

Issue: Group III Written Notice with termination (patient abuse); Hearing Date: 01/27/03; Decision Date: 01/28/03; Agency: DMHMRSAS; AHO: David Latham, Esquire; Case No. 5605



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5605

Hearing Date: January 27, 2003
Decision Issued: January 28, 2003

PROCEDURAL ISSUE

Due to seasonal holidays and other factors, the first date on which all participants were available for a hearing was the 42nd day following appointment of the hearing officer.¹

APPEARANCES

Grievant
Employee Relations Manager
Advocate for Agency
Three witnesses for Agency

¹ § 5.1 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001, 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 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.² 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 for 6 years, in both part-time and full-time positions. He is a Forensic Mental Health Technician (FMHT). The patients at this facility are mentally retarded, physically handicapped, mentally ill or some combination of these conditions. Grievant has three prior active disciplinary actions: a Group I Written Notice for unsatisfactory attendance; a Group I Written Notice for unsatisfactory attendance; and a Group I Written Notice for unsatisfactory work performance.⁴

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 a copy of the policy.⁵ 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, use of language that demeans, threatens, intimidates or humiliates the person.⁶

² Exhibit 1. Written Notice, issued October 4, 2002.

³ Exhibit 1. Grievance Form A, filed October 29, 2002.

⁴ Exhibit 7. Written Notices, issued May 6, 2001, October 16, 2001, and May 22, 2002, respectively.

⁵ Exhibit 4. Receipt for policy signed by grievant, April 24, 2000.

⁶ Exhibit 3. Section 201-3, Departmental Instruction 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, April 17, 2000.

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.”⁷

On September 4, 2002, grievant worked the day shift from 7:00 a.m. to 3:30 p.m. The employee who was scheduled to replace him experienced car trouble and grievant was asked to work for about one additional hour until his replacement arrived. Grievant was assigned to monitor, one-on-one, a particularly troublesome patient who is mildly mentally retarded. The patient was on his bed in his room; grievant was sitting in a chair in the hall just outside the patient’s door. The patient had been in four-point restraints most of the day but was allowed out of bed late in the afternoon. As a result, at 4:00 p.m. the patient was more upset than usual and was threatening to beat up staff and the grievant. Grievant responded with words to the effect of, “That’s OK. You just keep on saying those things and acting this way, and I’ll get to see you in restraints - all four, and then I will get to mess with you all shift, because they will ask me to stay over for the one-on-one.”

The charge nurse (registered nurse) had heard the patient acting up but could not hear specifically what he was saying because he was in his room. When grievant responded to the patient, the nurse was about 20 feet away and heard grievant clearly. After answering a telephone call, she relieved grievant by assigning another staff person to the patient. Another FMHT was in the same general area and also heard grievant threaten the patient by saying he wanted to get the patient in restraints so he could get overtime. The charge nurse asked grievant why he had said what he did. Grievant said he didn’t know, but that he was tired and was fed up with the patient.

During the investigation, grievant did not advise the investigator that there was a third staff member who witnessed the incident. During grievant’s second-step grievance resolution meeting with the facility director, grievant again did not mention a third witness. Grievant has not previously had any adverse interaction with either the charge nurse or the FMHT who witnessed his statement to the patient. Grievant has no reason to believe that either person would be untruthful about what they heard grievant say.

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

⁷ Exhibit 3. Section 201-8, *Ibid.*

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.⁸

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 Human Resource Management 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 One example of a Group III offense is threatening persons associated with any state agency including patients.

The agency has demonstrated, by a preponderance of the evidence, that grievant verbally abused a patient by verbally threatening to place him in restraints and "mess with him." Although grievant now denies having done so, the weight of the evidence demonstrates that he did make such a threat. First, two witnesses testified credibly that grievant made the threat. Grievant had no previous problem with either witness and candidly admitted that he could not think of any reason that either witness would be untruthful.

⁸ § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

⁹ Exhibit 8. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

Second, although grievant contends there was a third witness, grievant never mentioned this witness during the investigative interview, during the second-step resolution meeting, or at any time prior to this hearing. Grievant did not bring this witness to testify at the hearing and did not request an Order to compel his appearance.

Third, during the investigative interview, grievant denied that he made the statement attributed to him. During the second-step resolution meeting grievant again denied to the facility director that he made the statement. However, grievant then argued that he was simply following the patient's treatment plan, which he contends permits staff to remind patients who are acting up that they can be placed in seclusion or restraints. By making this argument, grievant has effectively acknowledged that he did, in fact, make the statement. Grievant's earlier denial and subsequent admission are inconsistent and therefore taint his credibility.

Fourth, grievant did not produce or request a copy of the patient's treatment plan to submit as evidence in this case. Nonetheless, viewing grievant's contention in the light most favorable to him, it will be assumed for the sake of argument that the patient's treatment plan does permit him to be reminded of the consequences for acting up. However, grievant's statement went well beyond "reminding" and became a threat when he told the patient he would "mess with him" when he got him into four-point restraints.

Grievant observes that the RN and the FMHT witnesses' memories were inconsistent with regard to where each was standing at the time grievant made the threat. While this is correct, the two witnesses' recollection of what grievant said is generally consistent. Exactly where they were standing is of relatively little evidentiary value compared to what grievant said.

Grievant also claims there should be videotape of this incident. However, grievant did not request a copy of the videotape from the agency and did not ask the hearing officer to issue an Order for its production. However, even if such a surveillance videotape exists, the surveillance cameras do not have audio capability. Thus, a videotape would not reveal what grievant said.

Grievant argues that the investigation was flawed because the backgrounds of witnesses were not investigated. However, the investigator testified that it is neither required nor part of such an investigation to look into the background of each witness. Moreover, grievant did not proffer during the hearing any evidence about the witnesses' background that would cast any doubt on their credibility.

Finally, grievant notes that the FMHT witness wrote two statements about the incident. He believes that she was coached when preparing the second statement. However, grievant did not question her about this during his cross-

examination of this witness. Other than his own opinion, grievant did not offer any objective evidence to support his belief.

Mitigation

The agency considered possible mitigating circumstances but was unable to find any circumstances that would justify reducing the level of discipline. The grievant had been employed for only six years. His two most recent evaluations rated his performance as only "Fair but Needs Improvement" and "Contributor" (satisfactory).¹⁰ On the other hand, aggravating circumstances exist because grievant had accumulated three Group I Written Notices during the preceding 18 months.

DECISION

The disciplinary action of the agency is affirmed

The Group III Written Notice and termination of grievant's employment on October 4, 2002 are hereby UPHELD. 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.

¹⁰ Exhibits 5 & 6. Grievant's performance evaluations for 2000 and 2001, respectively.

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.¹¹ 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.¹²

[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

¹¹ An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, Record No. 2853-01-4, Va. Ct. of Appeals, (December 17, 2002).

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.