

Issue: Group III Written Notice with termination (verbal abuse of patient);  
Hearing Date: 04/06/06; Decision Issued: 04/07/06; Agency: DMHMRSAS;  
AHO: David J. Latham, Esq.; Case No. 8310; Outcome: Agency upheld in  
full.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8310

Hearing Date: April 6, 2006  
Decision Issued: April 7, 2006

APPEARANCES

Grievant  
Director of Nursing  
Advocate for Agency  
Four 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 verbally abusing a patient.<sup>1</sup> As part of the disciplinary action, grievant was

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<sup>1</sup> Agency Exhibit 1. Group III Written Notice, issued February 6, 2006.

removed from state employment effective February 6, 2006. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.<sup>2</sup> The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant for almost four years. She was a direct service associate at the time of removal from employment.<sup>3</sup> In June 2002, grievant was counseled in writing for disruptive behavior and violating patient rights as a result of practicing religion in the work place and practicing religion with patients.<sup>4</sup>

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."<sup>5</sup> The policy requires all employees (including contract employees) to *immediately* report allegations of abuse or neglect of residents to the facility director. The policy lists as an example of abuse the use of language that threatens or intimidates a person. Grievant received a copy of this policy when she was hired.<sup>6</sup> She received additional training in 2004 and 2005 on the topics of human rights in DMHRSAS facilities and therapeutic communications.<sup>7</sup>

On December 19, 2005, grievant had come up with the idea of giving a gift basket of food to coworker D at the office Christmas party. She began circulating a signup sheet for volunteers to donate food for the gift basket. Coworker D noticed the signup sheet being shown to employees and asked coworker B what was going on. Coworker B told D about the food basket that grievant was trying to organize. D became upset, stating that she didn't need food and found it insulting that grievant thought she needed food. Shortly thereafter, D entered an office where grievant was. D was red-eyed and teary, and confronted grievant telling her that she didn't need food. Grievant explained that it was only meant to be a gift basket. D said she didn't want the food basket now that she knew about it.

Grievant then went to a patient room to confront B. The patient room had four patients; one patient was being attended to by B and another coworker. Grievant approached B within inches, pointed her finger in B's face and angrily asked, "Why did you tell, why did you tell?" B responded that D had asked what was going on and she felt that she should tell her about the food basket.

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<sup>2</sup> Agency Exhibit 1. *Grievance Form A*, filed February 14, 2006.

<sup>3</sup> Agency Exhibit 3. Grievant's Employee Work Profile, November 25, 2004.

<sup>4</sup> Agency Exhibit 5. Writing counseling documentation, June 21, 2002.

<sup>5</sup> Agency Exhibit 4. 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."

<sup>6</sup> Agency Exhibit 7. Acknowledgement of Understanding, signed by grievant May 10, 2002.

<sup>7</sup> Agency Exhibit 7. Student Progress Summary.

Grievant became more upset, began crying, and shouted at B that she was just a “little old Scrooge,” “a mean old lady,” and that “You’re just jealous of me.” The patient being attended to is mentally retarded; she began crying and “carrying on.” Both B and her coworker told grievant to leave the room so that they could continue working. Grievant started to leave the room and then turned back again when B said something to calm the patient. Grievant again yelled at B and then left the room. B and the coworker remained in the room to calm the patient who continued crying for several minutes. Another patient in the room asked, “What’s wrong with that lady (grievant)?”

An investigator interviewed those who were involved with or who witnessed the incident. Grievant told the investigator that she should have pulled B aside rather than confront her in a patient room. She acknowledged that what she had done was not appropriate “because I got a little heated.” Grievant admitted to the second-step resolution reviewer that she has a naturally loud voice and that she had been using a “raised voice” during this incident.

#### 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.<sup>8</sup>

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 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.<sup>9</sup> It is expected that a facility director will terminate the employment of an employee who has abused or neglected a client.<sup>10</sup>

The descriptions of the incident by grievant and the two coworker witnesses were generally similar. However, grievant denies that the patient was crying and carrying on when she left while the two coworker witnesses maintain that the patient was crying and continued to do so for several minutes after grievant left the room. Grievant acknowledges that she was angry, upset, crying, and heated during this incident. The two witnesses were not emotionally involved in the situation. Therefore, the testimony of the two witnesses is preponderant in this case.

The patient over whose bed grievant was shouting at B suffers from mental retardation. The evidence indicates that the patient cried and carried on during this incident and, continued to cry for several minutes after grievant left the room. It is reasonable to conclude that the patient, due to her lack of mental ability, did not understand what was going on. She knew only that she was first being attended to by two caregivers, and then suddenly, grievant was angrily confronting one of the caregivers. While the patient may not have understood what was being said, she certainly observed and sensed grievant's physical and verbal anger. This highly-charged emotional outburst was occurring right next to the patient's bed. The patient knew only that the situation was very unpleasant, unpredictable, and may have feared that it somehow involved her, or could erupt into a physical altercation. It is entirely understandable that the patient would become upset, begin crying, and then require several minutes of reassurance afterwards.

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<sup>8</sup> § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

<sup>9</sup> Agency Exhibit 6. DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

<sup>10</sup> Agency Exhibit 4. Section 201-8, DI 201(RTS)00, *Ibid*.

It was not appropriate for grievant to angrily confront a coworker while that coworker was giving required care to a patient. More importantly, it was unacceptable that grievant should carry on in such a loud and angry manner that the patient became fearful and intimidated. Grievant's actions and angry, loud verbalizations were perceived by the patient as threatening and intimidating. Therefore, her behavior falls within the definition of verbal abuse.

### Mitigation

The normal disciplinary action for a Group III offense is removal from employment. The policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has been employed for less than four years and therefore, does not have long state service. Her performance prior to this incident has been satisfactory. The agency did not consider this latter factor to be sufficiently mitigating and decided that the appropriate corrective action was removal from state employment. Based on the totality of the evidence, the hearing officer concludes that the agency properly applied the mitigation provision.

### DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and the removal of grievant from state employment on February 9, 2006 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 14<sup>th</sup> St, 12<sup>th</sup> 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.<sup>11</sup> 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.<sup>12</sup>

[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

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<sup>11</sup> 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).

<sup>12</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.