

Issue: Group III Written Notice with termination (patient abuse); Hearing Date: 09/07/05; Decision Issued: 09/08/05; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8155; Outcome: Agency upheld in full.

Administrative Review: EDR Ruling Request received 09/15/05; EDR Ruling No. 2006-1140 issued 12/07/05; Outcome: Remanded to HO; Revised Decision issued 01/27/06; Outcome: Employee granted full relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8155

Hearing Date: September 7, 2005
Decision Issued: September 8, 2005

PROCEDURAL ISSUE

During the hearing and after most of the agency's witnesses had testified, grievant's representative pointed out that a witness who was not called by either party was in the waiting area. The witness is not currently employed by the agency although at the time of the incident, he had been employed as a contract employee. The agency advocate and the Director were unaware of why the witness had appeared; grievant's representative also had no knowledge of why this witness was present. During a break, the witness approached the hearing officer and stated that the Director of Nursing had called him that morning and asked him to appear. The Director of Nursing acknowledged that she had called him because of an e-mail she had received several days earlier which listed potential witnesses who might be needed at the hearing. The witness's testimony, if it had been consistent with his written witness statement, would have been favorable to the agency. The hearing officer asked both parties if they wanted to call the witness to testify; both parties declined. Grievant objected to the witness testifying because she had not anticipated this witness and therefore had not prepared questions for the witness. Because the agency chose not to call the witness, and because grievant might have been disadvantaged by the lack of notice, the witness was not called to testify.

APPEARANCES

Grievant
Representative for Grievant
Center Director
Advocate 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 state employment effective June 9, 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 four years. She was a direct service associate at the time of removal from employment.

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."³ The policy requires all employees (including contract employees) to *immediately* report allegations of abuse or neglect of residents to the facility director.

On May 13, 2005, a male resident with mental retardation had been behaving badly and was placed in "time-out." After being in restraints for 45 minutes, the resident was released but continued his negative behavior and

¹ Agency Exhibit 1. Written Notice, issued June 9, 2005.

² Agency Exhibit 1. *Grievance Form A*, filed June 13, 2005.

³ 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."

kicked a hole in a wall. He was placed in restraints a second time. When he was again released, the patient requested to call his aunt. The team leader heard part of the conversation and then spoke with the resident's aunt. The aunt said that the resident claimed grievant had hit him because he was bad. However, the aunt said she did not believe that grievant would have hit the resident. The team leader reported the conversation to the Center Director.⁴ Because there was no evidence other than the resident's allegation, and because the resident's aunt did not believe that grievant would have hit the resident, the Director concluded that there was insufficient information to warrant an investigation.

On May 24, 2005, a contract employee (referred to in Procedural Issue, supra) reported that he had seen grievant strike the resident on May 13th. Upon learning of this report, the Center Director assigned an investigator to the case. The investigator interviewed the resident, grievant, and six other employees who worked in the resident's building. The investigator concluded that grievant had physically and verbally abused the resident. Central Office directed that grievant be removed from employment.

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.

⁴ Agency Exhibit 3. Team Leader's witness statement, May 25, 2005. See also Agency Exhibit 4, e-mail from team leader to Center Director, May 17, 2005.

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.⁵

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 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.⁶ It is expected that a facility director will terminate the employment of an employee found to have abused or neglected a client.⁷

The agency had two bases for removing grievant from employment – physical abuse and verbal abuse.

Physical abuse

Grievant denies striking the resident. The agency could have called two witnesses (the resident and the contract employee) who purportedly would have testified that grievant hit the resident, however, the agency failed to call either witness to testify. In lieu of these witnesses' testimony, the agency offered only an unsworn statement from the contract employee, and the investigator's hearsay about what the resident said. This hearsay evidence, by itself, is insufficient to outweigh grievant's denial.

