Issue: Group III Written Notice with termination (client abuse); Hearing Date: 07/15/03; Decision Issued: 07/17/03; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 5751: **Administrative Review: Hearing Officer Reconsideration Request received 07/25/03; Reconsideration Decision date: 07/29/03; Outcome: No basis to reopen hearing or change original decision.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5751

Hearing Date: July 15, 2003
Decision Issued: July 17, 2003

PROCEDURAL ISSUE

Due to availability of participants, the case could not be docketed for hearing until the 29th day following appointment of the hearing officer.[1]

APPEARANCES

Grievant
Two representatives for Grievant
One witness for Grievant
Assistant Director of Residential Services
Advocate for Agency
Four witnesses for Agency

ISSUES

[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.

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 resident.[2] As part of the disciplinary action, grievant was removed from state employment. 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 Development Disabilities Specialist (DSS) for just over one year.[4]

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." The definitions of abuse and neglect are, respectively:

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

Grievant was assigned as the shift leader in a cottage housing up to eight residents. At the start of her shift on April 22, 2003, she directed the only other staff person assigned to the cottage to care for certain designated clients; grievant assumed responsibility for the remaining clients including client D. Client D is a 27-year-old male with profound mental retardation who occasionally takes off all his clothes. At about 5:45 p.m., client D had been hitting himself and had been jumping up and down. Thereafter, he had thrown a toy and was

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[2] Exhibit 1, p. 1mo. Written Notice, issued May 9, 2003.
[3] Exhibit 1, p. 2. Grievance Form A, filed May 21, 2003.
[4] Exhibit 4. Grievant's Employee Work Profile, October 25, 2002.
[5] Exhibit 5. Section 201-3, Departmental Instruction 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, April 17, 2000.

grunting; by about 6:00 p.m., client D had calmed down and was sitting in a chair by a window.[6] After a few minutes, he pulled off all his clothes and diaper and lay down on the repositioning table. He had been lying on the table for a few minutes when, at about 6:05 p.m., the night shift supervisor who had been making cottage rounds entered grievant's cottage and observed client D lying naked on the repositioning table in the television room.[7] The client was not being aggressive. Grievant and her subordinate were both sitting at a table within six to eight feet of client D.[8] Other clients were in the room at the time. Grievant was not making any effort to dress client D or cover him with a sheet. Grievant was somewhat afraid of client D because in the past he had broken her glasses, and hurt her on another occasion.[9]

The supervisor asked grievant why client D was naked and why she was not attempting to dress or cover him. Grievant stated that client D had been having a tantrum earlier and that she decided just to let him lie there for five minutes and then give him a shower.[10] Grievant also said that it was the client's right to be naked and that he had a "program" for this.[11] Client D's behavioral treatment plan does not specifically address what action to take when the client takes off all his clothes.[12] Grievant is aware that standard procedure when any client strips is to promptly dress or cover him with a sheet until he can be dressed. Client D's behavioral plan provides that when he is aggressive toward others or property, he will spend five minutes of calm, in contingent exclusion.

An investigator assigned to the case concluded that grievant neglected client D. Grievant was disciplined for abuse of a resident, failing to provide proper supervision, and using a technique inconsistent with the client's treatment plan.

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

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[6] Testimony of grievant's witness, a security officer who had been in the cottage from about 5:40 p.m. to 6:00 p.m.

[7] Grievant contends that client D had only been naked for 30 seconds. However the testimony of the other DSS and the security officer is preponderant that he had been naked for a few minutes.

[8] Also sitting at the table was a person assigned by the infirmary to sit one-on-one with a specific client. This person had no responsibility for other clients.

[9] Exhibit 1, p. 8. Letter to whom it may concern from grievant, May 8, 2003.

[10] Exhibit 3, p. 14. Letter to whom it may concern from grievant, April 22, 2003.

[11] A client-specific written behavior plan ("program") is developed by the agency psychologist, nurse and management staff for each client. Employees are required to read and comply with behavior plans in their daily care of clients.

[12] Exhibit 3, pp. 10-13. Client D's behavioral plan, revised January 9, 2001.

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.[13]

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].[14] The policy also states:

> The offenses listed in this procedure are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head, although not listed in the procedure, undermines the effectiveness of the agency's activities or the employee's performance, should be treated consistent with the provisions of the procedure.[15]

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[13] § 5.8, EDR Grievance Procedure Manual, effective July 1, 2001.
[14] Exhibit 7. DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.
[15] Exhibit 7. Section V.A. *Ibid*.

The evidence in this case does not support a finding that client D was abused, as that term is defined in Departmental Instruction 201. Client D was not physically or psychologically harmed in any way, nor is there any evidence that grievant's inaction might have resulted in such harm. Therefore, the characterization of grievant's offense as client abuse in the Written Notice cannot be sustained.

