to falsify their testimony. These two supervisors had issued a second Group II Written Notice to grievant on August 8, 2001 and had recommended grievant be discharged at that time. Grievant submitted mitigating evidence to the facility director who allowed the discipline to stand but changed the discharge to a ten-day suspension. Grievant theorizes that the two supervisors may have harbored resentment against him because he went over their heads to the facility director. It is conceivable that grievant's supervisors could have been disappointed that their recommendation was overruled by the facility director. However, grievant has provided no proof to support his allegation. A mere allegation, without some form of corroboration, is insufficient to prove the charge. Moreover, even if the supervisors were resentful, grievant has offered no theory, let alone proof, to show how the tape recording with his voice could have been fabricated.

Grievant further suggests that a coworker disguised his voice to sound like the grievant. That coworker testified at the hearing; his voice, tone, amplification and speech patterns are quite different from those of the grievant. Grievant failed to suggest any reason for this coworker either to verbally abuse client F or to falsely implicate grievant. On September 12, 2001, this coworker wrote in his witness statement that he did not hear what grievant said to client F during the telephone call. If this coworker had been the perpetrator, it is far more likely that he would have included some of the recorded conversation in his witness statement.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice issued to the grievant on September 24, 2001 and his 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 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.

_____
David J. Latham, Esq.
Hearing Officer