

Issue: Group I Written Notice with termination (disruptive behavior); Hearing
Date: 06/16/03; Decision Issued: 06/17/03; Agency: DMHMRSAS; AHO:
David J. Latham, Esq.; Case No. 5735



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5735

Hearing Date: June 16, 2003
Decision Issued: June 17, 2003

PROCEDURAL ISSUE

Grievant requested as part of the relief she seeks, a written apology from the facility. Hearing officers may provide certain types of relief including rescission of discipline and payment of back wages and benefits.¹ However, hearing officers do not have authority to require an agency to issue an apology.² Such a decision is an internal management decision made by each agency, pursuant to Section 2.2-3004.B of the Code of Virginia, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
One witness for Grievant

¹ § 5.9(a) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

² § 5.9(b)6 & 7. *Ibid.*

Employee Relations Manager
Advocate for Agency
Five 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 timely filed a grievance from a Group I Written Notice issued for disruptive behavior.³ The grievant's employment was terminated as the result of an accumulation of active disciplinary actions. 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 (MHMRAS) (Hereinafter referred to as "agency") has employed the grievant for three years as a forensic mental health technician (FMHT). Grievant has four prior active disciplinary actions. She received a Group III Written Notice for falsification of state documents (failure to disclose a criminal record on her application);⁵ a Group I Written Notice for unsatisfactory attendance;⁶ a Group I Written Notice for unsatisfactory attendance;⁷ and, a Group III Written Notice for verbal abuse of a client.⁸ None of these disciplinary actions are currently on appeal.

At approximately 5:00 p.m. on March 25, 2003, grievant was standing in the dayroom talking with two other FMHTs. One other FMHT was also present in the dayroom along with approximately five patients. Grievant was standing in front of a desk at which a male FMHT was seated. She was approximately six to seven feet from a door leading to the nurses' office and about 12-15 feet from a female FMHT sitting in the corner. Grievant and the two FMHTs were joking and talking very loudly. Grievant's supervisor, a registered nurse, was in the nurses' office and motioned to grievant through the door window by putting his forefinger vertically across his lips. Grievant understood that he was telling her to be quiet and keep the noise down. The RN then opened the door and told the FMHTs to lower their voices because they were too loud. As he closed the door, grievant

³ Exhibit 1. Written Notice, issued April 4, 2003.

⁴ Exhibit 1. Grievance Form A, filed April 7, 2003.

⁵ Exhibit 6. Written Notice, issued July 19, 2000.

⁶ Exhibit 6. Written Notice, issued October 11, 2001.

⁷ Exhibit 6. Written Notice, issued February 12, 2002.

⁸ Exhibit 6. Written Notice, issued February 4, 2003.

threw a paperback book toward him and it struck the door.⁹ Grievant walked to the door, picked up the book, and went to the corner table where she sat down.

The nurse called security and soon thereafter grievant was removed from the dayroom. The agency determined that the grievant's behavior had been disruptive and issued a Group I Written Notice. Because grievant had accumulated several active disciplinary actions, she was removed from employment. In her written grievance, the grievant contends that "the incident never happened."

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 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.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 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

⁹ The 127-page paperback puzzle book belongs to grievant.

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

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.1 of the Standards of Conduct policy provides that Group I offenses include acts and behavior that are deemed least serious; one example is disruptive behavior.¹¹

The agency has demonstrated, by a preponderance of evidence, that grievant threw a book towards a supervisor. Witness testimony and the surveillance videotape outweigh grievant's contention that the incident never happened. Both FMHTs closest to grievant and the registered nurse wrote witness statements that grievant threw the book and it hit the door. The surveillance videotape shows the book in grievant's hand, the next frame shows it lying on the floor, and the next frame shows grievant picking it up from the floor.¹²

In addition to the preponderant weight of witness testimony and videotape evidence, grievant's testimony is less than credible for the following reasons. First, in her grievance form A, grievant wrote that the incident never happened. She now admits that the incident did happen. Second, she testified that the nurse never opened the door. However, in her written statement attached to the grievance, she wrote, "The PM nurse comes to the door & tells staff to keep it down."¹³ (Underscoring added)

Grievant contends that the book merely slipped out of her hands. She alleges that she was swinging her arm back and forth and that the book slipped and hit the door. In view of the available evidence and testimony, grievant's explanation appears specious and self-serving.

Grievant alleges that this disciplinary action is retaliatory and that "someone is out to get her." However, grievant provided no evidence to support this allegation. Moreover, she was unable to state who is out to get her, and what motivation anyone might have to get her. The evidence reflects that the agency has been unusually lenient in allowing her to return to work after her first Group III Written Notice, and in not discharging her when she incurred a second Group III Written Notice.

The agency cited grievant for "disruptive behavior." One could argue that this term is not an appropriate descriptor for what occurred in this situation. Although grievant was loud and had to be told to be quiet, that was not disruptive, in and of itself, because grievant's coworkers were equally loud. Throwing the book was not, by itself, a disruptive act. However, while this

¹¹ Exhibit 8. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

¹² The surveillance camera takes a picture every two or three seconds.

¹³ Exhibit 1. Grievant's written statement, March 27, 2003.

descriptor may not have been the most appropriate term to use, the written notice goes on to describe the grievant's behavior. The witness statements and investigation provide the supporting detail of that behavior. Grievant's behavior was the significant issue, not the two-word descriptor. That behavior was probably more insubordinate than disruptive. However, whatever description one chooses to use, the fact remains that grievant's behavior was inappropriate, unsatisfactory, and unacceptable. Given her past disciplinary record, a Group I Written Notice was entirely appropriate to the circumstances.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice for disruptive behavior issued on April 4, 2003, and grievant's removal from 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 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.¹⁴ 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.¹⁵

[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

¹⁴ 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).

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.