

Issue: Group II Written Notice (inappropriate/non-therapeutic interaction with client); Hearing Date: 10/08/03; Decision Issued: 10/15/03; Agency: DMHMRSAS; AHO: Frederic Firestone, Esq.; Case No. 5814

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the Matter of Southeastern Training Center – Department of Mental Health, Mental
Retardation and Substance Abuse Services Case Number 5814

Hearing Date: October 8, 2003
Decision Issued: October 15, 2003

PROCEDURAL BACKGROUND

Upon request on behalf of the Grievant and with the agreement of the Agency, the hearing was rescheduled to accommodate the schedule of the Grievant's representative. At the outset of the hearing, the Agency's representative asked to obtain a ruling from the Department of Employment Dispute Resolution, Division of Hearings, on two matters: first, the request of the Grievant's representative to admit into evidence a document created by one of the witnesses appearing for the Agency, a document which was among those provided to the Hearing Officer at the time of his appointment. The Hearing Office had ruled that this document was admissible despite the Grievant's failure to identify it to the Agency as directed at the pre-hearing conference. The second issue raised was the Agency's objection to a request by the Grievant that two witnesses (both of whom were employees of the Agency) be heard despite failure of the Grievant to identify them to the Agency as directed at the pre-hearing conference. The Hearing Officer had reserved decision on the admissibility of their testimony until the time at which their testimony was sought. The Hearing Officer had noted that the Grievant did not obtain the services of the representative until shortly before the hearing. The hearing was recessed to obtain a ruling on these two matters. Upon a joint telephone conference of representatives of both parties, the Hearing Officer, and an official of the Department of Dispute Resolution, the latter ruled that these decisions were within the purview of the Hearing Officer, whose rulings in the two matters, should be followed. In the event, the document in question was received in evidence, and the Grievant, with permission of the Hearing Officer, chose to present one of the two witnesses.

APPEARANCES

Grievant
Representative for Grievant
Representative for Agency
Four Witnesses for Agency
One Witness for Grievant

ISSUES

Was the Grievant's conduct on April 14, 2003 such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for that conduct?

FINDINGS OF FACT

The Grievant filed a timely appeal from a Group II Written Notice issued on June 12, 2003. The Notice was issued for the Grievant's alleged "inappropriate/non-therapeutic interaction with client," by taking a doll the resident was holding and throwing it. The Notice asserted that the Grievant's "actions were demeaning and fall[] within the definition of psychological abuse." Following denial of relief at the third resolution step in the grievance process, the agency head qualified the grievance for a hearing.

The Southeastern Virginia Training Center (SETC), a facility of the Department of Mental Health, Mental Retardation and Substance Abuse Services (the Agency) has employed the Grievant for 13 years without any disciplinary action against her prior to the matter under appeal.

The resident whose doll was taken ("Ms. C.") is a multi-handicapped person, with severe mental retardation, autistic disorder and further disabilities including obsessive-compulsive disorder. Unrebutted testimony by persons with knowledge, established that Ms. C finds it important that there be structure and predictability in her day, and that she is attached to her personal effects. Primary among these is a doll she cradles in her arm, which she evidently considers her "baby." The staff's consideration of Ms. C.'s attachment to the doll is illustrated by their usual practice of waiting until Ms. C. is asleep to take the doll to wash it. On the few alternate times the doll is washed, Ms. C. waits close to the door of the laundry room, in apparent fear of losing the doll.

The incident which gave rise to the disciplining of the Grievant, came at a time when a number of patients were on the grounds of the facility, and Ms. C. wandered away from the group, contrary to the expectations of the staff. The Grievant went to Ms. C. and asked her to return to the group. Ms. C. failed to respond to the attempted persuasion. The Grievant then grabbed Ms. C.'s doll and threw it in the direction she sought to have Ms. C. go. She then called to another patient who was near the spot where the doll landed, and asked that person to pick up the doll and throw it further in the direction the Grievant sought to have Ms. C. go. That person did not do so. There was no allegation or evidence that the Grievant hit or verbally threatened Ms. C. The single witness to the event testified that the Grievant threw the doll "far" and that the witness had never before seen any staff member take or throw any possession of any patient. Further, she testified to the emotional attachment of Ms. C. to the doll, which "she holds like a baby." The Grievant testified that her throwing of the doll was an act of playfulness, and similarly portrayed her request to the second patient. Further, she

testified that she feared violence at that time by Ms. C., either against the Grievant or against another patient.

