

Issue: Group I Written Notice (unsatisfactory work performance); Hearing Date: April 10, 2002; Decision Date: April 11, 2002; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esquire; Case Number: 5414



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5414

Hearing Date: April 10, 2002
Decision Issued: April 11, 2002

APPEARANCES

Grievant
Human Resource Analyst for Agency
Representative for Agency
Four witnesses for Agency

ISSUES

Did the grievant's actions on August 31, 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 I Written Notice issued on November 1, 2001 for unsatisfactory work performance. 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 (MHMRSAS) (Hereinafter referred to as "agency") has employed the grievant for four years. She is a Human Services Care Worker. The patients at this facility are mentally ill, and in some cases, psychotic.

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.

At about 8:00 p.m. on August 31, 2001, a female client caused a disruption in the dayroom by disrobing. While other staff dealt with that client, grievant volunteered to take a group of 12-14 clients outside to the courtyard for a smoke break. The courtyard, which is estimated at about 80' x 80', is bounded by the building on three sides and fenced in on the fourth side. At 8:00 p.m., the sun had just gone down and it was twilight. Although there are floodlights that come on automatically at dusk, several of the lights were burned out on August 31, 2001. Grievant noticed that only one light on the porch and one floodlight at the end of the building were functioning.¹ As a result, lighting in the courtyard was poor and dark. By 8:15 p.m., the courtyard was almost totally dark. At this point, grievant could not identify details of people but could only make out their outlines in the courtyard area. The courtyard has some trees, bushes, picnic tables, chairs and a pavilion.

Grievant stationed herself on the porch near the door to the courtyard to open and close the door for patients who wanted to either enter or exit the courtyard. Two of the patients, one male and the other female, had been attempting for some time to have a sexual liaison. Three days earlier, they were discovered together in the bathroom about to engage in sex but staff prevented consummation of the encounter. When it had become dark by about 8:20 p.m., the female propositioned the male patient and they agreed to have sex. They were near a picnic table and behind a tree so that grievant was unable to observe them in the darkness. As they had sex, another client informed grievant who then went over and separated the two patients. The female patient has a

¹ Agency records reflect that the lights had been reported out three weeks earlier on August 7, 2001.

history of sexual encounters with males and has been identified by the Treatment Team as “provocative and exhibiting inappropriate sexual behavior.”²

Agency practice requires that two staff members accompany patients while they are in the courtyard to assure that all patients can be observed. Grievant was aware of this practice. On August 31, 2001, five staff members, including grievant, were working on the ward. Grievant did not obtain another staff member to accompany the patients into the courtyard. One staff member was dealing with the disruptive patient and three were busy with other duties. While grievant was in the courtyard, she was busy lighting cigarettes for clients, opening and closing the door, and conversing with two patients. A male staff member had been designated as courtyard monitor on August 31, 2001.³ However, he was new to this ward and was not aware of his assignment.

During the investigation of this incident, some female staff members encouraged the male staff person to falsify his witness statement by stating that he was in the courtyard when, in fact, he was not there during the smoke break. When the RNCA in charge of the ward asked grievant and the male staff member where they had been during this incident, both told her that the male staff member had been standing by the fence at the end of the courtyard. The male staff member was not disciplined for lying about his whereabouts. The female staff who encouraged the male staff member to lie were not disciplined.

After consideration of several mitigating circumstances, the agency decided to reduce the discipline from a Group III Written Notice for patient neglect to a Group I Written Notice for unsatisfactory job performance.⁴ The Group I Written Notice was issued on November 1, 2001.⁵ Grievant filed her grievance on the same date.⁶

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

² Exhibit 5. Investigator’s Summary report, September 18, 2001.

³ Exhibit 7. Assignment sheet.

⁴ Exhibit 8. Memorandum from Human Resource Director to Deputy Director, October 23, 2001.

⁵ Exhibit 1. Written Notice, issued November 1, 2001.

⁶ Exhibit 2. Grievance Form A, filed November 1, 2001.

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 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 occurrence normally should warrant removal from employment.⁹ The agency's policy on patient neglect provides that employees are subject to the full range of disciplinary action, up to and including termination of employment.

The basic facts in this case are undisputed. Grievant allowed 12-14 patients into a darkened courtyard for a smoke break. She knew that the courtyard was so dark that she could not properly observe the activities of the patients yet she allowed patients into the courtyard. Grievant knew that one of the patients is a provocative and sexually active female who had been involved in sexual encounters with male patients yet she did not closely monitor this patient while in the courtyard. She also knew that two staff members are required to

⁷ § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*

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

⁹ Exhibit 4. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

accompany patients on the smoke break but she failed to obtain a second staff person to be a courtyard monitor.

Given this opportunity, a female and male patient engaged in sexual intercourse. Grievant was totally unaware of this activity until another patient reported it to her. Knowing that the lighting in the courtyard was inadequate, grievant could have canceled the smoke break on that evening. Further, she could have more closely monitored the activities of the sexually active female. Finally, grievant could have asked another staff person to join her in monitoring the courtyard. Grievant's failure to take any of these precautions was neglectful of the requirement to provide for the safety of patients. Therefore, the agency appropriately gave consideration to disciplining grievant pursuant to the terms of its policy on Patient Abuse and Neglect.

The standard disciplinary action in a case of abuse or neglect is termination of employment. However, the Standards of Conduct provide for the consideration of mitigating circumstances in the implementation of disciplinary actions. The Standards of Conduct 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.¹⁰

In this case, the agency gave consideration to nine mitigating factors (enumerated in Exhibit 8). Because of grievant's previously unblemished record, letters of commendation, prompt reporting of the incident and other factors, the agency elected not to terminate her employment. Instead, the agency issued a Group I Written Notice for unsatisfactory work performance – the lowest possible level of disciplinary action. Based on the totality of the circumstances in this case, the agency has demonstrated, by a preponderance of the evidence, that grievant's work performance on August 31, 2001 was not satisfactory.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued to the grievant on November 1, 2001 for unsatisfactory job performance is AFFIRMED. The Written Notice shall

¹⁰ Exhibit 4. Section VII.C.1, *Ibid*.

remain in the grievant's personnel file for the length of time specified in Section VII.B.2.c 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