Issue: Group III Written Notice with termination (patient neglect); Hearing Date: 10/31/05; Decision Issued: 11/02/05; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8192

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8192

Hearing Date: October 31, 2005
Decision Issued: November 2, 2005

APPEARANCES

Grievant
Representative for Agency
Five 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

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 from state employment effective September 2, 2005. Following failure of the parties to resolve the grievance at the third resolution step, the agency head

[1] Agency Exhibit 17. Written Notice, issued September 2, 2005.

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. He was a direct service aide (DSA) at the time of removal from employment. Grievant has four prior active disciplinary actions – a Group II Written Notice for failure to follow proper documentation procedures (February 5, 2004), a Group I Written Notice for abuse of state time (March 23, 2004), a Group I Written Notice for unsatisfactory attendance (April 26, 2004), and a Group I Written Notice for unsatisfactory work performance (November 5, 2004).[3] Grievant was counseled in writing in March 2005 for avoiding his responsibilities including personal client care.[4]

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."[5] Standard policy and practice is that employees must remain at work until the end of their scheduled shift, regardless of when a break is taken. For example, if an employee whose shift ends at 10:30 p.m. takes his 15-minute break from 10:15 p.m. to 10:30 p.m., he must remain in the building until 10:30 p.m. The residents at this facility all have multiple handicaps. Most residents have mental retardation, many are physically handicapped, and many are unable to bathe, clothe, feed, or toilet themselves. Standard policy and practice dictates that clients are to be completely taken care of by the end of the shift so that incoming staff are not immediately confronted with unexpected work when they arrive. Specifically, those residents who wear diapers are to be checked and, if necessary, changed reasonably proximate and prior to the end of the shift. If a charge aide asks an employee to perform a task involving resident care just before end of shift, the employee is expected to complete the task even if it results in working a few minutes beyond the end of the scheduled shift.

On August 11, 2005, grievant was scheduled to work from 2:00 p.m. to 10:30 p.m. At about 10:20 p.m. grievant returned from his break. Grievant was responsible for five residents; four are ambulatory and resident M is wheelchair confined. The acting charge aide directed grievant to change resident M and put him in bed. Two other employees including the medical aide heard the charge aide give this instruction to grievant.[6] Grievant responded that his shift was over

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[2] Agency Exhibit 18. *Grievance Form A*, filed September 12, 2005.

[3] Agency Exhibit 16. E-mail from human resources to Chief of Police, October 24, 2005.

[4] Agency Exhibit 12. Memorandum from shift supervisor to grievant, March 20, 2005.

[5] 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."

[6] Agency Exhibit 7. Medical aide's witness statement, August 12, 2005. See also Agency Exhibit 8. DSA's witness statement, August 12, 2005.

and that he was leaving his keys in the door.[7] Grievant then left the building, leaving his keys in the door. Resident M is mentally retarded, has palsy, is wheelchair confined, is non-verbal, and is unable to bathe, clothe, or toilet himself. The acting charge aide called the shift supervisor at 10:25 p.m. to report that grievant had failed to follow her directive to change resident M and had left work before his shift ended.[8] The acting charge aide and another direct service aide then changed resident M at about 10:30 p.m. and found that he had soiled himself; it appeared that the resident had been soiled for some time.

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]

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[7] The entrance to the living area in which grievant worked is always locked because residents cannot leave unless they are under supervision. When employees leave at the end of the shift, they are required either to leave their keys in the staff office or to turn the keys over to an incoming employee. Leaving keys in the door is not permitted because a resident could use the keys to get out of the building.

[8] Agency Exhibit 6. Charge aide's written statement, August 17, 2005. See also Agency Exhibit 10. Shift supervisor's written statement, August 13, 2005.

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

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.[10] The facility has promulgated its own abuse policy which provides that violation of the departmental instruction on abuse and neglect is a Group III offense.[11] It is expected that a facility director will terminate the employment of an employee found to have abused or neglected a client.[12]

The agency has shown, by a preponderance of evidence, that grievant was instructed to change a resident ten minutes before the end of his shift. Grievant refused to comply with the instruction and instead left the building ten minutes before the end of his shift. Grievant denied that the acting charge aide had instructed him to change resident M. However, the testimony of the acting charge aide, the medical aide, the shift supervisor, and the written statement of another DSA outweigh grievant's denial.

Grievant asserts that the acting charge aide had told him at about 9:30 p.m. that she and another aide would change resident M because she knew that grievant's shift ended at 10:30 p.m. (half an hour before the others). The acting charge aide denied grievant's assertion. However, even if she had told grievant this, the fact is that at 10:20 p.m., the acting charge aide directed grievant to perform the task. The charge aide is within in her authority to countermand or change her own directions to grievant. Therefore, even if she had earlier excused grievant from that task, she was entitled to subsequently reassign the task to grievant. Once she told him at 10:20 p.m. to change resident M, grievant was obligated to comply with her instruction.

Grievant asserts that the acting charge aide told him to leave the keys in the door. However, the charge aide denies telling him to do so; two other employees heard the conversation and both corroborate the charge aide's version. Grievant speculates that the medical aide could not have heard the conversation between him and the acting charge aide. However, the medical

[10] Agency Exhibit 15. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.
[11] Agency Exhibit 2. *Abuse of Individuals Receiving Services*.
[12] Agency Exhibit 3. Section 201-8, Departmental Instruction 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients,* revised April 17, 2000.

aide testified credibly; grievant failed to present any evidence that would taint the medical aide's credibility. Grievant alleges that someone altered his break time on the Living Area Report but he has presented no evidence to support his allegation. It appears that the numbers could have been altered but there is no evidence to suggest that anyone had a motive for doing so.

When grievant was interviewed by the abuse investigator, he noticed a tape recorder in the room and assumed that the interview was being recorded. In preparation for this hearing, grievant requested a copy of the tape recording. However, the investigator testified credibly that he never tape-records interviews, that grievant's interview was not recorded, that the recorder is old and unused, and that he is unsure whether it is operational. In any case, even if such a recording existed, it would not be probative evidence because it would presumably only reflect grievant's written witness statement and the investigator's report.

The agency considered whether any mitigating circumstances existed; none were found. On the other hand, grievant's record of active disciplinary actions is lengthy. Even before the instant disciplinary action, grievant had one active Group II and three active Group I Written Notices. Thus, the agency could have removed grievant from employment in November 2004 when he was disciplined for the fourth time in nine months. The agency decided at that time to give grievant one last chance. However, with the current offense, the agency decided that the extensive record of discipline was an aggravating circumstance that supported its decision to remove grievant from state employment. The agency's decision was within the limits of reasonableness.

Technically, grievant's offense included a failure to follow a supervisor's instructions (a Group II offense), and leaving the work site during work hours without permission (a Group II offense). The agency concluded that his offense also constituted patient neglect (a Group III offense) because grievant failed to provide care necessary to the health and welfare of a resident. The evidence is sufficient under these circumstances to justify a Group III Written Notice. However, even if the agency had issued Group II offenses, the accumulation of active disciplinary actions during the past two years is more than enough to warrant his removal from employment.[13]

DECISION

The disciplinary action of the agency is affirmed.

[13] Agency Exhibit 15. Section VII.D, Policy 1.60, DHRM *Standards of Conduct*, September 16, 1993.

The Group III Written Notice and the removal of grievant from state employment on September 2, 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.[14] 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.[15]

[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

[14] 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).

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