Issue: Group III Written Notice with termination (disclosing confidential information during an investigation); Hearing Date: February 11, 2002; Decision Date: February 13, 2002; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esquire; Case No.: 5368

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5368

Hearing Date: February 11, 2002
Decision Issued: February 13, 2002

APPEARANCES

Grievant
Three witnesses for Grievant
Agency Representative
Legal Assistant Advocate for Agency
Six witnesses for Agency

ISSUES

Did the grievant's actions on August 10, 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 November 28, 2001 because he disclosed confidential information during an investigation of client abuse.[1] 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.[2]

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 five years. Grievant has two active disciplinary actions.[3] He received a Group II Written Notice on July 13, 1999 for failure to follow supervisory instructions. He received a Group I Written Notice on January 5, 2000 for unsatisfactory job performance.

Grievant received a copy of Departmental Instruction 201 on Reporting and Investigation Abuse and Neglect of Clients.[4] Section 201-4 states, in pertinent part, "Any action by an employee that compromises the integrity or outcome of a factual investigation may be cause for disciplinary action."[5]

Prior to August 10, 2001, a female employee had observed what she believed to be possible abuse of clients. She discussed the matter with a coworker and a nurse, both of whom convinced her to report her observations. On a computer at work, she began to type a letter describing what she had seen. When she realized that at least one employee had been reading over her shoulder, she deleted the letter. She then typed a one-page letter on her personal computer at home and delivered it to the night shift supervisor on August 10, 2001. The letter made its way to the facility director who assigned an investigator. He also notified the two suspected abusers by letter that an investigation had begun, that they were being transferred to other buildings, and that they should keep the matter confidential.[6]

On or about August 30, 2001, the investigator requested the female employee who had reported the alleged abuse (hereinafter referred to as accuser) to write a more detailed description of her observations. The accuser typed a three-page letter on her home computer on the night of August 30, 2001. She then showed the letter to grievant, who had been renting a room from the female employee for several months. The accuser trusted and liked grievant, often calling him "son;" the closeness was mutual and grievant often called her "Mom." After grievant read the letter, he pointed out an incorrect date and

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[1] Exhibit 7. Written Notice, issued November 28, 2001.
[2] Exhibit 9. Grievance Form A, filed December 20, 2001.
[3] Exhibit 8. Written Notices issued to grievant.
[4] Exhibit 1. Receipt form, signed by grievant April 14, 2000.
[5] Exhibit 1. Departmental Instruction 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, revised April 17, 2000.
[6] Exhibits 2 & 3. Letters to suspected abusers, August 22, 2001.

returned the letter to the accuser. She delivered the letter to the facility the following day.

When the accuser returned to work on September 4, 2001, she heard gossip from several people who said that many people knew about her letters and that employees were discussing information from the letters. She believed that grievant was the only person who could have divulged such information and evicted him from her house that evening.

The accuser had taught grievant how to use her home computer; it was not password protected. Grievant used the computer to access the Internet and for a correspondence course. He did not access either of the two letters discussed above. He did not print out or otherwise obtain copies of the two letters. On or about September 5, 2001, the coworker who had initially discussed this matter with the accuser asked grievant whether her name was in the letters. Grievant confirmed to her that he had seen her name mentioned in the letter.

Subsequently, this coworker told the accuser that grievant had said the coworker was mentioned in her letter. When grievant learned about that conversation, he was angry with the coworker and said to another employee, "That bitch will get hers."

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.[7]

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[8] 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. The agency's policy on patient abuse provides that an employee is subject to discipline, up to and including termination of employment, for failure to report incidents, withholding information about abuse, misstating facts during an investigation, or failing to comply with the policy.[9]

From the beginning of the investigation, grievant has acknowledged seeing the three-page letter and confirming to one employee (who was not a subject of the allegation) that her name appeared in the letter. Grievant has also consistently averred that he never had a copy of the letter, never showed it to anyone and never gave a copy to anyone. The agency did not offer any witness who said that grievant either showed or gave them a copy of the letter. The testimony suggesting that he could have done so is speculative.

The accuser states that she never showed her letter to grievant; grievant maintains that she did show him the letter and that he suggested correction of an erroneous date. Both the accuser and grievant testified credibly; their testimony was direct, unambiguous, and delivered without any hint of deception. These two are the only people with direct knowledge on this issue. Because these two people testified in an equally credible fashion, the agency has not borne the burden of proof on this point of contention.

