Issue: Group III Written Notice with termination (patient neglect) and Group II Written Notice (inappropriate patient interaction); Hearing Date: February 27, 2002; Decision Date: March 4, 2002; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esquire; Case No.: 5359; **Administrative Review: Hearing Officer Reconsideration Request received 03/14/02; Reconsideration Decision Date: 03/15/02; Outcome: No new evidence present; Request denied**

# *COMMONWEALTH of VIRGINIA*

***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

## DECISION OF HEARING OFFICER

In re:

Case No: 5359

Hearing Date: February 27, 2002
Decision Issued: March 4, 2002

## PROCEDURAL ISSUE

Due to unavailability of the parties, this hearing had originally been docketed for the 37th day following appointment of the hearing officer. One week prior to the hearing, grievant's representative requested an additional one-month postponement because the grievant was experiencing a serious health problem. Based on the recommendation of grievant's physician, the Hearing Officer granted a one-month postponement. The hearing was redocketed for the 70th day following appointment of the hearing officer.[1]

## APPEARANCES

Grievant
Representative for Grievant
Five witnesses for Grievant

[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.

Facility Director
Legal Assistant Advocate for Agency
Six witnesses for Agency

## ISSUES

Did the grievant's actions on September 27, 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 two Written Notices. A Group III Written Notice was issued on October 25, 2001 for patient neglect.[2] A Group II Written Notice was issued on October 25, 2001 for inappropriate patient interaction.[3] 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.[4]

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 six years. She has been employed by the Commonwealth for a total of 18 years.

Group III Written Notice – resident neglect

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 neglect:

> Neglect means failure by an individual, program or facility responsible for providing services to provide nourishment treatment, care, goods or services necessary to the health, safety or welfare of a person receiving care or treatment for mental illness, mental retardation or substance abuse.[5]

One of the patients for whom grievant was responsible is a 51-year-old, profoundly mentally retarded male who requires physical assistance in all self-care needs. He was hospitalized in January 2001 for pneumonia and his course

[2] Exhibit 1. Written Notice, issued October 25, 2001.
[3] Exhibit 4. Written Notice, issued October 25, 2001.
[4] Exhibit 12. Grievance Form A, filed November 14, 2001.
[5] Exhibit 10. Departmental Instruction 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, revised April 17, 2000.

since that time had been downhill. By April 2001, his physical deterioration had become obvious with weight loss and more difficulty in eating. On April 17, 2001, the resident's Nutritional Management Service Plan (NMSP)[6] was changed to reflect that all liquids given to this patient were to be thickened with a modified cornstarch thickener and that the patient was to always be fed by staff. By June 19, 2001, further assessment of this resident determined that he would often aspirate[7] on food or liquids that were thin or runny. Therefore, the resident's NMSP was changed on June 19, 2001 to require that 1) all liquids must be thickened to a pudding consistency and, 2) he was to be fed **only** with a spoon from a plate. In addition, liquid nutritional supplement was removed from the NMSP.[8] This NMSP remained in effect until October 16, 2001.

Grievant has been regularly trained about the four consistencies of liquids – thin, medium (nectar), thick (honey) and pudding consistency. Training classes have included demonstrations of how to mix thickener and examples of the four levels of consistency. In addition, a special training session was conducted on June 27, 2001 and July 2, 2001 to explain to all staff the changes in this specific resident's nutritional plan; grievant attended one of these two sessions.[9]

On September 27, 2001 at about 9:00 a.m., an occupational therapist observed grievant feeding a liquid to the resident from a cup. When asked about the liquid, the grievant said she was giving the resident a mixture of milk and nutritional supplement. When reminded by the therapist that nutritional supplement had been removed from the resident's diet, grievant immediately disposed of the liquid. She then obtained some milk, mixed it with thickener and spoon-fed it to the resident.

Group II Written Notice – Inappropriate interaction with resident

On September 27, 2001 at about 10:00 a.m., grievant was in the hallway near the laundry room of the cottage. A 46-year-old female resident with severe mental retardation and Down syndrome came into the hallway at the same time. Another staff member at the front of the cottage called to the female resident and told her to come to the front. When the resident failed to respond to the summons, grievant told the resident to go to the front of the cottage. When the resident again failed to respond, grievant pulled the resident's hair (pigtail) and told her to go the front of the cottage. The resident then turned and walked

[6] The NMSP is a highly detailed, two-page, description of a resident's dietary levels, supervision, positioning during eating, special needs and materials. The NMSP is maintained in the resident's binder located in each housing unit. All staff in the housing unit have access to, and are expected to comply with, the instructions contained in the NMSP.

