Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 04/16/02; Decision Date: 04/18/02; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esquire; Case Number: 5424; **Judicial Review: Appealed to the Circuit Court in the County of Amherst on 05/23/02; Outcome: HO misapplied mitigation policies. Decision reversed. Court ruling dated 07/12/02**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5424

Hearing Date: April 16, 2002
Decision Issued: April 18, 2002

APPEARANCES

Grievant
Attorney for Grievant
Facility Director
Legal Assistant Advocate for Agency
Seven witnesses for Agency

ISSUES

Did the grievant's actions on December 22, 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? Did the agency issue the disciplinary action promptly?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued on March 4, 2002 for 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 certified nurse's aide (CNA) for 23 years. Her most recent performance evaluation rated her a "contributor" and noted that she "provides good personal care to assigned clients."[3] She has no prior active disciplinary actions.

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." Grievant received and read this document.[4] 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.[5]

In November 1999, grievant received training on the legal responsibilities of a nursing assistant. The written training material she received states, in pertinent part:

- *Never* give medications. This is the responsibility of a nurse or a physician.
- *Don't* handle tubes or objects that enter into a patient's body.[6]

Grievant has primary care responsibility for 5-6 patients in a ward that is supervised by a licensed practical nurse (LPN). One of her patients is a 34-year-old male with profound mental retardation, recurrent unexplained fever, chronic constipation and several other physical ailments.[7] He had an episode of

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[1] Exhibit 1. Written Notice, issued March 4, 2002.
[2] Exhibit 1. Grievance Form A, filed March 8, 2002.
[3] Exhibit 12. Performance Evaluation, signed October 13, 2001.
[4] Exhibit 15. *Receipt of Information and Agreement to Abide*, signed April 17, 2000.
[5] Exhibit 14. Departmental Instruction 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, revised April 17, 2000.
[6] Exhibit 13. *Legal Responsibilities of the Nursing Assistant*, 1996.
[7] Exhibit 18. Clinical Resume, patient G.M., January 9, 2002

gastrointestinal bleeding in 1989 but there is no evidence of a recurrence since that date.[8] The standing physician's order for this patient specified that a Fleet's enema should be administered three times weekly (MWF) and p.r.n. (as needed). An enema was administered to the patient sometime on December 21, 2001, probably during the day shift.[9] Grievant came on duty at 11:15 p.m. on the evening of December 21, 2001. At 2:00 a.m. (on December 22, 2001), the LPN found the patient's temperature elevated (101.6°) and administered a Tylenol suppository.[10]

At 4:00 a.m., grievant checked the patient's temperature with a rectal thermometer. Although his temperature had decreased slightly (101°), grievant suspected the patient had a fecal impaction. She put on a surgical glove and inserted her right index finger into the patient's rectum to probe for a possible impaction (there was none). She did not make any written record of performing this procedure. Grievant continued to monitor the patient every half-hour thereafter, checking his diaper for dampness or soiling. At 6:30 a.m., she noted nothing unusual and the patient's diaper was clean.

At 6:45 a.m., a day-shift CNA came on duty and found the patient's diaper completely saturated with blood.[11] She immediately notified the LPN who notified the physician. He ordered the patient taken to the medical clinic and thereafter, the patient, with severe rectal bleeding, was promptly taken by ambulance to a hospital emergency room. A colonoscopy was performed revealing an arterial bleeding lesion in the rectum. The rectal tear was cauterized and the bleeding stopped.[12] The rectal tear was only a few centimeters from the anus and within the distance normally reached during a digital examination. The tear was not caused by either cancer or a polyp. The patient received seven units of blood while at the hospital.[13] He was discharged from the hospital on December 26, 2001.

