Issue: Group III Written Notice with suspension (inappropriate restraint of patient); Hearing Date: 05/26/05; Decision Issued: 05/31/05; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8057

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8057

Hearing Date: May 26, 2005
Decision Issued: May 31, 2005

PROCEDURAL ISSUE

Grievant requested as part of her relief to be returned to the living area where she had been working prior to the disciplinary action. A hearing officer does not have authority to transfer an employee, or to direct the personnel by which work activities are to be carried out.[1] Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
Representative for Agency
Four witnesses for Agency

[1] § 5.9(b)3 & 7. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, August 30, 2004.

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 inappropriate restraint of a client.[2] As part of the disciplinary action, grievant was suspended without pay for three days. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.[3] The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant as a direct service associate (DSA) for 35 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."[4] The policy also provides that use of mechanical restraints that is not in compliance with the client's individual service plan (behavioral treatment plan) constitutes abuse. A facility policy that addresses behavioral restraints states that each individual is entitled to be completely free from any unnecessary use of restraint. Restraint shall not be used for convenience of staff, or as a substitute for a behavioral treatment program. The policy defines mechanical restraint to mean the use of a mechanical device that involuntarily restricts the freedom of movement or voluntary functioning of a limb or portion of a person's body; and the person is unable to remove the device without assistance.[5] Mechanical restraints are limited to use in emergency situations and approved behavior treatment programs. A facility policy on client rights provides that each client is entitled to enjoy the freedoms of everyday life including the freedom to move around the living area, campus and community.[6]

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[2] Exhibit 18. Written Notice, issued February 23, 2005.

[3] Exhibit 19. *Grievance Form A*, filed March 2, 2005.

[4] Exhibit 14. 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."

[5] Exhibit 3. *Behavioral Restraints*, June 9, 2003.

[6] Exhibit 4. *Client Rights*, March 17, 2004.

Grievant is responsible for a female client who has mental retardation, hydrocephalus, and right cerebral atrophy.[7] She is unable to ambulate or use her right arm. She is able to propel her wheelchair independently but very slowly by using her left arm only.[8] If the right wheel lock on the wheelchair is engaged, the client is unable to unlock the chair.

On August 23, 2004, a patient care worker reported that grievant had been inappropriately locking a client's wheelchair on multiple occasions. Grievant acknowledged that, on one occasion, she had locked the wheelchair for a second to get other clients out of her way.[9] Another patient care worker had repeatedly seen grievant lock the client's wheelchair for the purpose of requiring her to sit at a specific table in the living area.[10]

The agency promptly assigned an investigator who interviewed relevant employees and issued her report on September 4, 2004. No further action was taken until the discipline was issued about six months later.

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

[7] Exhibit 6. *Psychological Evaluation*, October 7, 2004.
[8] Exhibit 5. *Occupational Therapy Evaluation*, August 23, 2001.
[9] Exhibit 9. Grievant's witness statement, August 24, 2004.
[10] Exhibit 13. Care worker's witness statement. August 24, 2004.

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 her evidence first and prove her claim by a preponderance of the evidence.[11]

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 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].[12] It is expected that a facility director will terminate the employment of an employee found to have abused or neglected a client.[13]

The agency has shown by a preponderance of evidence that grievant inappropriately locked the client's wheelchair on multiple occasions. Although grievant avers that she locked the client's chair on only one occasion, the credible testimony of two witnesses is sufficient to conclude that such inappropriate locking occurred more than once. Moreover, while grievant contends that she locked the chair only once to move clients out of the way, the testimony supports a conclusion that on other occasions, she locked the chair for inappropriate reasons (requiring the client to sit at one location).

Grievant alleged that she locked the client's wheelchair because the client attempted to "run over" other clients. The other witnesses in this case have never seen this particular client attempt to run over other clients. The client's medical records and other facility records do not reflect any incidents involving this client running over or into others. Rather, the available documentation and testimony indicate that the client can propel her wheelchair only very slowly and that she does not intentionally run into others. In the absence of any documentation or corroborative testimony regarding the alleging "running over" of

[11] § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.
[12] Exhibit 17. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.
[13] Exhibit 14. Section 201-8, DI 201(RTS)00, *Ibid*.

other clients, grievant's allegation is deemed less credible than the testimony of other witnesses and the available written evidence.

There was no evidence proffered to show any specific problems between grievant and the aides who reported her offense. The grievant suggests that the three aides tended to be a clique, and that the three direct service associates were a separate clique, however, there is no evidence that this was a factor in the aides' reporting of the offense.

Prompt Issuance of Disciplinary Actions

One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. As soon as a supervisor becomes aware of an employee's unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior.[14] Management should issue a written notice as soon as possible after an employee's commission of an offense.[15] The agency's own policy requires responsible personnel in the Human Resources Office to provide an *immediate response* to any proposal for disciplinary action submitted by a facility director.[16] One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. Unless a detailed investigation is required, most disciplinary actions are issued within one or two weeks of an offense.

In the instant case, the local facility completed its investigation within ten days and promptly forwarded its report to central office. Central Office did not approve the issuance of discipline until five and a half months later. No explanation was proffered to explain this delay. Delaying discipline for such an inordinate amount of time communicates to grievant that the agency does not view the offense as serious. Then, when the agency belatedly issued such a severe level of discipline, the grievant received a mixed message, i.e., that the agency maintains the offense was severe, but not serious enough to take action promptly. Under these circumstances, the imposition of a monetary penalty (suspension without pay) is unusually harsh. Further mitigation is provided by the Director's testimony that grievant has 35 years of service, and that the abuse in this case was mild.

DECISION

The disciplinary action of the agency is modified.

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[14] Exhibit 17. Section VI.A. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.
[15] Exhibit 17. Section VII.B.1. *Ibid.*
[16] Exhibit 14. Section 201-9, DI 201(RTS)00, *Ibid*.

The Group III Written Notice issued on February 23, 2005 is hereby UPHELD. The three-day suspension is RESCINDED; grievant shall be reimbursed for salary withheld during the period of suspension.

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 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.[17] You must file a notice of appeal with the clerk of the circuit court in the

[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).

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

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