[7] Aspiration, as used in this context, means the breathing in of food or liquid into the lungs. Aspiration by a person in a weakened state can often result in pneumonia.

[8] Liquid nutritional supplement cannot be fed to aspiration-prone patients because cornstarch has no thickening effect on such supplements, even when a large quantity of thickener is added.

[9] Exhibit 2, p.14. Attendance Record for NMP for the resident in question, June 27, 2001. This class was repeated on July 2, 2001 for those who did not attend the first class.

toward the front of the cottage. Grievant then turned to a housekeeper working in the area and said, "That was payback for some of the times she hit me."

The housekeeper works at different cottages as assigned. When assigned to a cottage, she keeps to herself, performs her work and goes on to the next assignment. Prior to this incident, she did not know grievant and has not had any interaction with her. The housekeeper has worked for the agency for approximately one year.

The resident can verbalize a few words but cannot carry on a conversation and is incapable of testifying. With severe mental retardation, she is incapable of describing an event that occurred several months ago.

## 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.[10]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the

[10] § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*

Code of Virginia, the Department of Personnel and Training[11] 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. Violation of the agency policy on Client Abuse is a Group III offense. The agency's policy on patient abuse provides that an employee found to have abused a client would normally be discharged.[12] The agency Standards of Conduct also provides that Group II offenses include acts and behavior which are more severe in nature (than Group I) and are such that an accumulation of two Group II offenses normally should warrant termination of employment. Inappropriate or non-therapeutic interaction with a client is one example of a Group II offense.[13]

Group III Written Notice – resident neglect

The underlying facts regarding this incident are undisputed. Grievant knew that the patient she was feeding on September 27, 2001 had a very restricted diet that prohibited nutritional supplement, required that all liquids be thickened to pudding consistency, and required spoon feeding only. In violation of these restrictions, grievant gave the patient nutritional supplement, fed him thin liquid, and fed him from a cup rather than by spoon. Not only was grievant aware of the restrictions, she had attended a special training session in which she was told that the patient would aspirate on fluids of less than pudding consistency, and that such aspiration could result in a recurrence of pneumonia. Moreover, she knew that the patient had a bout of pneumonia earlier in the year, that his condition had been deteriorating, and that a recurrence of pneumonia could have serious, if not fatal, consequences.

Grievant's failure to comply with these feeding restrictions constitutes client neglect. Accordingly, the agency has demonstrated by a preponderance of the evidence, a prima facie case of client neglect, which is subject to discipline under both the agency's policy on abuse and neglect, and the Standards of Conduct.

[11] Now known as the Department of Human Resource Management (DHRM).
[12] Exhibit 9. DMHMRSAS Employee Handbook, *Standards of Conduct and Client Abuse*.
[13] Exhibit 9. *Ibid.*

There are no circumstances to warrant mitigation in this case. The grievant fed nutritional supplement to the resident even though the supplement had not been provided on his breakfast tray from the kitchen. Grievant admits that she obtained the supplement on her own from a cabinet. Even though grievant may have believed the resident would benefit from nutritional supplement, she also knew that the NMSP prohibited the resident from receiving such supplement. Therefore, her unilateral decision to give the resident nutritional supplement is negligent, in and of itself. Similarly, grievant was deliberately feeding the resident liquid that was not thickened to pudding consistency despite being fully aware of the dietary restriction. Finally, she was feeding the liquid from a cup, not by spoon, as was required in the NMSP. Thus, grievant knowingly violated three separate written and verbal instructions she had received. Grievant has offered no explanation for these violations that would warrant mitigation.

Grievant alleged that other employees had sometimes fed residents from cups despite having a restriction to spoon-feed. However, none of the witnesses at the hearing corroborated grievant's allegation. Grievant also contends that she has never seen the NMSP, and that she was unaware that nutritional supplement had been discontinued for the resident. Given the special training class grievant attended and her constant access to the NMSP, grievant's plea of ignorance is simply not credible.

Grievant also argues that her decisions to give supplement, and to feed from a cup were judgement calls on her part. NMSPs are extremely detailed, explained to staff and kept readily available for their use so that direct service staff such as grievant will **not** make judgement calls. Trained professionals determine a resident's dietary needs after careful assessment of the resident's medical condition. Once the needs are determined, grievant's responsibility is to follow such instructions to the letter until the people who are charged with the responsibility to change them do so.

