

Issue: Group III Written Notice (patient abuse); Hearing Date: 01/22/03;
Decision Date: 01/23/03; Agency: DMHMRSAS; AHO: David J. Latham,
Esquire; Case No. 5615



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5615

Hearing Date: January 22, 2003
Decision Issued: January 23, 2003

PROCEDURAL ISSUES

Due to the Christmas and New Years holidays, and the availability of participants, the hearing could not be docketed until the 35th day following appointment.¹

Grievant requested as part of the relief she seeks, that her coworkers be advised that the patient abuse allegation was not substantiated. Employee discipline and grievances are confidential personnel matters. The hearing officer may not direct the agency to discuss with other employees (other than necessary human relations or management personnel) the outcome of the grievance process.²

¹ § 5.1, Department of Employment Dispute Resolution (EDR) *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.

² § 5.9(b)7, EDR *Grievance Procedure Manual*, effective July 1, 2001.

APPEARANCES

Grievant
Attorney for Grievant
Three witnesses for Grievant
Representative for Agency
Two 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 for abusing a patient on September 4, 2002.³ Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.⁴

The Department of Mental Health, Mental Retardation and Substance Abuse Services (MHMRSAS) (Hereinafter referred to as "agency") has employed the grievant as a registered nurse for 11 years. She has never been disciplined or counseled. Geriatric 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

³ Exhibit 5. Written Notice, issued October 11, 2002.

⁴ Exhibit 4. Grievance Form A, filed October 24, 2002.

harm, injury or death to a person receiving care or treatment for mental illness, mental retardation or substance abuse.⁵

At about 5:00 p.m. on September 4, 2002, grievant was working with a 69-year-old female patient who is bipolar and schizophrenic. The patient is verbally and physically aggressive. She has a history of being difficult to work with, resisting instructions, yelling, kicking, hitting, and biting anyone in her vicinity when she is upset and acting up. On this occasion, grievant had wheeled the patient in her wheelchair to the door of the dining room. The patient then started acting up and slid out of her wheelchair onto the wheelchair footrests. Three human service care workers (HSCW) tried to talk the patient into getting back into her wheelchair. The patient was cursing and yelling, "Leave me alone; leave me alone," and was fighting, kicking and attempting to bite staff.

At this point, grievant and a fourth HSCW lowered the patient to the tiled floor and moved the wheelchair out of the way. Grievant told the other staff to back off and let her talk with the patient; most of the staff returned to their duties. Grievant talked with the patient and encouraged her to get back in the wheelchair. When the patient continued to be uncooperative, grievant became concerned for the patient's safety. The patient was lying on her back blocking the door to the dining room. The evening meal was being served at this time and other patients were coming in and out of the dining room. Some patients have little regard for others and would willingly kick a patient who was lying on the floor in their path. The patient's posey mat was not available in the immediate area. Grievant held the patient by her upper arm or arms and pulled her approximately 1½ feet so that she was lying beside the doorway rather than blocking the doorway.

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:

⁵ Exhibit 6. Section 201-3, Departmental Instruction 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, April 17, 2000.

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.⁶

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].⁷ An example of a Group III offense is an act of physical violence.

The agency has failed to demonstrate, by a preponderance of evidence, that grievant committed either an act of physical violence or patient abuse. First, there was only one witness who raised a question about grievant's movement of the patient. Although that witness was (by her own estimate) no more than seven feet from the patient, she could not accurately recall some details about the incident. However, she did remember that grievant moved the patient no more than 1½ feet and that she moved her just enough to get her out of the doorway. The witness did not see the grievant do anything that caused or might have caused physical harm to the patient. She did not see grievant use excessive force or take any other action that could be construed as physical abuse.

Second, the only other person who witnessed the incident was an HSCW who recalled that grievant "gently slid" the patient out of the doorway.⁸ She observed that, before grievant moved the patient, the patient had been in a potentially hazardous area because other patients were trying to get through the

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

⁷ DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

doorway. This witness believes that grievant moved the patient in an appropriate manner.

Third, the grievant's testimony was consistent with the two witnesses to the extent that she moved the patient approximately 1½ feet. Grievant was familiar with the patient's treatment plan and knew that it called for a posey mat to be placed on the floor whenever the patient removed herself from the wheelchair.⁹ However, the patient's posey mat was not immediately available and grievant determined that it was most important to first move the patient out of the doorway to prevent passing patients from kicking her.

Fourth, grievant acknowledges that she did not utilize a Mandt® technique when moving the patient.¹⁰ However, the Mandt® techniques describe how to move a passive patient – not a patient who is kicking, flailing her arms, and attempting to bite people.

Fifth, the staff psychologist testified that when a situation is not addressed in a patient's treatment plan, staff is expected to use their best judgement at the time to handle the situation. In this case, grievant determined that the paramount concern at the moment was moving the patient out of the path of other patients who might kick her. Under the circumstances, grievant made a judgement she felt was best at that time. While such judgements are always subject to second-guessing at a later time, her judgement appears reasonable in this instance.

The investigation, while thorough and detailed, draws a conclusion that focuses on two somewhat inflammatory points. First, it relies heavily on one witness' description that the patient was being "dragged like an old rag."¹¹ This description is outweighed by the testimony of both grievant and the second witness. Moreover, this description is so subjective and loaded with negative connotations that it is of relatively little evidentiary weight. This is especially true in view of the fact that all agree that the patient was moved only 1½ feet. A second focus on the patient's repeated yelling to "leave me alone" ignores the fact that the patient had been yelling this refrain well before she was moved.

The investigation correctly observes that grievant did not use a Mandt® technique to move the patient. Grievant readily acknowledged this and had a reasonable explanation for not doing so. However, the agency has not identified with specificity just which technique should have been used for a patient who is lying on the floor yelling, flailing her arms, kicking and attempting to bite those around her. Assuming that there is a technique for dealing with this situation,

⁸ Exhibit 2. Section III.A.1.b, Investigator's Summary, September 18, 2002.

⁹ Exhibit 3. Treatment Plan for patient.

¹⁰ Exhibit 9, p. 1-7. The Mandt System® *Student Manual 2002*, Module 1. The stated goal is to reduce the potential for injury to all people involved in an interaction by using a graded system of alternatives in our work with others.

¹¹ Exhibit 2. Section IV, *Ibid*.

grievant's failure to use the appropriate technique constitutes, at most, an isolated incident of unsatisfactory job performance – not patient abuse.

The investigation concludes, also correctly, that a posey mat was not used. However, the patient's mat was not in the area at that time. Grievant could have gone to get the mat, or could have sent another staff member to get the mat. However, she determined that such a delay could have been potentially hazardous to the patient and that it was most important to immediately move her out of harm's way. This was a reasonable judgement call under the circumstances. However, even if one concludes that grievant's judgement was not reasonable, her judgement call does not constitute patient abuse.

In summary, the agency has demonstrated only that grievant failed to use an unspecified Mandt® technique when she moved a patient. However, in order to prove patient abuse under the agency's definition, the agency must show that grievant's actions (or her failure to use a Mandt® technique) "caused or might have caused physical harm." The agency has failed to sustain that burden of proof. Accordingly, the disciplinary action must be reversed. It is recommended that grievant be counseled as to what techniques the agency expects grievant to utilize in future similar situations.

DECISION

The disciplinary action of the agency is reversed.

The Group III Written Notice issued to the grievant on October 11, 2002 is hereby RESCINDED. The Written Notice and any memoranda relating to said Notice shall be purged from grievant's personnel file.

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.¹² 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.¹³

[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

¹² 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).

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.