

Issue: Group III Written Notice with termination (patient abuse); Hearing Date: 05/02/05; Decision Issued: 05/04/05; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8046



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8046

Hearing Date: May 2, 2005

Decision Issued: May 4, 2005

APPEARANCES

Grievant
Representative for Grievant
Four witnesses for Grievant
Observer for Grievant
Representative for Agency
Three 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 a patient.¹ As part of the disciplinary action, grievant was removed from

¹ Agency Exhibit 2. Written Notice, issued January 12, 2005.

state employment effective January 12, 2005. 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 for five years. He was a certified nursing assistant (CNA) at the time of his removal from employment. He was rated a "Contributor" on his most recent performance evaluation.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

Client H is a 45-year-old male with mild mental retardation, aggressive and impulsive behavior, and becomes agitated. He has a good memory and does not lie. On November 21, 2004, client H reported that grievant kicked him.⁵

At about 7:00 p.m. on November 26, 2004, a female CNA observed grievant and client H on the patio during a smoke break. Grievant pushed the client against a screen and hit him on the back with a closed fist. The CNA asked grievant what would happen if the client developed swelling and bruises. Grievant said, "The patients like it."⁶

At about 7:15 p.m., a registered nurse (RN) in the nursing station heard client H yell in the adjoining dayroom. She looked into the dayroom and observed grievant and client H facing each other with arms raised. Grievant was holding each of client H's wrists. No one else was in the dayroom. The RN assumed that the two were playing, dismissed it from her mind, and returned to her work. About 25 minutes later, the female CNA referred to in the preceding paragraph brought client H to the nursing station because his left ring finger was bleeding. The wound appeared to be a fresh injury and was oozing blood but not profusely. The RN asked client H how his finger became injured. Client H said that "I pulled that skin off my finger yesterday, but [grievant] twisted my finger and

² Agency Exhibit 1. *Grievance Form A*, filed February 8, 2005.

³ Grievant Exhibit 1. Performance Evaluation, September 29, 2004.

⁴ Agency Exhibit 5. Section 201-3, Departmental Instruction (DI) 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, October 31, 2003. 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."

⁵ Agency Exhibit 6. Witness statement from a CNA, December 1, 2004.

⁶ Agency Exhibit 6. Female CNA's witness statement, December 6, 2004.

made it bleed because he was mad with me.”⁷ About two hours later, the female CNA asked client H how he hurt his finger; the client said, “[Grievant] did it.”⁸

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 the grievant must present his evidence first and prove his claim by a preponderance of the evidence.⁹

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 (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. The *Standards* 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

⁷ Agency Exhibit 6. Interdisciplinary (ID) Note, November 26, 2004. [NOTE: The RN who wrote the ID Note used the word “somebody” in lieu of grievant’s name because staff have been instructed not to put the names of employees in ID notes. However, she testified that client H had specifically named grievant by his first name when making the statement about his injury.]

⁸ Agency Exhibit 6. Female CNA’s witness statement, December 6, 2004.

⁹ § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

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 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.¹⁰ It is expected that a facility director will terminate the employment of an employee found to have abused or neglected a client.¹¹

Grievant denies being with the client on the patio, hitting the client, being alone in the dayroom with client, and twisting the client's finger. However, a preponderance of evidence leads to a conclusion that grievant was with the client both on the patio and alone in the dayroom, and that he did hit the client and twist his finger.

First, the grievant has offered no reason that the female CNA, the RN, or the client would have any reason to lie about what they saw, heard, and experienced. There is no evidence that any of these persons had taken any prior adverse action against grievant, and no evidence that grievant had done anything to the three that would give them reason to retaliate against him.

Second, the CNA testified credibly about what she saw and heard. Her testimony was consistent with her written witness statement given to the investigator. Similarly, the RN also testified credibly about what she saw and heard in the dayroom and in the nursing station. Her testimony was likewise consistent with her written witness statement. Both independently asked the client how his finger had been hurt, and on both occasions the client stated that grievant had hurt his finger.

Third, the client has a reputation for honesty. Grievant has not shown that the client had a reason to name him as the offender if it wasn't truthful. Further, the client provided a motive for grievant's actions, stating that grievant was mad at the client. While the reason for grievant's anger is not known, the client related what he perceived – that grievant was mad at him.

Fourth, in order for grievant's denial to be credible, one would have to conclude that the RN, the CNA, and the client all conspired to create a story about what took place. Given the client's mild mental retardation, and his reputation for honesty, it would be very difficult to get him to agree to such a conspiracy. Moreover, it would also take a lot of planning for the RN and the CNA to make their independent recollection of the events consistent with each other. In fact, all of the witnesses' recollections were both internally consistent and consistent with each other. There is no evidence to suggest any collusion.

¹⁰ Agency Exhibit 3. DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

¹¹ Agency Exhibit 5. Section 201-8, DI 201(RTS)00, *Ibid*.

Grievant offered the testimony of three people who were not witnesses to any of the events at issue herein.¹² One had worked with grievant on only a few occasions and had not witnessed grievant abusing patients. A second person had worked with grievant in the past and had not observed any patient abuse by grievant. The testimony of these two people was given no evidentiary weight because they did not witness the events at issue, and because the fact that they had not observed abuse in the past does not prove that it did not occur on November 26, 2004. The third person called by grievant is a union steward and testified only that grievant denied culpability during the third-step grievance resolution meeting.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and the removal of grievant from state employment on January 12, 2005 are hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 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

¹² Grievant's fourth witness is the female CNA who witnessed grievant hitting the client and heard the client say that grievant hurt his finger.

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 15 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 15-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.¹³ 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.¹⁴

[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

¹³ 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).

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.