Invasive procedures such as digital rectal examinations are only within the scope of practice of physicians and registered nurses. CNAs are neither trained nor authorized to perform such procedures. Grievant knew that she was not permitted to perform such a rectal examination. She did not make a written record of performing this procedure because, "I knew I shouldn't have done it."[14] During the next two days, grievant's conscience bothered her. She believed that she might have failed to remove a large sapphire ring from her index finger while performing the examination and that it could have caused the rectal tear. She threw the ring away in her household garbage. As her conscience continued to

[8] Exhibit 7. Consultation report, December 24, 2001.
[9] Exhibit 20. Treatment Record, patient G.M., December 2001.
[10] This patient frequently resisted oral medication; suppositories were commonly used when he required an analgesic.
[11] Exhibit 10. Interdisciplinary Notes, December 22, 2001.
[12] Exhibit 7. Hospital *Operative Note*.
[13] Exhibit 7. Hospital *Consultation* report.
[14] Grievant's testimony during the hearing.

affect her, grievant went to her local police department and offered to "turn herself in before she was arrested."[15] She decided to go to the police rather than the facility because she believed that she "would get a better deal from the police than from the facility."

In her 23 years of experience, grievant has often observed registered nurses performing digital rectal examinations. Grievant felt that she could conduct such an examination without complication. Grievant has the reputation of being gentle, caring and competent in her work.[16] There is no indication that grievant had any intention to harm the patient.

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.[17]

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

[15] Exhibit 4. *Investigator's Summary*, January 17, 2002.
[16] Exhibit 4. Memorandum from RN Manager to Investigator, January 8, 2002.
[17] § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*

Code of Virginia, the Department of Personnel and Training[18] 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.[19] 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.[20]

Certain basic facts in this case are undisputed, and are in fact, admitted by grievant. Specifically, grievant forthrightly acknowledges that: a) she did perform a digital rectal examination on patient G.M., b) she knew that such an invasive procedure is not within the scope of practice for a certified nurse's aide, c) she had never received formal training on how to conduct such a procedure and, d) she had not been told or given permission to perform the examination. The definition of abuse (cited supra), when reduced to the relevant elements, means any act by an employee that was performed, 1) knowingly or intentionally and, 2) that caused or might have caused physical harm to a patient.

The first element is established by grievant's admission that she knowingly and intentionally performed the rectal examination. Grievant questions whether her act was performed "knowingly." The term "knowingly" is defined as "having or reflecting knowledge, information or intelligence."[21] There is no doubt from grievant's testimony that she knew precisely what act she was performing, why she was performing it and what she hoped to accomplish by it. Therefore, it must be concluded that she performed it knowingly.

Whether grievant's examination caused the rectal tear cannot be established with absolute certainty. The evidence reveals that invasive procedures had been performed on the patient at least three or more times in the 24-hour period before grievant conducted her examination. An enema was administered, a medicinal suppository was inserted and rectal thermometers were inserted. It is theoretically possible that one of these procedures, if performed improperly or with defective equipment, could have caused the rectal

[18] Now known as the Department of Human Resource Management (DHRM).
[19] Exhibit 17. DHRM Policy 1.60, Standards of Conduct, effective September 16, 1993.
[20] Exhibit 14. Section 201-8, Departmental Instruction 201(RTS)00, *Ibid.*
[21] Webster's Ninth New Collegiate Dictionary.

tear. However, for three reasons, it appears more likely than not that none of these procedures caused the tear. First, the personnel who performed the enema and the suppository insertion were experienced nurses who are trained and authorized to perform such procedures. Second, the investigation revealed no defective equipment. Third, and most convincingly, the unrebutted testimony of the agency's physician established that the arterial tear would have pumped out a large quantity of blood in a relatively short time (30-60 minutes at most).[22] Thus, it is highly unlikely that procedures performed many hours earlier (enema and suppository insertion) could have caused the rectal tear.

On the other hand, it is likely that grievant was responsible for the rectal tear for two reasons. First, she had never been formally trained to perform the procedure. Second, she was the last person to perform any type of invasive procedure on the patient before the injury was discovered. However, even though it is probable that grievant's examination caused injury to the patient, it is not necessary to decide that issue in order to conclude that grievant's action constituted abuse under the agency's policy.

The second element necessary to constitute abuse requires that the act either caused or *might have caused* harm to the patient. Here, grievant knew that she was performing an invasive procedure that requires training and authorization. Knowing that she had neither training nor authorization, grievant knew, or reasonably should have known, that performing this examination *might* cause harm to the patient. Thus, even if this patient had not been injured, grievant nonetheless knowingly performed an act that *might* have caused injury to the patient – prima facie evidence of abuse as defined in the policy. Accordingly, the agency has demonstrated, by a preponderance of the evidence, that the grievant's unauthorized rectal examination constituted abuse – an offense that normally results in termination of employment.

