

Issue: Group III Written Notice with termination (patient abuse); Hearing Date: 12/12/02; Decision Date: 12/18/02; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No.: 5588



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5588

Hearing Date: December 12, 2002
Decision Issued: December 18, 2002

APPEARANCES

Grievant
Two witnesses for Grievant
Representative for Agency
Party for Agency
Three witnesses for Agency

ISSUES

Did the grievant's actions 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 and termination of his employment for abusing a patient.¹ 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 for 22 years. He is a Licensed Practical Nurse (LPN). The patients at this facility are mentally retarded, physically handicapped, mentally ill or some combination of these conditions.

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.” Abuse is defined as:

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. Examples of abuse include, but are not limited to, acts such as: assault or battery.³

The policy further states that that a facility director will normally terminate an employee found to have abused or neglected a client, but it also provides for lesser discipline if there are mitigating circumstances.”⁴

Patient J. is a 71-year-old female with mild mental retardation and bipolar disorder.⁵ She has impaired short- and long-term memory and chronically poor insight and judgement. She can become agitated, loud, disruptive, verbally abusive, and at times physically aggressive and threatening. She has struck many employees at different times. Her mood is unstable. She is enamoured with the grievant and frequently tells staff that she loves him and used to “go with him.”⁶ She prefers to be fed and cared for by the grievant. She has never previously hit the grievant. During the past three years, patient J. has accused every employee in the building of hitting her at one time or another. For several

¹ Exhibit 5. Written Notice, issued October 22, 2002.

² Exhibit 6. Grievance Form A, filed October 23, 2002.

³ Exhibit 2. Section 201-3, Departmental Instruction 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, April 17, 2000.

⁴ Exhibit 2. Section 201-8, *Ibid.*

⁵ Exhibit 1. Annual Summary and Physical Examination, August 5, 2002.

⁶ Exhibit 1. Witness statement, September 13, 2002.

days immediately prior to September 12, 2002, patient J. had been “escalated” requiring “several psychotropic medications.”⁷

On the night of September 12/13, 2002, grievant worked the night shift from 11:00 p.m. until 7:30 a.m. There was a need for an employee in another ward and grievant volunteered to work in that ward. However, his supervisor instructed him to return to his regular ward at breakfast time in order to feed patient J. When grievant returned at about 7:00 a.m., he found patient J. agitated and hostile, verbally abusive, yelling and cursing, and stating, “They’re trying to kill me, they’re beating me up, all the cock-sucking mother fuckers.”

Grievant, by his own admission, was physically tired and mentally worn out on the morning of September 13, 2002.⁸ He was so tired that:

“my body internally was shaking as if a train was running next to me and vibrating my body with tremendous force. I couldn’t think straight. I knew what I was supposed to be doing, but everything was just so irritating that I felt like I just couldn’t deal with anything. I needed some rest, I needed to sleep, just needed to get away from everything. ...

When I entered the ward and all the cursing J. was doing did not have the same effect on me. I couldn’t stand it. I felt like my head was going to split. ... She started to strike out with her hand at me and I told her to stop she didn’t. I held her by both arms, I remember yelling at her, I remember pushing her in the area of her shoulder, but God be my witness, that’s all I remember doing.”⁹

As grievant was preparing patient J’s food, she struck him in the chest. Grievant was shocked and surprised because patient J had never hit him before. He reacted by pushing her shoulder. The patient then swung at grievant three or four more times. When J attempted to hit grievant with upraised fists, grievant prevented her from doing so by grabbing her forearms until she desisted. During this episode, grievant told patient J to stop what she was doing.

The RN in charge of the building on the night of September 12/13, 2002 did not observe any conflict between grievant and patient J. None of her staff mentioned any incident between the two. Grievant’s immediate RN supervisor considers grievant an excellent employee, cooperative, a kind and professional caregiver, and one who upholds agency standards. She has never observed him abuse patients and he has never been disciplined for such an offense.

⁷ Exhibit 1. Investigator’s report of staff physician’s comments.

⁸ Exhibit 4. Grievant’s handwritten statement, October 11, 2002.

⁹ Exhibit 4. *Ibid.*

The employee who was feeding another patient directly behind grievant did not corroborate the allegation made against grievant by the reporting employee. The only employee who reported seeing the incident was feeding another patient about 12-15 feet behind grievant. She was unable to see patient J because grievant was standing in front of the seated patient J. There was no evidence of physical or psychological injury sustained by the patient as a result of this incident.

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 Code of Virginia, the Department of Personnel and Training¹¹ 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.

¹⁰ § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

¹¹ 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].¹² An example of a Group III offense is an act of physical violence.

