

Issues: Two Group III Written Notices with termination (absence in excess of 3 days without proper authorization; criminal conviction); Hearing Date: 05/13/03; Decision Issued: 05/14/03; Agency: VDH; AHO: David J. Latham, Esq.; Case No. 5713



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5713

Hearing Date:	May 13, 2003
Decision Issued:	May 14, 2003

PROCEDURAL ISSUES

The documents proffered by the agency included two Group III Written Notices issued on the same date. However, testimony elicited during the hearing revealed that the Health Director had agreed to reduce the written notice issued for an absence in excess of three days to a Group I Written Notice. Although the parties agreed to this reduction in discipline on March 19, 2003, a revised written notice has not yet been issued. Grievant stated that she is contesting only the remaining Group III disciplinary action, not the Group I Written Notice.

Grievant brought four witnesses to the hearing but indicated that their testimony would be that her work performance was good, that grievant had not had any client complaints, and that she had good character. The agency stipulated that grievant's past work performance and character are good, and that no clients have complained about her. Since these issues are not in dispute, the four witnesses were excused from providing testimony.

APPEARANCES

Grievant
Health Director
Attorney for Agency
Two witnesses for Agency

ISSUES

Did the grievant's actions warrant disciplinary action under the Standards of Conduct policy? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely grievance from two Written Notices. She received a Group III Written Notice issued for an absence in excess of three days without proper notice to supervision.¹ She also received a Group III Written Notice for conviction of a crime of such a nature that to continue employment would compromise client and employee safety.² During the second-step of the grievance resolution process, the Health Director reduced the first written notice (absence in excess of three days) to a Group I Written Notice. Grievant's employment was terminated on February 28, 2003 as part of the two disciplinary actions. Following failure to resolve the grievance, the agency head qualified the grievance for a hearing.³

The Department of Health (hereinafter referred to as agency) has employed the grievant for ten years as an outreach worker. A major function is to visit patients in their homes and observe self-administration of medication.

On August 10, 2002, grievant became involved in a domestic dispute and stabbed a male friend with scissors. She was arrested and indicted on charges of malicious wounding, and assault and battery. On the advice of her attorney, grievant plead not guilty to the charge of malicious wounding. The court tried

¹ Exhibit 1. Written Notice, issued February 27, 2003.

² Exhibit 1. Written Notice, issued February 27, 2003.

³ Exhibit 2. Grievance Form A, filed March 19, 2003.

grievant on November 12, 2002 and found her guilty of Assault and Battery.⁴ The court ordered that the case be referred to a probation officer for preparation of a presentencing report, a hearing on which was to be held on February 14, 2003.⁵ Grievant understood that she would have to meet with the probation officer at some time prior to the sentencing hearing, but assumed that she would receive written notice in the mail. A date in mid-January 2003 was established for the grievant's meeting with the probation officer but she did not receive notification. When she failed to appear for the meeting with the probation officer, the court issued a writ of *capias* for her arrest.

On the evening of February 6, 2003, grievant was taken into custody and incarcerated in city jail. While in jail, grievant was permitted to use the telephone to make collect calls. She was unable to call the agency because the agency's answering system automatically disconnects collect calls. Grievant did not know the home telephone number of her supervisor. She called a friend and told her to ask a coworker to notify the agency that she was incarcerated. That coworker did call the agency on February 11, 2003 and relayed grievant's message. On February 12, 2003, grievant's son came to the agency and advised that grievant was in jail. Grievant was released from jail on Friday, February 21, 2003 and arrived home at about 6:00 p.m. On Monday, February 24, 2003, grievant called her supervisor to explain what had happened.

On February 24, 2003, after meeting with her probation officer, grievant reported to work. Her supervisor gave her a written due process memorandum that explained that she had until 3:00 p.m. on February 26, 2003 to provide a written response.⁶ Grievant failed to meet this deadline but did submit a written response on February 27, 2003.⁷ Grievant contended that she had "not been convicted of any illegal crime."⁸ The agency then issued the two written notices and removed grievant from employment effective February 28, 2003.⁹

When hiring new employees, the agency requests a criminal history record check. The agency does not hire employees who have been criminally convicted of crimes of physical violence.

