

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: June 14, 2002; Decision Date: June 18, 2002; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esquire; Case Number: 5445



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5445

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| Hearing Date: | June 14, 2002 |
| Decision Issued: | June 18, 2002 |

PROCEDURAL ISSUE

The hearing was initially docketed for the 15th day following appointment of the hearing officer.¹ The grievant requested a postponement because of a conflict with her part-time employment. The hearing officer granted grievant's request and the hearing was rescheduled for the 32nd day following appointment of the hearing officer.

APPEARANCES

Grievant
Legal Assistant Advocate for Agency
Six 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 July 2, 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 because she had physically 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 human services care worker (HSCW) for one year and two months. Grievant received a Group I Written Notice on May 15, 2001 for unsatisfactory attendance; this disciplinary action remains active. During the two months following her employment, grievant received extensive training on a wide variety of topics including human rights (September 19, 2000), Mandt System® techniques⁴ (September 22, 2000), and behavior modification techniques (October 11, 2000).⁵

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, in pertinent part:

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

² Exhibit 7. Written Notice, issued March 7, 2002.

³ Exhibit 8. Grievance Form A, filed April 5, 2002.

⁴ The main goal of The Mandt System® is to teach one how to effectively manage a potentially negative or even dangerous situation by calming one's own emotional response and managing one's own behavior so you can interact with other people positively. See page 7, The Mandt System® *Student Manual*, revised May 31, 1998.

⁵ Exhibit 2. Grievant's Training Record.

illness, mental retardation or substance abuse. Examples of abuse include, but are not limited to, acts such as assault or battery.⁶

At about 1:30 p.m. on July 2, 2001, grievant heard banging on the floor of a bedroom and went to investigate. She found that a 40-year-old female client, who is moderately mentally retarded,⁷ had dragged a bed from one side of the room to another. A registered nurse (RN) was in the nursing office adjacent to the bedroom and also heard banging coming from the room. He left the office, turned left and walked two or three steps to the doorway of the bedroom. As he looked into the room he noticed the bed mattress on the floor and saw the client hunkered down over the bed frame. The grievant was bent over the client and with a closed fist struck the client in the face three times in rapid succession. Grievant started to walk away, gave the client one last jab in her left side, and said, "I told you to leave that damn bed alone."⁸

The event happened so quickly, and so shocked the RN, that it was over before he could intervene. He then went immediately to another RN to report the incident. A nurse supervisor approached the two RNs during this conversation and the RN advised her of what he had seen. The supervisor asked him to identify the person who had struck the client. The RN pointed out the grievant and then went to the Facility Director's office to report the incident. A physician examined the client at 2:55 p.m. Although there were no signs of injury, the client pointed to the left side of her chest and said she "was hit."⁹

The matter was reported to the facility police department on the day of the incident and grievant was arrested and charged with battery. Grievant signed a summons stating that she would appear for an arraignment on July 9, 2001. When grievant failed to appear in court on that date, the court issued a bench warrant for her. Grievant was subsequently arrested and a trial date set. One or two continuances occurred and the case was finally set for trial on February 25, 2002. The RN had a medical emergency on that date and the commonwealth's attorney decided to enter a *nolle prosequi* upon the record. The agency had not taken action to discipline grievant pending the outcome of the grievant's trial. When the commonwealth's attorney decided not to further prosecute the case, the agency issued a Group III Written Notice and discharged the grievant on March 7, 2002.¹⁰

⁶ Exhibit 1. Departmental Instruction 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, revised April 17, 2000.

⁷ Exhibit 3. *Client's Behavior Support Plan*.

⁸ Exhibit 4. RN's witness statement form, July 2, 2001.

⁹ Exhibit 6. Medical Examination form, July 2, 2001.

¹⁰ Section VIII.B.6, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993 provides that an agency may suspend an employee during the pendency of court action. When legal action is concluded, the agency has the option either to impose disciplinary action, including termination of employment, or to reinstate the employee.

The RN who observed this incident had been working for the agency only a few months. On July 2, 2001, he had just been assigned to grievant's ward. He did not know the names of any of the clients or employees who worked there. He had never had any contact with grievant and did not know who she was. Grievant did not know the RN and had not had any previous interaction with him.

Grievant acknowledged that she has an anger management problem and that she has taken an anger management control class.

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 Training¹² 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.

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

¹² Now known as the Department of Human Resource Management (DHRM).

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.¹³ The agency's policy on patient abuse provides that an employee found to have abused a client would normally be discharged.¹⁴

There were only three people who witnessed this incident but one (the client) is incapable of testifying due to her mental disability. Therefore, this case involves the classic "he said – she said," situation. Grievant denies striking or hitting the client, while the RN has testified that grievant struck the client a total of four times.¹⁵ Both grievant and the RN testified credibly during the hearing. Nonetheless, it is concluded for the following four reasons that grievant did physically abuse the client by striking her.

First, the client advised the examining physician that she had been hit in her left side. The agency psychologist and the examining physician both testified that the client does not lie. This corroborates the RN's testimony that grievant jabbed the client in her side just before she walked away. Although the physician found no evidence of injury, the absence of such evidence is not dispositive. The examination occurred nearly one and one half hours after the incident and such evidence could easily have disappeared in the interim. Moreover, the blows to the client might have been hard enough to hurt but not so hard as to leave any telltale evidence.

Second, grievant has failed to provide any reason that the RN would fabricate such an incident. The RN and grievant did not know each other and had never had any interaction until the incident occurred. It is simply not credible that the RN would have created a fictional incident for no reason. Based on the client's affirmation that she had been hit, the evidence establishes that the client was actually struck, and that the RN witnessed the incident. The RN did not know anyone in the ward since he had just been assigned there. Therefore, it is also not credible that he would accuse grievant if she was not the person who struck the client.

Third, the RN's testimony during the hearing was consistent with the witness statement he provided on the day of the incident, despite the fact that the incident occurred nearly one year ago. It was also consistent with the testimony of other agency witnesses. Finally, the RN was employed on a contract basis for approximately six months and has not worked for the agency since late 2001.

¹³ DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

¹⁴ Exhibit 7. Section 201-8, DI 201(RTS)00, *Ibid*.

¹⁵ Exhibit 5. Grievant's witness statement form, July 2, 2001.

He has no reason to testify favorably for the agency and is therefore an impartial witness.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice issued to the grievant on March 7, 2002 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