However, the preponderance of evidence does support a conclusion that grievant failed to properly care for client D and used a procedure that is not in the client's behavioral treatment plan. Grievant knew that the agency strives to protect the privacy and dignity of all clients. While some clients exhibit the behavioral problem of stripping, employees are trained and instructed to promptly dress or cover any client who becomes naked. Grievant had also read and was familiar with this client's treatment plan. She knew that the plan does not permit a client to remain naked for several minutes in the presence of staff and other residents. Grievant's decision to let client D do so was in contravention of the established written plan. Therefore, grievant's failure to cover or dress client D did constitute neglect because it was a failure to provide a service necessary to the health and welfare of the client.

The agency has shown, by a preponderance of evidence, that grievant neglected client D. The burden of persuasion now shifts to grievant to demonstrate any mitigating circumstances. Grievant contends that the supervisor wanted to get rid of her. However, the evidence established that the supervisor had known grievant for only six months, had no prior adverse interactions with grievant, and had no reason to want grievant's employment terminated. Grievant also alleges that the other DSS had been disciplined but failed to present any testimony or evidence to support the allegation.

Grievant suggests that the other DSS should have taken action to cover client D. However, unrebutted testimony established that grievant had specifically told the other DSS that grievant would be responsible for client D during the shift. Since grievant was shift leader and senior employee in the cottage, the other DSS was not in a position to contravene grievant's direct instructions. Grievant also suggests that the sitter could have covered client D. The sitter had been sent to the cottage for the specific purpose of sitting one-on-one with another client. Since grievant had assumed responsibility for client D, and the sitter was assigned exclusively to one patient, the sitter could not reasonably have been expected to take over client D's care. Thus, grievant has attempted to shift responsibility to every other employee in the area, rather than acknowledge her own culpability in this matter.

Grievant argues that her decision to let client D remain naked on the table for five minutes complied with the behavioral treatment plan, which calls for five minutes of calm after aggression. This argument fails for two reasons. First, if

client D had been aggressive immediately prior to his stripping, five minutes of contingent exclusion would be appropriate. However, grievant's own witness (security officer) testified that client D had become calm about five minutes before the night shift supervisor entered the cottage. Therefore, client D was no longer aggressive and it was not necessary to invoke the five-minute exclusion plan when client D stripped and lay down on the table. Second, even if the five-minute exclusion plan had been appropriate, the client should either have been dressed or covered with a sheet so that his nakedness would not be on display to everyone in the cottage and to any unexpected visitors who might enter the cottage.

Grievant makes one valid point with regard to the night shift supervisor. The supervisor herself could have covered the client, or directed grievant to do so, *before* starting her lengthy discussion with grievant. It would appear that, in view of the importance given to client dignity, the first priority should have been the client, and the counseling of grievant the second priority. However, while the supervisor could have handled the matter differently, that does not change the fact that grievant failed to take appropriate action when the client first stripped. Instead, grievant took an inappropriate course of action by deciding to allow the client to remain naked for five minutes.

Departmental Instruction 201 states, "It is expected that a facility director will terminate [the employment of] an employee(s) found to have abused or neglected a client."[16] While the Standards of Conduct provide for mitigation in appropriate cases, there have been no circumstances presented in this case that would justify reduction of the discipline. Grievant has been employed for only a little over one year and thus does not have long state service. Her performance has not been extraordinary and there are no other extenuating conditions that would support a reduction in discipline.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and the removal of grievant from state employment on May 9, 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:

[16] Exhibit 5. Section 201-8, DI 201, *Ibid.*

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.[17] 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.[18]

[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

[17] 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). See also *Virginia Department of Agriculture and Consumer Services v. Tatum*, 2003 Va. App LEXIS 356, which holds that Va. Code § 2.2-3004(B) grants a hearing officer the express power to decide de novo whether to mitigate a disciplinary action and to order reinstatement.

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

DECISION OF HEARING OFFICER

In re:

Case No: 5751

Hearing Date:	July 15, 2003
Decision Issued:	July 17, 2003
Reconsideration Received:	July 25, 2003
Reconsideration Response:	July 29, 2003

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 10 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the Director of the Department of Employment Dispute Resolution (EDR). The request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.[19]

PROCEDURAL ISSUES

Two representatives presented grievant's case during the hearing. Grievant submitted a request for reconsideration but did not copy her

[19] § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

representatives on the request. It will therefore be presumed that grievant is no longer represented and has elected to proceed on a *pro se* basis.

Grievant failed to provide a copy of her request to the opposing party and to the EDR Director. In this case, the hearing officer elects to respond to grievant notwithstanding her failure to comply with the procedural requirements.