APPLICABLE LAW AND OPINION

⁴ Exhibit 2. Trial Order, signed November 14, 2002. NOTE: Grievant was later sentenced to two years incarceration, which sentence was suspended and the grievant placed on two years of unsupervised probation.

⁵ Although the Trial Order gives the date as February 14, 2002, it is assumed that this was a typographical error.

⁶ Exhibit 2. Memorandum from supervisor to grievant, February 24, 2003.

⁷ Exhibit 2. Memorandum from grievant to supervisor, February 27, 2003.

⁸ Exhibit 2. *Ibid.*

⁹ One of the two written notices has the incorrect date of February 27, 2003 as the date of removal, however, the correct date was February 28, 2003.

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. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.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 Human Resource Management (DHRM) 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. Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. Two examples of a Group III offense include an absence in excess of three days without proper authorization or a satisfactory reason and, criminal convictions for illegal conduct occurring on or off the job that clearly are related to job performance or are of such a nature that to continue employees in their positions could constitute negligence in regard to agencies' duties to the public or other state employees.¹¹

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

¹¹ Exhibit 3. Section V.B.3, DHRM Policy 1.60, Standards of Conduct, September 16, 1993.

It is undisputed that grievant was absent from work from February 7, 2003 through February 21, 2003. It is also undisputed that she did not properly notify her supervisor or any other management employee of the agency during this absence. However, grievant was incarcerated during this entire period and could only make collect calls from jail. She was able to call a friend and her ex-husband and asked them to notify her employer about her situation. The agency asserted, and grievant conceded, that she could have requested leave and could have asked her attorney to formally notify the agency on her behalf. The agency determined that although grievant's efforts at notification were not optimal, she did attempt to provide notification through the limited means available to her. Given the totality of the circumstances, the agency concluded that the offense warranted no more than a Group I Written Notice. Because grievant has affirmed that she is not contesting the Group I notice, there is no need to further address this disciplinary action.

It is also undisputed that grievant has been convicted of assault and battery. Although grievant denied being convicted, the uncontested trial order of the court establishes that grievant was convicted on November 14, 2002. Moreover, during the hearing, grievant testified that on May 6, 2003, the court sentenced her to two years of probation. Therefore, grievant has been criminally convicted for illegal conduct. The agency argues that her crime of violence is such that to continue grievant in her position could constitute negligence in regard to the agency's duty to both clients and other state employees.

There can be no doubt that a crime of physical violence must be viewed quite differently from such illegal conduct as speeding or other non-violent offenses. This case must also be evaluated in conjunction with the nature of grievant's job responsibility. Grievant often works alone and unsupervised, visiting patients in their residences. Most of these patients are vulnerable to abuse because they are either elderly, infirm, or possibly illegal immigrants. While there have been no complaints from grievant's patients, grievant's demonstrated willingness to use physical violence to resolve a problem raises a real concern about the propriety of placing her in situations where she is alone with a patient who may be unable or unwilling to complain about abuse.

The agency considered the possibility of placing grievant in some other position but determined that it had no available positions that would not involve some contact with either clients or coworkers. If grievant were retained in employment, the agency could be held negligent should grievant engage in violent conduct involving either a client or coworker. Accordingly, the agency determined that it had no alternative but to remove grievant from state service. Given the circumstances, it is concluded that the agency made the appropriate decision. Although grievant has ten years of satisfactory work performance, this is insufficient to justify reducing the discipline for the reasons just stated.

As previously noted, although the agency agreed to reduce one of the two disciplinary actions from Group III to Group I, it has not yet effected this change. Although this may appear moot to the agency, the grievant's personnel file should accurately reflect the agreed-upon discipline. Accordingly, the agency should prepare the appropriate paperwork to reflect the reduction in discipline.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice for an absence in excess of three days without proper notice is hereby UPHELD.

The Group III Written Notice for criminal conviction of a crime of violence and the termination of grievant's employment are hereby UPHELD.

The agency is directed to remove from grievant's personnel file the Group III Written Notice for an absence in excess of three days, and to issue in its stead a Group I Written Notice for the same offense.

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, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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