Grievant argues that the investigator's initial finding of no abuse should be upheld because he is an experienced investigator. Agency management has the right and obligation to overrule the initial finding of a subordinate employee if it determines that the employee made an incorrect conclusion. A prior ruling by the Director of the Department of Employment Dispute Resolution (EDR) has established that upper management has the discretion to review the immediate supervisor's decision and to make a determination to award the requested relief or uphold the disciplinary action.[23]

Grievant contended that a supervisor had previously told her that grievant could give enemas and suppositories but grievant would not identify the person who allegedly told her that. That person did not testify or submit an affidavit.

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[22] The physician also testified that fecal matter could temporarily have blocked the rectal tear. If the patient later shifted his position during sleep, it may have then resulted in a delayed discharge of blood that had accumulated in the colon.

[23] Compliance Ruling of Director, In re: DMHMRSAS, March 23, 2001.

Prompt Issuance of Disciplinary Actions

One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. As soon as a supervisor becomes aware of an employee's unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior.[24] Management should issue a written notice as soon as possible after an employee's commission of an offense.[25] One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. Unless a detailed investigation is required, most disciplinary actions are issued within one or two weeks of an offense.

In this case, the disciplinary action was issued ten weeks following commission of the offense. A detailed investigation was conducted and the report was completed approximately four weeks after the injury. However, the investigation manager questioned the investigator's conclusion and asked him to conduct further inquiries. After the manager reversed the initial determination, a second person reviewed the report; three weeks were required for the additional investigation and reviews. Subsequently, the medical director reviewed the case and returned it to the facility for disciplinary action.[26] It is understandable that the agency would give this case more scrutiny than a lesser disciplinary action. However, it appears that the reviews following the investigation manager's final determination might have been conducted somewhat more expeditiously. Nonetheless, given the seriousness of this case, the delay in issuance of discipline is not sufficiently inordinate to warrant vacating the disciplinary action.

Mitigation

Code of Virginia § 2.2-3005.C.6 provides that a hearing officer has the power to order appropriate remedies. The specific authority for a hearing officer or grievance panel to modify or reverse an agency's disciplinary action is found in the Standards of Conduct, which states, in pertinent part, "A grievance panel[27] may uphold, **modify**, or reverse disciplinary action taken by an agency so long as the panel's decision is consistent with written policy."[28] (Emphasis added) The Department of Human Resource Management has affirmed the authority of a hearing officer to modify a decision through the application of mitigation in a ruling in which it stated:

[24] Exhibit 17. Section VI.A. *Ibid.*
[25] Exhibit 17. Section VII.B.1. *Ibid.*
[26] Exhibit 3. Memorandum to facility director from medical director, February 28, 2002.
[27] Grievance panels have been replaced by hearing officers.
[28] Section IX.B.1, DHRM Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

> A panel correctly viewed the lack of counseling before the issuance of a Group II Written Notice as a mitigating factor justifying reduction of disciplinary action to a Group I Written Notice.[29]

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.[30]

The grievant has both long service (23 years) and otherwise satisfactory work performance. Her most recent performance evaluation documents the grievant's performance as a contributor who provides good care, maintains good attendance and willingly works overtime when needed. The documentary evidence and testimony reflect only positive comments about the grievant. There is no record of any prior discipline. She has been forthright in disclosing her actions in this case, cooperative during the investigation, and appears genuinely contrite about what she did. All of these factors mitigate in the grievant's favor. There are no aggravating circumstances. But for this one incident, the grievant has been a significant asset to the agency for more than two decades.

Accordingly, it is concluded that, while the grievant's action merits a Group III Written Notice, there are sufficient mitigating circumstances to warrant retaining the employee in state service. However, to emphasize the seriousness of the offense, grievant's reinstatement will not include back pay or benefits during the period between March 4, 2002 and the date of reinstatement.

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice issued on March 4, 2002 is AFFIRMED. However, the grievant is reinstated to her position without back pay or benefits. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

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[29] Department of Personnel and Training interpretation, February 28, 1992.

[30] Exhibit 17. Section VII.C.1, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

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