

Issue: Group III Written Notice with termination (client neglect); Hearing Date: 10/18/05; Decision Issued: 10/21/05; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8185



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8185

Hearing Date: October 18, 2005
Decision Issued: October 21, 2005

APPEARANCES

Grievant
Assistant for Grievant
Human Resource Manager
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? Did the agency discriminate against grievant on the basis of race?

FINDINGS OF FACT

Grievant filed a timely appeal from a Group III Written Notice for neglecting a patient.¹ As part of the disciplinary action, grievant was removed

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

from state employment effective August 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 three years. She was a direct care aide (DCA) at the time of removal from employment. Grievant has one prior active disciplinary action – a Group I Written Notice for patient neglect and falsification of records.

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 residents in the building where grievant works are mentally retarded and some have other disabilities as well. On July 26, 2005, the staff had been giving breakfast to residents. Grievant left the dining room pushing one resident in a wheelchair with her right hand and was tapping another resident on the shoulder with her left hand to encourage him to move along the hallway with her. Resident W, who is profoundly mentally retarded and blind but ambulatory within the living area, had been walking down the hallway in front of grievant and the wheelchair. Resident W suddenly fell to the floor, apparently striking his head on a gait trainer (walker) that had been parked in the corner of the hallway.

Another DCA who was feeding a resident in the dining room heard the noise from the resident falling into the gait trainer and looked out the door and down the hall toward grievant and the residents. She observed grievant behind the wheelchair with one resident, the resident to grievant's left, and resident W in front of the wheelchair slowly getting to his feet.⁴ She assumed since grievant was closest to resident W that grievant would attend to him and check to ascertain if he was injured. The DCA was responsible for feeding and watching another resident in the dining room and, because it was logical that grievant should assist resident W, the DCA went back to attend to her own resident.

A minute later, the DCA took her resident to the bathroom. Resident W was standing in the hallway facing away when she walked by. When the DCA returned from the bathroom a minute or two later, resident W had walked to the door of the dining room where he had attracted the attention of another employee. At this time, it became apparent that resident W had sustained a one-

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

³ Agency Exhibit 2. Section 201-3, Departmental Instruction (DI) 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, October 31, 2003. 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."

⁴ Agency Exhibit 5. Diagram of building area in vicinity of accident site. Also see photographs of accident site from various angles.

inch gash at the outer edge of his left eyebrow, which was bleeding.⁵ At about this time, grievant returned from the bathroom with the resident in the wheelchair. When an active treatment specialist (ATS) asked grievant what happened to resident W, grievant denied any knowledge of how he was injured.

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 her evidence first and prove her claim by a preponderance of the evidence.⁶

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

⁵ Agency Exhibit 5. Photograph of injury to resident W.

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

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.⁷ The facility has promulgated its own Standards of Conduct policy which provides that violation of the departmental instruction on abuse and neglect is a Group III offense.⁸ It is expected that a facility director will terminate the employment of an employee found to have abused or neglected a client.⁹

It is not known why resident W fell. Over a four-year period, he had fallen only three times, all in 2004.¹⁰ Because there was a superficial scrape on the outside of his right calf, it was theorized that the wheelchair grievant was pushing might have hit resident W in the leg while she was watching another resident to her left. Grievant denies hitting resident W with the wheelchair and there is no evidence to the contrary. However, it is undisputed that resident W fell and was injured in the process.

Grievant denies that resident W was in the hallway when she took two residents to the bathroom. The DCA who heard the noise of resident W falling into the walker and looked out the dining room door testified credibly and directly that resident W was getting up directly in front of the wheelchair grievant was pushing. The DCA also saw grievant tapping the resident to her left on the shoulder, thus corroborating what grievant testified to.

The testimony of the DCA who looked out the dining room door is found more credible than grievant's denial for three reasons. First, when she described what she saw, she mentioned that grievant was tapping a resident to the left on the shoulder. Because grievant corroborated that she was doing this, it is undisputed. The DCA could not have known about this unless she had looked out the door and down the hallway and observed grievant doing it. Second, grievant attempted during the hearing to prove that the resident in the wheelchair had a habit of sticking one leg out to the side of the wheelchair. There was no reason to mention this unless grievant was suggesting that the resident's leg might have caused resident W to fall. This inferred attempt to shift responsibility to the resident in the wheelchair suggests that grievant was indeed aware of the fall but did not want to be blamed for it. Third, grievant had previously been disciplined for neglect and falsification of records. This prior history of being untruthful taints her credibility.

Racial discrimination

⁷ DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

⁸ Agency Exhibit 2. Section 6.C.3.o., Instruction 106, *Standards of Conduct*, revised January 13, 2004.

⁹ Agency Exhibit 5. Section 201-8, DI 201(RTS)00, *Ibid*.

¹⁰ Agency Exhibit 5. Resident fall trend analysis sheet, October 1, 2001 through July 28, 2005.

An employee may demonstrate racial discrimination by showing direct evidence of intentional discrimination (specific remarks or practices), circumstantial evidence (statistical evidence), or disparate impact resulting from the discipline. In this case, grievant has not presented any testimony or evidence of remarks or practices that would constitute racial discrimination. In fact, it was grievant who first raised an issue of race when the ATS asked her what had happened. When the ATS asked grievant if she knew how resident W had been injured, grievant responded with a question of her own, asking the ATS "Why are you singling me out, is it because I'm black?"¹¹ Grievant has not offered any circumstantial evidence or shown any disparate impact that would suggest a racial component to the discipline. She has failed to show any basis to support her allegation of racial discrimination. Therefore, it is concluded that the agency did not discriminate against grievant on basis of race.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and the removal of grievant from state employment on August 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

¹¹ Agency Exhibit 1. Attachment to grievance form.

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.¹² 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.¹³

[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

¹² 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).

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.