OPINION

In her request for reconsideration, grievant attempts to present new evidence regarding the background of an agency witness (her coworker). She also seeks to present new evidence that contradicts the testimony of an agency witness. The general rule regarding the reopening of a hearing for presentation of new evidence requires that the evidence be *newly discovered*. With the exercise of due diligence, grievant could have presented this evidence during the hearing. She has not indicated that she was unaware of this information at the hearing. Accordingly, the evidence proffered by grievant is not *newly discovered* and, therefore, does not meet the criteria necessary to justify reopening the hearing. Moreover, the hearing officer may not consider this evidence when reconsidering the decision.

Grievant references a definition of *adult neglect* found in Title 63.2 Welfare (Social Services), specifically Va. Code § 63.2-100, however, this definition is applicable only to the Department of Social Services. The Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) is governed by Title 37.1, specifically Va. Code § 37.1-1, which provides the definition of *neglect* found in the agency's Departmental Instruction 201(RTS)00. Accordingly, grievant's reference to a different agency's law has no applicability in this case.

Grievant also references Va. Code § 18.2-369, which provides the criminal definition of neglect. She suggests that neglect could not have occurred because the agency did not report the incident to the Department of State Police. The criminal definition of neglect is different from the agency's definition because it requires that injury or endangerment to the client's health must occur in order to constitute a crime.[20] In the instant case, grievant's neglect of the patient did not result in either injury or endangerment of the client's health. Therefore, the agency did not report the incident to the State Police because the requisite elements of *criminal* neglect had not been met.

[20] Va. Code § 18.2-369C states: "Neglect" means the knowing and willful failure by a responsible person to provide treatment, care, goods or services which results in injury to the health or endangers the safety of an incapacitated adult.

Grievant takes issue with the hearing officer's findings of fact. The hearing officer's findings are derived from the testimony of all witnesses, and from the written evidence (investigation report, witness statements, and other relevant documents). The Findings of Fact are the hearing officer's determination of what actually occurred. When, as here, the testimony of witnesses varies on factual evidence, the trier of fact often finds that the truth lies somewhere between the two different versions of an event.

Grievant correctly notes that footnote 7 is erroneously worded. It should have read, "Grievant contends that client D had only been quiet for 30 seconds. However, the testimony of the DSS and security officer is preponderant that he had been calm for a few minutes."

Grievant objects to the fact that the agency did not call witnesses that grievant felt would help her case. Each side may call the witnesses it feels will support its case. Eight days prior to the hearing, the agency sent grievant a list of witnesses it intended to use. Grievant thereafter had ample opportunity to request an Order for any witness, whether on the agency's list or not. Grievant did not submit any request for witness orders. Grievant feels that the facility director should have been at the hearing. However, the facility director did not witness the incident, and did not personally investigate the matter. His primary involvement in the case was to issue discipline after central office found that neglect had occurred. Thus, his testimony was not critical in determining what actually occurred in the cottage.

Grievant misquotes the hearing decision. The Findings of Fact do not cite specific times for events, rather, all times are referred to as "*about* 6:00 p.m." because they are estimates based on a compilation of all testimony and evidence. Grievant now contends that she does not have glasses. However, during the hearing grievant never rebutted her coworker's testimony that client D had broken her glasses.

Grievant reiterated the concern, already addressed by the hearing officer in the decision, that the written notice cited her for abuse rather than neglect. It appears that the agency considered neglect to be a subset of the general term abuse and used the word abuse on the written notice. However, the important issue is not whether the agency may have mischaracterized its description of the offense, but whether grievant committed an offense.

Grievant takes issue with the investigation and implies that the investigator falsified certain aspects of her witness statement. The witness statement that grievant voluntarily signed on April 25, 2003 bears no evidence of alteration. Grievant had an opportunity to read the statement before signing it and thereby attested to its correctness. Her belated attempt to disavow certain words and to supplement the statement after the fact is self-serving and therefore not credible.

The hearing officer cannot concur with grievant that the "investigator was *elusive* during questioning," but did find his testimony to be imprecise at times.

Grievant also seeks to proffer testimony about five situations that occurred at the facility, some of which involved discipline and some that did not. Grievant could have presented such information during the hearing if it was comparable to her situation. Only one of the five examples proffered appears to be potentially relevant; the other four cases involve different types of offenses. However, there is insufficient information about the one possibly relevant case to make a meaningful comparison between it and grievant's case. Moreover, grievant did not present this evidence during the hearing and so the hearing officer may not now consider it.

DECISION

The hearing officer has carefully reconsidered grievant's arguments and concludes that there is no basis either to reopen the hearing, or to change the Decision issued on July 17, 2003.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.[21]

[21] 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).

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David J. Latham, Esq.
Hearing Officer