Group II Written Notice – Inappropriate interaction with resident

Grievant denies either pulling the resident's hair or making a statement to the housekeeper afterwards. Grievant asserts that she placed her hands on the resident's shoulders and "directed" her towards the front of the cottage. Grievant suggests that, because it is her word against that of the housekeeper, the agency has not borne the burden of proof to show that grievant pulled the resident's hair. When the trier of fact finds the testimony of both witnesses equally credible, it is correct that the accuser cannot prevail. However, where the evidence warrants, the trier of fact may make a credibility determination that swings the balance in one direction or the other.

The housekeeper's testimony was clear, concise and detailed. Her initial statement to the investigator was completely consistent with her testimony during

the hearing. She had worked at the facility for just over one year and had not had any previous interaction with grievant. There has been no evidence proffered to suggest that she had any motivation not to be truthful about what she observed and heard on September 27, 2001.

If the housekeeper had only seen hair pulling, there is a possibility that she could have been mistaken about what she had seen. However, it is highly unlikely that she would be mistaken not only about her observation but also about an unsolicited comment by grievant. Since the housekeeper had no apparent reason to fabricate grievant's comment, it is more likely than not that grievant did, in fact, make the statement, "That was payback for some of the times she hit me." Accordingly, it is concluded that grievant's denial of hair pulling is less credible than the housekeeper's observations.

Moreover, grievant's testimony regarding the first incident in this hearing is so incredible that it significantly tainted her credibility with regard to the second incident.

## DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice issued on October 25, 2001, the Group II Written Notice issued on October 25, 2001 and her 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

# *COMMONWEALTH of VIRGINIA*

***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

## DECISION OF HEARING OFFICER

In re:

Case No: 5359

| | |
|---|---|
| Hearing Date: | February 27, 2002 |
| Decision Issued: | March 4, 2002 |
| Reconsideration Received: | March 14, 2002 |
| Reconsideration Response: | March 15, 2002 |

## APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request 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. A request to reconsider a decision 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.[14]

## OPINION

Grievant's primary request, in both the first and last paragraphs of her reconsideration request, is that the hearing officer vacate the two disciplinary actions and permit the grievant to resign from her employment with an

[14] § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

unblemished record. From this request, it appears that grievant believes she can make a negotiated settlement with the hearing officer.

Before a grievance is qualified for a hearing, the grievance process provides for three possible resolution steps within the agency. During that resolution process, the agency could, at its option, reach the type of negotiated settlement proposed by grievant. If grievant had made a request to the agency to resign in lieu of discharge during the resolution process, the agency could have granted her request, if it chose to do so. However, once an independent hearing officer conducts a hearing, the hearing officer's authority is limited to the types of relief specified by the grievance process. In this case presented herein, the hearing officer could uphold, reduce or rescind the disciplinary actions, or reinstate the employee to her former position.[15]

The decision of whether to permit an employee to resign in lieu of discharge is an internal management procedure decided by each agency. Section 2.2-3004.B of the Code of Virginia states, in pertinent part:

> Management reserves the exclusive right to manage the affairs and operations of state government.

The grievance procedure is consonant with the law by providing that a hearing officer may not establish or revise the agency's policies or procedures.[16] Each agency must be able to establish its own procedures, based on the individual needs and requirements of that agency. A hearing officer has no authority to make such a decision on the agency's behalf. Accordingly, it is concluded that the grievance procedure does not permit a hearing officer to accept an employee's resignation in lieu of discharge. Therefore, the hearing officer is unable to grant the relief sought by grievant.

Grievant disagrees with the hearing officer's conclusions about grievant's knowledge of the resident's dietary requirements and the permissible consistency of liquids that could be fed to him. For the reasons already stated in the decision, the hearing officer finds that the preponderance of evidence supports the conclusions in the decision. The grievant has not presented any new evidence or evidence of incorrect legal conclusions to support her arguments.

## DECISION

The grievant has presented no newly discovered evidence or evidence of incorrect legal conclusions. Therefore, there is no basis to change the Decision issued on March 4, 2002.

---

[15] § 5.9(a), Department of Employment Dispute Resolution *Grievance Procedure Manual,* effective July 1, 2001.
[16] § 5.9(b), *Ibid.*

## APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

3. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. 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