The Written Notice filed against the Grievant cites DI [Departmental Instruction] 201, dealing with abuse and neglect of clients. It includes (201-3) causing psychological harm or injury within its definition of abuse.

The initial investigation of this matter at the facility concluded that no disciplinary action was necessary. The Abuse and Neglect Investigation Manager for the parent agency reversed this recommendation. She testified at the hearing that actions or omissions that could have caused harm, forbidden by DI 201, were part of the basis for her reversal. A 201 violation would ordinarily result in a Group III Notice and dismissal. However, the Director of SETC sought and obtained permission to reduce the Notice to Group II on grounds that the Grievant had served the facility 13 years without disciplinary actions; that the Grievant did not intend to demean, humiliate, or punish; and that the resident [Ms. C.] did not appear upset or emotionally distressed by the event, and showed no resulting behavior regression.

A memorandum of SETC regarding Ms. C., dated March 16, 2001, throws further light on the problems and issues surrounding the disciplinary action. That memo, "Deceleration of Leaving Without Supervision," directs that occurrences of Ms. C.'s "walking away from the cottage courtyard area or the window ledge outside where she prefers to sit, when supervision cannot be provided" should be ended. It provided for redirection (defined by a hearing witness as distraction), verbal cues, and physical guidance (defined by the witness as "hands on for less than one minute"). There was no more recent written direction concerning Ms. C.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 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 Section 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 Section 2.2-3001.

In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Section 5.8 EDR *Grievance Procedure Manual*.

To establish procedures on standards of conduct and performance for employees of the Commonwealth of Virginia and pursuant to Section 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. The *Standards of Conduct* groups offenses according to their severity and lists examples of each group. However, the *Standards* also note that:

The offenses set forth below are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provision of this section. Section V.A., DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

Section V.3.k. of the *Standards of Conduct* provides that the following is one of the enumerated Group III offenses:

Threatening or coercing persons associated with any state agency (including, but not limited to, employees, supervisors, patients, inmates, visitors, and students).

The Agency's DI 201 specifies in Section 201-1 that "The Department has zero tolerance for acts of abuse or neglect." In its Section 201-3 that document defines client abuse thus:

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 Grievant's acts of taking a valued possession (the doll) from a mentally retarded and mentally ill person and then throwing it beyond reach and attempting to induce another person to assist in further such conduct, is clearly an act that "might have caused physical or psychological harm." Additionally, these acts of the Grievant were made with the clear intent of coercing the patient to move in the direction of the thrown

doll. Coercing brings the act within the purview of Group III offenses enumerated in the Standards of Conduct.

The Agency's DI 201 clearly forbids not only the causing of physical or psychological harm, but in addition acts which **might have** such an effect. Given the vulnerability of the patients under the care of the Agency, the provision is clearly crafted to ensure maximum protection to patients under the Agency's care.

As the Director of the SETC testified, it was clear to him that the Grievant did not act with the intent of causing physical or psychological harm. This, together with the further observations of the director, furnished a well-founded basis for reducing the Written Notice from a Group III.

Inasmuch as the Grievant clearly **did** intend **the act** that caused the danger of psychological harm, she has committed violations of the *Standards of Conduct* and DI 201.

This Hearing Officer finds that the reduction of the Written Notice to a Group II was the proper response to the mitigating circumstances described above.

DECISION

The disciplinary action of the Agency is SUSTAINED. The Group II Written Notice is to remain in place for the period specified in the *Standards of Conduct*.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the *Grievance Procedure Manual* set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review

This hearing decision is subject to four types of administrative review, depending upon the nature of the alleged defect with the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This 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.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The director's

authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the director of EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. **In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests 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**. (Note: the 10-day period in which the appeal must occur, begins with the **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days.) A copy of each appeal must be provided to the other party.

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 Decisions

Within 30 days of a final decision, a party may appeal on the grounds that the determination is contradictory to law, by filing notice of appeal with the clerk of the circuit court of the jurisdiction in which the grievance arose. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

Frederic N. Firestone
Hearing Officer