Issue: Group III Written Notice with termination (striking a coworker); Hearing Date: 01/28/03; Decision Date: 01/29/03; Agency: DMHMRSAS; AHO: David J. Latham, Esquire; Case No. 5616

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5616

Hearing Date: January 28, 2003
Decision Issued: January 29, 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
Attorney for Grievant
One witness for Grievant
Representative 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.

Six 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 her employment on November 14, 2002 for striking a coworker.[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 16 years. She is a direct service associate (DSA). The patients at this facility are mentally retarded.

In mid-October 2002, grievant had been assigned to a new ward on the evening shift (3:00 to 11:30 p.m.). Four employees are assigned to 13 patients in this ward. Even though all four employees are responsible for all 13 patients, usually three or four patients are assigned to each employee during a shift. About a week or two later, grievant mentioned that she was displeased with the ward. Another DSA asked grievant if she were going to move to an adjoining ward. Grievant said, "Don't you want me here?" The DSA responded that she had not said that. From that point forward, grievant and the DSA didn't speak to each other unless it was necessary to accomplish the job at hand.

At about 6:30 p.m. on November 4, 2002, a patient known to be potentially dangerous approached grievant from behind. The same DSA went to assist grievant and warn her about the patient's propensity to grab employees in a chokehold. Grievant said she didn't need the DSA's help and the DSA walked away. It had been long-standing custom that the DSA would give juice as a reward to a particular patient after he had performed certain chores. At about 9:00 p.m., the patient finished his chores and the DSA was about to give him juice. Grievant objected because this patient was assigned to her, and because she had previously given the patient several drinks of juice and other liquids. The DSA and grievant argued about this for a few minutes. The DSA eventually walked away angry because the patient had come to expect his reward.

[2] Exhibit 11. Written Notice, issued November 4, 2002.
[3] Grievance Form A, filed November 18, 2002.

The DSA went into the staff office to complete paperwork. A medical aide was in the small office also completing paperwork. Both were sitting at a counter facing a wall as they worked. A few minutes later, grievant entered the office behind the two employees and said, "They know how to treat the black men but not the black women." Both grievant and the medical aide are black. The DSA is white and has been living with a black man for a long time.[4] The DSA responded to grievant to the effect that, "Do you have a problem with black and white? If so, get over it." The DSA then got up and walked out of the office past grievant into the dayhall. Grievant was standing next to the door facing in the DSA's direction. As the DSA walked out the door past grievant, she felt a slap on the back of her head. There were no other people in the immediate area except the grievant.

The DSA immediately turned around to face grievant and loudly said, "You hit me! Don't you ever touch me. Don't hit me again!" Grievant denied hitting the DSA. The medical aide got up and moved between the two. Another DSA sitting in the dayhall also came over and there was no further altercation. The DSA immediately called the second shift supervisor and went to his office to report the incident. Subsequently, she also called the first shift supervisor (the black man with whom she lives). The second shift supervisor did not follow the procedure requiring him to report the incident. The first shift supervisor did follow procedure and reported the incident to the facility police department.

When this incident occurred, the only other employees in the general area (medical aide and a DSA in the dayhall) were both writing paperwork and did not see what occurred. Neither one heard the sound of one person striking another. Both did hear the DSA telling grievant not to hit her again. The DSA's supervisor has known her four years and has always found her to be truthful.

The facility has its own policy on workplace violence, defining this term as: "Any physical assault, battery, threatening behavior or verbal abuse occurring in or communicated to the workplace."[5]

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

[4] For ten years grievant has known the black man with whom the DSA lives. However, she maintains that she only learned a few weeks before the incident that they were living together.
[5] Exhibit 9. Facility policy, *Workplace Violence*, May 23, 2002.

