

Issue: Group III Written Notice with termination (resident abuse); Hearing Date: 05/20/04; Decision Issued: 05/21/04; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 713



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 713

Hearing Date: May 20, 2004
Decision Issued: May 21, 2004

APPEARANCES

Grievant
Representative for Grievant
Department Head
Representative for Agency
Five witnesses for Agency
Observer 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 abusing a resident.¹ As part of the disciplinary action, grievant was removed from state employment. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.² The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant as a health services care worker (HSCW) for seven years. Grievant has one prior active disciplinary action – a Group I Written Notice for failing to verify that another employee had accepted responsibility for a client before grievant left the area.³

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."⁴

On February 11, 2004, grievant and a male HSCW were working in one ward of a dormitory. On this date, two clients with mental retardation had been restricted for medical reasons to stay either in their rooms or the communal living area; all other clients were away from the dormitory receiving vocational or other services. Grievant and her coworker were responsible to assure that the clients remained inside the dormitory ward. They did not have to maintain one-on-one contact with the clients but were required to stay in the ward to assure that the two clients did not leave or injure themselves.

Grievant went to lunch while the male HSCW watched the clients. When grievant returned at about 12:15 p.m., the male HSCW told grievant that he was leaving for lunch because he was scheduled to pick up some clients from another location at 1:00 p.m. to take them for medical treatment. Grievant told him to go ahead to lunch. The male HSCW also told grievant that a nurse would be coming to take one of the two clients to the treatment area to see the physician. The male HSCW then left the building to get his lunch.

Grievant then escorted the client who was to see the physician out of the living area, through a set of double doors, down an L-shaped hall, and into the treatment area. She remained with that client in the treatment area for approximately ten minutes and escorted him back to the ward. On grievant's

¹ Exhibit 1. Written Notice, issued March 9, 2004.

² Exhibit 2. *Grievance Form A*, filed April 1, 2004.

³ Exhibit 1. Group I Written Notice, issued November 27, 2002.

⁴ Exhibit 7. Departmental Instruction (DI) 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, revised April 17, 2000. The definition of abuse is: "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." The definition of neglect is: "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."

way back to the ward, her supervisor saw grievant in the hall and asked where she had been. After grievant explained, the supervisor said she had found the other client unattended in the ward. Grievant said she thought the male HSCW was there, and then said she thought he had gone to lunch.⁵

It is undisputed that, during the entire incident, the client remained in his bed, was not injured, and was probably unaware that he had been left alone. The matter was reported to the facility director, who assigned an investigator to look into the matter. The investigator interviewed those with knowledge of the incident and concluded that grievant had left the client unattended and that the allegation of neglect was supported.⁶ Central office approved the investigator's report and forwarded it to the facility director. The facility director decided to issue the discipline at issue herein and to remove grievant from employment. The director found that grievant's previous disciplinary action for a similar offense was an aggravating circumstance that precluded the application of mitigation.

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. In all other actions, such as claims of retaliation, the grievant

⁵ Exhibit 4. Supervisor's written statement, February 13, 2004.

⁶ Exhibit 3. Investigator's Summary, February 18, 2004.

must present her evidence first and prove her claim by a preponderance of the evidence.⁷

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, 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].⁸ It is expected that a facility director will terminate the employment of an employee found to have abused or neglected a client.⁹

Grievant argues that the agency failed to prove that neglect occurred; however, the facts indicate otherwise. It is undisputed that a supervisor found a client alone in the ward and that neither grievant, the male HSCW, nor any other employee was in the ward at the time. The definition of neglect (footnote 4, *supra*) includes failure to provide care for the safety of a client. Leaving a client unattended where he could exit the building or injure himself is a failure to provide care for the client's safety. Therefore, the fact that the client was left unattended is *prima facie* evidence that neglect occurred.

The remaining issue is whether grievant was responsible for the neglect. Grievant asserts that when she left the ward to escort one client to the medical treatment area, the male HSCW was still in the area. She also says she told the male HSCW that she was going to escort the client to the treatment area. Grievant's assertions are less than credible for three reasons. First, grievant contends that the supervisor telephoned and directed her to take the client to the medical treatment area. However, the male HSCW denies that any such call came in while he was there and that grievant did not tell him she was escorting the client to the treatment area. Moreover, the supervisor credibly testified that she did not call grievant with any such direction. Therefore, the weight of the evidence is that grievant was not instructed to take the client to the treatment area. Rather, she decided on her own to do so after the male HSCW told her that a nurse was coming to get the client.

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

⁸ Exhibit 7. DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

⁹ Exhibit 7. Section 201-8, DI 201(RTS)00, *Ibid*.

Second, grievant's initial response to the supervisor was that she "thought" the male HSCW was in the ward. She then added that she believed he had gone to lunch. However, in her written statement, grievant said there was a "miscommunication" between her and her coworker.¹⁰ Grievant admits, and the male HSCW confirms, that she had told him to go to lunch. The male HSCW testified credibly that he left promptly at that point because he had to finish lunch quickly and pick up clients at 1:00 p.m. It appears more likely than not that when grievant decided to take the client for medical treatment, she did not realize that the male HSCW had already left for lunch. Thus, the "miscommunication," if there was one, was that grievant failed to ascertain whether the male HSCW was still in the ward when she escorted the client to treatment. Alternatively, grievant may have decided that the remaining client would be safe in his bed for the short time she would be in the treatment area.

Third, even though grievant saw the male HSCW later in the day, she never asked him why he was not in the ward when she left. If he had actually been in the ward when she left, it would have been only natural to ask him why he subsequently left. Since grievant never asked this logical question, it is more likely than not that she did not ask because she knew that he had already left for lunch before she escorted the client to the treatment area. Accordingly, it is concluded that the agency has shown, by a preponderance of evidence, that grievant was responsible for neglect of the client who was left alone in the ward.

Retaliation

Grievant alleged that this disciplinary action was retaliatory. Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.¹¹ To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Generally, protected activities include use of or participation in the grievance procedure, complying with or reporting a violation of law to authorities, seeking to change a law before the General Assembly or Congress, reporting a violation of fraud, waste or abuse to the state hotline, or exercising any other right protected by law. In this case, grievant failed to offer any evidence of a protected activity that she may have engaged in. Further, grievant failed to offer any testimony or evidence that addresses her allegation of retaliation. Therefore, grievant has not proven retaliation.

Level of discipline

In the previous similar incident, the agency opted to reduce the discipline in part because of the peculiar circumstances of that case, and in part because it

¹⁰ Exhibit 4. Grievant's written statement, February 17, 2004.

¹¹ EDR *Grievance Procedure Manual*, p.24

was grievant's first offense. When a second similar offense occurs, the existence of a prior offense is an aggravating rather than a mitigating circumstance. Accordingly, the agency concluded that the discipline for this offense should not be reduced. Moreover, in the present case, grievant has not demonstrated any remorse by acknowledging her offense, but has instead, attempted to shift responsibility to her coworker. Therefore, there is no basis to reduce the discipline imposed by the agency.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and the removal of grievant from state employment on March 9, 2004 are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400

Richmond, VA 23219

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.