Patient J. did not testify at the hearing. Given her mental retardation and impaired memory it is unlikely her testimony would have been useful. However, the written statements of other employees provide useful indicators regarding the credibility of patient J's hearsay statements. First, patient J. was already accusing others of beating her up ("*They're beating me up!*") when grievant first came onto the ward. Second, when asked by one employee if grievant had beat her up, patient J. said, "No, another one."¹³ Third, when asked where she was hurt, patient J. pointed to her forehead. There is no evidence or testimony that grievant struck patient J. in the forehead; it is alleged only that grievant hit J. on the shoulder. Fourth, patient J's impaired memory and labile mood swings require that her statements be subjected to careful scrutiny. Fifth, patient J. had been placed on several psychotropic medications for her escalated condition in the days leading up to this incident. Therefore, the hearing officer accords little evidentiary weight to the hearsay evidence about patient J's statements.

The sole witness who reported the incident was feeding another patient about 12-15 feet behind grievant. She could not see patient J. She alleges that she heard grievant say, "Hit me again, J, " and that grievant hit the patient three times. Grievant denies making any such statement, and denies hitting the patient three times. The RN supervisor testified very credibly that the reporting witness has a reputation for being untruthful and for exaggerating. Further it is widely known that the reporting witness does not like grievant. Shortly after she was hired one year ago, she had a disagreement with grievant and has not been friendly towards him since that time.

Grievant has expressed significant remorse for his actions.¹⁴ It is clear from his written statement that he was physically and mentally drained on the morning of September 13, 2002. When patient J suddenly struck him without warning, he reacted without thinking and pushed her shoulder. Grievant admits that it was improper to do this; he should have just backed away from the patient after she hit him. He failed to back away because he was so shocked that patient J had hit him. She had never hit him in the two years he fed and cared for her.

¹² DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

¹³ Exhibit 1. Witness statement, September 13, 2002.

¹⁴ Exhibit 4. Grievant's handwritten statement, October 11, 2002.

Two RN nurse supervisors testified that the grievant is an excellent worker, that he is of good character and that he has never previously abused patients. He receives above average evaluations, is always cooperative, and is considered a kind and professional caregiver. The nurses felt very comfortable leaving grievant in charge of the ward when they had to go to other wards. The testimony of the two RN supervisors was detailed, dispassionate and very credible.

Essentially, this case pits grievant's testimony against that of one witness. Grievant has testified credibly and forthrightly that he did push the patient's shoulder and defended himself by putting his hands up in front of himself and holding the patient's upraised forearms to prevent her from hitting him again. He has expressed considerable remorse and bared his innermost feelings in a remarkably candid written statement. His 22 years of unblemished service and high reputation with supervisors corroborate that his credibility is excellent. The reporting witness, on the other hand, has been employed for only one year and has a well-known dislike of the grievant. Her reputation includes lying and exaggerating. Accordingly, the grievant's testimony is found to be more credible than that of the sole reporting witness. It is therefore more likely than not that grievant's recollection of the event is more accurate than the witness's version.

The investigation report places weight on the fact that patient J said someone with grievant's first name had "beat me up." However, this ignores the fact that patient J. had also been accusing others of beating her up ("*they* are beating me up"). It also ignores the fact that when specifically asked if grievant beat her up, patient J. responded in the negative and said that it was someone else with the same first name as grievant. The sum total of patient's J's answers is that she was confused, medicated, and upset. For these reasons, and those discussed previously, the report's reliance on patient J's statements is not warranted.

The investigative report also dwells on patient J's previously incurred minor wound. The patient had a dressing that covered a wound on the back of her hand and wrist. Extensive bandaging had been placed on the wound and part of the bandaging extended onto the forearm. However, grievant held the underside of patient J's forearms – well away from the actual wound area – because he knew where the wound was.

Nonetheless, even adopting grievant's version of the event, it must be concluded that grievant did restrain patient J by pushing her shoulder and by holding her forearms to prevent her from hitting him. Technically, these actions fit within the agency's definition of abuse because the definition is extremely broad. Therefore, it must be concluded that grievant did commit an offense for which agency and facility policies normally require termination of employment.

However, both agency and facility policies provide for the application of lesser disciplinary action when there are mitigating factors.¹⁵

Mitigation

Section 2.2-3005.C of the Code of Virginia provides that grievance hearing officers shall have the following powers and duties:

6. For those issues qualified for a hearing, order appropriate remedies. Relief may include reinstatement, back pay, full reinstatement of fringe benefits and seniority rights, or any combination of these remedies; and
7. Take other actions as necessary or specified in the grievance procedure.