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.[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 Human Resource Management 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 demonstrated, by a preponderance of the evidence, that it is more likely than not that grievant did strike a DSA on the back of the head. Although there were no witnesses who saw the blow, the circumstantial evidence is sufficient to conclude that the event did occur for two reasons. First, all four employees in the area agree that as the DSA walked out the office door, she suddenly yelled, "You hit me! Don't ever touch me. Don't you hit me again!" The testimony of the witnesses appears to corroborate that the DSA made this utterance suddenly and spontaneously, as if it were a reaction to having just been struck.

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

[7] Exhibit 10. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

Grievant contends that she never struck the DSA and that the DSA falsely accused her in order to have her removed from employment. It is undisputed that grievant and the DSA were not friends. Moreover, the evidence establishes that the DSA was upset with grievant because of the two previous confrontations earlier in the evening, and because of the racial remark grievant had just made. However, the fact that the DSA was upset tends to mitigate in her favor because it is very unlikely that in her frame of mind, she would have been able to develop a foolproof plan to accuse grievant of hitting her when there were two potential witnesses in the area. (If the DSA had waited until she was alone with grievant and then accused grievant of striking her, the agency would probably be unable to sustain the burden of proof)

Second, In her written statement, grievant gives a fairly detailed description of the incident involving juice for a patient. However, she fails to give any description of the verbal exchange in the office that resulted in the DSA walking out. She makes mention only of the aftermath of the incident noting that the DSA, "said something about you better not hit me or something like that…"[8] At the time grievant wrote this statement, she knew that the investigation was being conducted because of the allegation that she struck the DSA. The fact that she focused on the juice incident, and almost totally glossed over the striking allegation suggests an unconscious desire not to talk about the real reason for the investigation.

In a subsequent written statement, grievant discusses the striking incident, but falsifies her racial statement. She contends in that statement that she was talking to the medical aide "about black men and women and how they treat each other."[9] In fact, her actual statement was, "They know how to treat the black men but not the black women."[10] It is clear from this statement, corroborated by the medical aide's testimony, that grievant was not talking about how black men and women treat each other, but about how "they" treat black men and black women. Even if grievant did not say a white woman, as alleged by the DSA, the inference is clear that by "they," she meant white women. Grievant claims she was speaking to the medical aide but in the small office it is reasonable to infer that the DSA was intended audience for her remark. The remark was a plain reference to the fact that the DSA lived with a black man, and the fact that grievant was displeased over the recent juice confrontation.

Grievant argues that because no one heard the contact between her hand and the DSA's head, the event could not have happened. This argument is not persuasive for three reasons. First, the contact was to the back of the DSA's head, which has a significant amount of hair. Second, the force of the blow was not a punch but an open-handed slap or backhand. These two factors could

[8] Exhibit 5. Grievant's written statement, November 5, 2002.
[9] Exhibit 7. Grievant's written statement, November 6, 2002.
[10] The DSA maintains that grievant said, "A white woman knows how to treat a black man but doesn't know how to treat a black woman."

have easily muffled the sound, if any, so as to be inaudible to the only two other people in the area. Third, grievant's footsteps as she left the room could have obscured the sound, if any sound was produced.

Grievant also argues that she was not in a defensive posture when the DSA turned around to object to the blow, and that if she had hit the DSA she would have been in such a posture. This argument does not persuade. It is just as likely, if not more likely, that grievant's reaction after surreptitiously hitting another employee would be to act completely innocent. Therefore, grievant's posture after the fact is not indicative of either guilt or innocence.

Grievant argues that the DSA wanted to have grievant removed from employment. This argument is purely speculative. Grievant has offered no witnesses or documentation to support her allegation. Although it is undisputed that grievant and the DSA were not on good terms, and although the DSA might have preferred that grievant work in a different ward, there is no evidence that the DSA wanted grievant to be discharged from employment.

The agency did consider the possibility of mitigating circumstances including the length of grievant's employment. However, the agency's policy is one of zero tolerance for any violence in the workplace.[11]

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and the termination of grievant's employment 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

[11] Exhibit 9. *Ibid*.

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]

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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.