The agency relies on its policy statement for Confidentiality of Patient Information as the basis for disciplinary action in this case. The stated purpose of this policy is to "insure confidentiality of communication between patients and

[7] § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*
[8] Now known as the Department of Human Resource Management (DHRM).
[9] Exhibit 1. *Ibid*.

staff" and to disclose information about patients "only in performance of duties."[10] The agency has not proffered any evidence to show that grievant disclosed either any information about the patients or even the names of the patients. The agency's interpretation is that any information flowing from an abuse investigation, no matter how tangentially related, is to be held confidential. In this case, the disclosure involved the name of a person who was neither patient nor an accused but merely one with whom the accuser had discussed the matter to get advice. There is no evidence that the disclosure adversely affected the investigation. However, to the extent that an employee may have become upset to find her name mentioned in the accusatory letter, the disclosure was inappropriate.

The agency also relied heavily on a hearsay statement from one of the two employees accused of patient abuse. That employee did not testify during the hearing but told the investigator that she had seen both letters written by the accuser. She has adamantly refused to say who showed her the letters. The agency infers that grievant showed them to her. Another employee had overheard grievant saying to the accused, "Here it is. Don't leave it around; I'll be back for it." It is concluded that grievant did not show the letters to the accused employee for four reasons. First, no one saw what grievant gave the accused employee. Grievant writes poetry in a spiral-bound notebook. He maintains that he allowed the accused employee to read his poems but asked her to not leave the notebook around because he places a significant value on his writing. The agency did not rebut grievant's testimony on this issue.

Second, if grievant were handing two letters to the accused employee, it is more likely than not that he would have said, "Don't leave them around," rather than, "Don't leave it around." Moreover, if grievant had actually made copies of the letters, it is more likely than not that he would simply have given her the copies rather than saying he would return to retrieve what he had given her.

Third, the accused employee (who was determined to be innocent of patient abuse) has not been shown to have any motivation to protect the grievant. Grievant was discharged on November 28, 2001. If the accused employee was reluctant to disclose his name prior to discharge, she should have felt much freer to disclose his name after his discharge. Yet, she has continued to refuse to disclose the name of the person who showed her the letters. The agency has not proffered either testimony or an affidavit from the accused as to who showed her the letters.[11] Accordingly, it is more likely that she is probably protecting someone else. The evidence reveals that other people had access to the letters, e.g., the accuser's supervisor who received the first letter, the person

[10] Exhibit 6. Facility Policy Statement IM 180-06, *Confidentiality of Patient Information*, effective June 1, 1996.

[11] The accused employee suffered a personal tragedy in late December 2001 and has been on leave since that time. However, between November 28 and late December, she did not disclose who had shown her the letters.

to whom she gave the second letter, and unknown others who may have had access to the letters before they reached the facility director.

Finally, when interviewed by the investigator, the second accused employee stated that grievant told her that he had seen the three-page letter. If grievant had a copy of the letter in his possession, it is more likely than not that he would have said, "I have a copy of the letter," rather than "I have seen the letter.

In summary, the agency has not shown that grievant had in his possession or distributed copies of the accusatory letters. However, by his own admission, grievant did disclose limited information contained in the letters – a violation of the confidentiality policy. Therefore, it is appropriate that disciplinary action be taken.

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.[12]

In this case, grievant disclosed one limited piece of information that was not directly related to the abuse allegation but which happened to be included in the accusatory letter. There has been no showing or even an allegation that the investigation was compromised in any way. Thus, while grievant erred, it was not a deliberate error and it did not result in any substantive harm. What is apparent is that someone else made copies of the letters and disclosed their content. Unfortunately, the employees who know the identity of the true culprit are unwilling to identify that person. The testimony suggesting that grievant may have been that person is speculative and uncorroborated. Under these circumstances, the highest level of discipline is not warranted, however, this type of offense is sufficiently serious that any repetition would warrant removal – the definition of a Group II offense.

Accordingly, it is held that the discipline in this case should be reduced to a Group II Written Notice. However, because the grievant already has two active written notices – a Group I and a Group II, the accumulation of these three

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice issued to the grievant on November 28, 2001 is VACATED. In its place, the agency shall issue a Group II Written Notice for the cited offense. The grievant's removal from employment is 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.

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David J. Latham, Esq.
Hearing Officer