There are several other factors that must be considered to determine whether physical abuse occurred. First, it is undisputed that the resident called his aunt on May 13th and said that grievant struck him. Second, one coworker (M) stated that grievant had told one resident to "get my broom" when she was upset with the behavior of another resident.⁸ This incident was corroborated by the contract worker. The resident that grievant is alleged to have struck on May

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

⁶ Agency Exhibit 7. DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993. See also Agency Exhibit 6. Chapter 13, DMHMRSAS Employee Handbook.

⁷ Agency Exhibit 5. Section 201-8, DI 201(RTS)00, *Ibid*.

⁸ The inference drawn from all the testimony and evidence on the "get my broom" issue suggests that grievant may have used the broom either to hit residents on the head, or at least to threaten to hit residents.

13th told the investigator that grievant had struck him on the head with her broom on other occasions. On the other hand, two of grievant's coworkers state that the resident is not truthful when he is angry (coworker S) or if he has done something wrong (coworker H). There is also undisputed evidence that there was friction between the contract employee and grievant. The contract employee felt that he was treated differently from other staff and that grievant had deliberately excluded him from an activity. The team leader corroborated that the contract employee had complained about grievant's behavior. Thus, the contract employee had reason to be upset with grievant and this could have been a possible motivation for his allegations against her. Further, the contract employee did not report the alleged physical abuse until nine days after the incident despite the policy mandate that all suspected abuse is to be reported immediately.

These conflicting factors call into question the credibility of both the resident and the contract employee – the only two people who purportedly witnessed grievant strike the resident. These credibility and factual issues might have been resolved if the agency had called the resident and the contract employee to testify. Because the agency did not call these important witnesses, it must be presumed that their testimony would not have been favorable to the agency. Considering the totality of the available evidence, the agency has not demonstrated, by a preponderance of evidence, that grievant struck the resident.

Verbal abuse

Grievant denies speaking to residents in an abusive manner, and denies that the team leader ever counseled her. One coworker (H) said that some staff use a harsh tone when speaking to residents. The contract employee stated that grievant spoke abusively to residents and used vulgar language when doing so. The team leader had spoken to grievant several times during the year about speaking loudly and harshly at residents. Another coworker (M) corroborated that the team leader had counseled grievant and two others for talking harshly to residents. She testified that she had heard grievant use curse words when speaking to residents.

While the credibility of the contract employee is in question, grievant did not challenge the credibility of the team leader and other coworkers. On cross-examination, grievant did not question the team leader and coworker about the accuracy of their written statements regarding the verbal abuse. Given the totality of the evidence, it is concluded that the agency has borne the burden of proof to show that grievant verbally abused residents.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and the removal of grievant from state employment on June 9, 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 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.⁹ 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.¹⁰

[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

⁹ 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).

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8155

Hearing Date:	September 7, 2005
Decision Issued:	September 8, 2005
Reconsideration Response Issued:	January 27, 2006

PROCEDURAL BACKGROUND

Grievant requested an administrative review of the decision. The Director of the Department of Employment Dispute Resolution reviewed the case and ordered that a new decision be issued.

DISCUSSION

Grievant has correctly observed in her request for review that the agency failed to demonstrate that her verbal abuse of patients occurred on the date of offense cited in the Written Notice. Because the agency limited its disciplinary action to the specific date of May 13, 2005, only grievant's actions occurring on that date can form the basis for discipline. The previously issued decision concluded that the agency did not bear the burden of proof to show that any physical abuse occurred on the cited date. This reconsideration now concludes similarly that the agency has not demonstrated that any verbal abuse occurred on May 13, 2005.

DECISION

The disciplinary action of the agency is reversed.

The Group III Written Notice and the removal of grievant from state employment on June 9, 2005 are hereby REVERSED.

Therefore, it is hereby ORDERED that grievant be reinstated to her former position, or if occupied, to an objectively similar position. Grievant is awarded full back pay, from which interim earnings (including unemployment compensation) must be deducted. Grievant's full benefits and seniority are restored.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 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 Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.¹¹

S/David J. Latham

David J. Latham, Esq.
Hearing Officer

¹¹ 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).