EDR, the state agency charged by law to implement the grievance statute, has long held that a hearing officer's powers and duties include the authority to consider mitigating circumstances in deciding whether the level of discipline issued to a grievant by his employing agency was too severe or disproportionate to the offense. Indeed, EDR's Rules for Conducting Grievance Hearings expressly recognizes that because employing agencies may consider mitigating circumstances under DHRM's Standards of Conduct, grievance hearing officers may do so as well.¹⁶

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.¹⁷

Further, DHRM's *Standards of Conduct* expressly recognizes that agency disciplinary actions may be upheld, modified or reversed through the grievance hearing process as long as the hearing decision "is consistent with written

¹⁵ Exhibit 2. *Ibid.* See also Exhibit 3, Facility Policy No. RI 050-57, *Reporting and Investigating Abuse and Neglect of Clients*, March 1, 2002.

¹⁶ EDR *Rules for Conducting Grievance Hearings*, effective July 1, 2001. See also Section 5.9(a)2, *Grievance Procedure Manual* which provides that available relief from hearing officers includes "upholding, reducing or rescinding disciplinary actions."

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

policy."¹⁸ Moreover, in a published interpretation of its *Standards of Conduct*, DHRM expressly recognizes that a grievance hearing panel correctly used mitigation to reduce the level of discipline issued to the grievant by his employing agency.¹⁹

In sum, both EDR and DHRM have long recognized through published policy, procedure, and rulings that a grievance hearing officer may apply mitigation in appropriate cases to reduce the level of a grievant's discipline. Moreover, DHRM policy provides that an agency's own policy may not be inconsistent with DHRM's²⁰; thus an agency may not, through its own policy, abrogate DHRM's (and EDR's) policies recognizing a hearing officer's authority to uphold, modify or reverse a disciplinary action through the appropriate application of mitigating circumstances.

In mitigating discipline appropriately, however, a hearing officer must "also consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy."²¹ Thus, only where compelling mitigating circumstances exist should a hearing officer reduce the level of discipline issued by an agency in accordance with law and policy. This is such a case.

The grievant has both long service (22 years) and otherwise satisfactory work performance. Grievant's supervisor has rated him not only satisfactory but above average. Grievant has the reputation of providing good patient care, being reliable, and willing to work overtime when needed. The documentary evidence and testimony reflect only positive comments about the grievant. There is no record of any prior active discipline. He has been extremely forthright and remorseful in discussing his actions in this case, and is genuinely contrite about what he did. All of these factors mitigate in the grievant's favor. There are no

¹⁸ Section IX.B.1, DHRM Policy 1.60 (*Standards of Conduct*), effective September 16, 1993 ("a grievance panel may uphold, modify or reverse disciplinary action taken by an agency so long as the panel's decision is consistent with written policy"). The language in this provision references grievance hearing "panels" and does not reflect the statutory amendments in 1995 which provide that hearing officers, not panels, conduct grievance hearings and issue hearing decisions. Nevertheless, this policy Section remains in effect and thus would appear to apply to the hearing officer system now, as it did to the hearing panel system prior to 1995.

¹⁹ Department of Personnel and Training Interpretation of *Standards of Conduct* ("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"). This language references a grievance hearing "panel" and thus does not reflect the 1995 statutory amendments that replaced hearing panels with hearing officers. The Interpretation would nevertheless appear to apply to the hearing officer system used today, as it did to the hearing panel system prior to 1995.

²⁰ Section IX.A.1, DHRM Policy 1.60 (*Standards of Conduct*), effective September 16, 1993 (permitting agencies to supplement the *Standards of Conduct* to accommodate specific needs so long as the agency policy is not inconsistent with the DHRM policy).

²¹ EDR *Rules for Conducting Grievance Hearings*, effective July 1, 2001.

aggravating circumstances. But for this one incident, the grievant has been a significant asset to the agency for more than two decades. Moreover, his action, while a disciplinary offense, was the result of exhaustion and a reflexive reaction to the totally unexpected blow from patient J.

Accordingly, it is concluded that, while the grievant's action merits a Group III Written Notice, there are sufficient mitigating circumstances to warrant reinstatement. However, to emphasize the seriousness of the offense, grievant's reinstatement will not include back pay or benefits during the period between October 22, 2002 and the date of reinstatement. Further, by this decision, grievant is on notice that the circumstances unique to this case may not preserve his employment in the future should there ever be a recurrence.

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice issued to the grievant on October 22, 2002 is hereby UPHeld. The grievant is REINSTATED to his position. The Written Notice shall remain in grievant's personnel file for the length of time specified in Section VII.B.2.c of the Standards of Conduct.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.²²

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

David J. Latham, Esq.
Hearing Officer

²² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.