

Issue: Group III Written Notice (abuse and neglect of a client); Hearing Date:  
10/08/04; Decision Issued: 10/12/04; Agency: DMHMRSAS; AHO: David J.  
Latham, Esq.; Case No. 7875



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 7875

Hearing Date: October 8, 2004  
Decision Issued: October 12, 2004

APPEARANCES

Grievant  
Representative for Grievant  
One witness for Grievant  
Representative for Agency  
Five witnesses for Agency

ISSUES

Did 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 and neglecting a resident.<sup>1</sup> As part of the disciplinary action, grievant was removed from state employment effective July 6, 2004. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.<sup>2</sup> The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant as a medication assistant for five years.

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."<sup>3</sup> One example of abuse is "Use of physical or mechanical restraints on a person that is not in compliance with federal or state laws, regulation, and policies, professionally accepted standards of practice or the person's individualized services plan."<sup>4</sup> The facility has promulgated an instruction that restrictive procedures may be used on clients only after design by an Interdisciplinary team (ID Team), and the client's representative, and review by a review committee, the Facility Director and a human rights committee.<sup>5</sup> Employees who believe that a client's physical management plan should be changed may notify a member of the ID team so that the entire team can review the case and decide whether any change is appropriate.

In the past, grievant's coworker had made a suggestion to the ID Team for change in one client's physical management plan. The team reviewed the case and a change was made. Grievant was aware that she had the right to suggest changes for clients to the ID team.<sup>6</sup> She did not request any changes for her clients.

On June 2, 2004, grievant worked on the evening shift. In the early evening, grievant and a human services care worker (HSCW) showered clients.

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<sup>1</sup> Exhibit 5. Written Notice, issued July 6, 2004.

<sup>2</sup> Exhibit 10. *Grievance Form A*, filed July 7, 2004.

<sup>3</sup> Exhibit 6. Section 201-3, 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."

<sup>4</sup> Exhibit 6. Section 201-3, *Ibid*.

<sup>5</sup> Exhibit 9. Facility Instruction 5300, *Restrictive Procedures*, October 1, 2002, provides that: "Behavioral Interventions using restrictive procedures must be designed by the ID Team, and his/her representative, the Behavioral Treatment Review Committee (BTRC), the Facility Director and the Local Human Rights Committee (LHRC), and reviewed by these Committees and the Facility Director at least every three months."

<sup>6</sup> Exhibit 10, p. 10. Second-step respondent's interview with grievant

The HSCW showered the clients, who then went from the shower into the bathroom where grievant dried and dressed them. The showers were done so quickly that at one point, multiple clients were standing naked in the bathroom waiting to be dried and dressed by grievant. Grievant told her coworker that she could not keep up with the drying and dressing but by then multiple clients had already been showered. At about 8:10 p.m. grievant placed one client on the toilet and seat belted her to the toilet even though the client's physical management plan specifies that the client should use a regular toilet seat.<sup>7</sup> At about 8:30 p.m., grievant left the bathroom area to take a personal break and returned about 9:00 p.m. The client was seat belted to the toilet from approximately 8:10 to 9:05 p.m. During part of the time grievant was on break, this client was unattended in the bathroom.<sup>8</sup> This particular client has a history of seizures, and of banging her head against the floor.

A newly hired trainee aided the two employees during her first shift at work following training. She was disturbed by the conduct and comments of the other employees because she believed their client care that evening violated agency policies she had just learned about in training.<sup>9</sup> Because she believed client rights had been violated, she reported the matter to agency management. Both grievant and the HSCW were disciplined and removed from state employment for their actions. The second-step respondent amended grievant's Written Notice to exclude the charge of violating client's rights to reasonable privacy and dignity.

### 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:

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<sup>7</sup> Exhibit 2. Client's Physical Management Plan.

<sup>8</sup> Exhibit 2. *Ibid.*, the Plan provides that the client should have "total staff assistance." The team leader testified that this means that a staff person should remain with the client at all times during the toileting procedure.

<sup>9</sup> See Exhibit 1 for the complete investigation and reports of other inappropriate actions by grievant's coworker including feeding food to the clients while they were seated on toilets.

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 must present her evidence first and prove her claim by a preponderance of the evidence.<sup>10</sup>

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].<sup>11</sup> It is expected that a facility director will terminate the employment of an employee found to have abused or neglected a client.<sup>12</sup>

The agency has shown, by a preponderance of evidence, that grievant did seat belt to a toilet a client whose physical management plan does not include use of such a restrictive device. She left the client belted to the toilet for nearly an hour and, during that time, took a half-hour break out of the area. Moreover, grievant admitted taking these actions, which were corroborated by her coworkers.

Grievant contends that seat belting clients (who do not have seat belting in their physical management plans) to toilets is a common practice. However, grievant failed to offer any witnesses or evidence to support this contention. The agency obtained written statements from other coworkers who aver that they are

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<sup>10</sup> § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

<sup>11</sup> Exhibit 7. DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

<sup>12</sup> Exhibit 6. Section 201-8, DI 201(RTS)00, *Ibid*.

unaware of anyone seat belting clients to toilets unless it is included as part of their physical management plan.<sup>13</sup>

Grievant maintains that she did not intentionally abuse or neglect the client. The issue here is not whether the grievant's actions were intentional but whether those actions constituted abuse or neglect. The broad definitions of abuse and neglect in the agency's policy include actions that *knowingly* might have caused harm to the client. Grievant *knew* that restrictive seat belting had not been approved for this client.<sup>14</sup> She also knew that the client is subject to seizures and is prone to head-banging. Grievant's seat belting of the client to a toilet for nearly an hour, and leaving her alone for a half hour, were actions that the grievant knew might have resulted in harm to the client.

Grievant acknowledged that she used the seat belt when toileting the client to prevent her from engaging in inappropriate behavior (putting her hands in the toilet or walking around).<sup>15</sup> In part, however, the seat belting was for grievant's convenience because grievant went on break for 30 minutes and left the client belted to the toilet. If grievant had remained with the client, she could have prevented the client from engaging in inappropriate behavior.

The agency has shown that grievant's discipline was consistent with others who have committed the same or similar offense. Grievant suggests that the discipline should be non-punitive. By definition, discipline is punishment. If grievant did not receive some form of punishment, there would be no discipline at all. In this case, the offense is sufficiently severe that it constitutes a Group III offense – the normal discipline for which is removal from employment. Grievant does not have long service with the agency (only five years) and has not demonstrated any other mitigating circumstances that could be a basis for reducing the level of discipline.

### DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and the removal of grievant from state employment on July 6, 2004 are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

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<sup>13</sup> Exhibit 1, pp. 37-44. Interviews conducted by investigator with three coworkers of grievant.

<sup>14</sup> Exhibit 10, p.10. Grievant acknowledged to the second-step respondent that she knew that seat belting was not part of the client's "program" (physical management plan).

<sup>15</sup> Exhibit 1. Grievant's interview statement and investigator's report summary.

## 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 14<sup>th</sup> St, 12<sup>th</sup> 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.<sup>16</sup> You must file a notice of appeal with the clerk of the circuit court in the

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<sup>16</sup> 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).

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>17</sup>

[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

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<sup>17</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.