

Issue: Group III Written Notice with termination (patient neglect); Hearing Date: 05/21/04; Decision Issued: 05/22/03; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 5721; **Hearing Officer Reconsideration Request received 06/03/03; Reconsideration Decision Date: 06/09/03; Outcome: Request untimely. Original decision has become final.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5721

Hearing Date: May 21, 2003
Decision Issued: May 22, 2003

PROCEDURAL ISSUE

Two days prior to the hearing, grievant requested a postponement contending that he had not had sufficient time to prepare for the hearing. On April 9, 2003, after receiving the second resolution step response, grievant requested that his grievance be qualified for a hearing. Grievant had ample time thereafter to begin preparing for his hearing. When the Hearing Division scheduled the hearing, grievant advised that May 21, 2003 was a good date for him.¹ In view of these circumstances, grievant's request for a postponement was denied.

APPEARANCES

Grievant

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.

Director, Client & Health Services
Advocate 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 for neglecting patients on February 16, 2003.² Grievant was removed from employment as part of the disciplinary action. 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 (hereinafter referred to as "agency") has employed the grievant as a human services care worker (HSCW) for two years.⁴ 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." Neglect is defined as:

Neglect means failure by an individual, program or facility responsible for providing services to provide nourishment, treatment, care, goods or services necessary to the health, safety or welfare of a person receiving care or treatment for mental illness, mental retardation or substance abuse.⁵

It is expected that a facility director will terminate [the employment of] an employee(s) found to have abused or neglected a client.⁶

On the night of February 16, 2003, grievant worked his regularly scheduled shift from 3:00 p.m. to 11:00 p.m. Due to a snowstorm, he and many

² Exhibit 1. Written Notice, issued March 17, 2003.

³ Exhibit 1. Grievance Form A, filed March 31, 2003.

⁴ Exhibit 6. Employee Work Profile, January 24, 2002.

⁵ Exhibit 4. Section 201-3, Departmental Instruction 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, April 17, 2000.

⁶ Exhibit 4. Section 201-8, *Ibid*.

coworkers were asked to work the next shift (11:00 p.m. to 7:00 a.m.) because relief workers could not get to the facility. During the midnight shift, grievant was assigned to the lower level of a split-level cottage. The lower level houses eight clients. Two female HSCWs were assigned to the upper level, which houses seven clients. At some time between 1:00 and 2:00 a.m., one of the female HSCWs went to the lower level and found grievant sleeping in a rocking chair with a sheet wrapped around himself. She woke him and told him that two clients were naked in the bathroom ripping sheets.

At about 3:00 p.m., the second female HSCW went downstairs and found grievant asleep but she did not wake him.⁷ Then the first female HSCW went to the lower level for the second time and again found grievant sleeping. She awakened him by clapping her hands and told him that the same two patients were still naked. She returned to the upper level and told the other female HSCW that grievant had been asleep and two clients were naked. The second HSCW called down the stairs until grievant responded and told him about the naked clients. Grievant then attended to the clients.

The facility has consistently terminated the employment of employees found to be sleeping during working hours.

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

⁷ The second female HSCW was disciplined and suspended for five days for failing to awaken the grievant.

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 An example of a Group III offense is violating safety rules where there is a threat of physical harm.

The agency has demonstrated, by a preponderance of the evidence, that grievant was found asleep by two employees on the night of February 16, 2003. Grievant denies that he was sleeping but his denial is not credible for the following three reasons. First, two other employees state that grievant was found, wrapped in a sheet, asleep in a rocking chair on three different occasions. One of the employees testified credibly about her observations during the hearing, while the other employee wrote two witness statements about what she had seen and done on that night.

Second, grievant has not advanced any theory as to why either employee would make a false accusation against him. Grievant testified that he had never met the first HSCW before the night of February 16, 2002. He knows of no reason why she would not accurately report what she had observed. Grievant had worked with the second HSCW previously, but had never had any adverse interaction with her and cannot suggest any reason that she would not be truthful.

Third, a trained investigator interviewed all involved employees within five days of the incident when their recollections were relatively fresh. While there appears to be some confusion about the exact time of observations, the

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

⁹ Exhibit 7. Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

recollection of events appears to be generally consistent between the two female HSCWs.

Grievant had the responsibility of monitoring eight clients, all of whom have mental retardation. Even though most of the clients were sleeping during the night, it was vital that grievant remain awake and alert in order to attend to clients who might awaken. By falling asleep, grievant failed to be aware that two clients had awakened, removed their nightclothes and were ripping sheets. One other client, who fortunately did not awaken, had a demonstrated history of running out of the cottage, even in cold winter weather. Thus, the potential for harm to clients was significant. Accordingly, grievant's failure to remain awake and alert constituted patient neglect.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and removal from employment on March 17, 2003 are hereby UPHELD.

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.¹⁰ 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.¹¹

[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

¹⁰ 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).

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.