

Issue: Group III Written Notice with termination (patient abuse); Hearing Date: 05/15/06; Decision Issued: 05/16/06; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8324; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8324

Hearing Date: May 15, 2006
Decision Issued: May 16, 2006

APPEARANCES

Grievant
Facility Director
Advocate 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

The grievant filed a timely appeal from a Group III Written Notice for verbally abusing a patient.¹ As part of the disciplinary action, grievant was removed from state employment effective February 8, 2006. Following failure of

¹ Agency Exhibit 1. Group III Written Notice, issued February 8, 2006.

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 less than three years. He was a direct service associate (DSA) at the time of removal from employment.³

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 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 has received training in 2005 on therapeutic options and therapeutic milieu.⁵

An RN counseled grievant on or about January 12, 2006 because of his inappropriate verbal interaction with a patient.⁶ Grievant was directed not to argue with patients, and was advised that a repetition of such action could lead to a charge of verbal abuse.

On January 18, 2006, grievant was the only male staff member on duty in his assigned area. A recently admitted bipolar male patient, who was designated for "patio accompaniment,"⁷ told grievant he wanted to go to the bathroom to take a bath. This patient was still in the manic state that had precipitated his admission and therefore required "patio accompaniment" to assure that he did not take any inappropriate actions. Grievant had to complete a mail delivery task and told the patient to wait for a few minutes. When grievant returned, a female staff person asked grievant to take the patient for a bath. Grievant approached the patient but the patient refused to go to the bath because he did not want grievant to accompany him. A few minutes later, the patient approached grievant and said he was ready to take his bath. After gathering his things, the patient again changed his mind and said he didn't want grievant to accompany him. Finally, a few minutes later, the patient agreed to have grievant accompany him and together they went to the men's bathroom.

² Agency Exhibit 1. *Grievance Form A*, filed March 8, 2006.

³ Agency Exhibit 5. Grievant's Employee Work Profile, October 25, 2004.

⁴ 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."

⁵ Agency Exhibit 6. Training Records.

⁶ Agency Exhibit 2. Counseling memorandum, January 12, 2006.

⁷ "Patio accompaniment" means that the patient must stay in his room or the day room at all times. He can only go to the patio, bathroom or other areas if accompanied by a staff member.

When they got to the bathroom, the patient refused to get into the bathtub in grievant's presence. Grievant explained to the patient that he is required to stay with the patient because it was his job to stay with any patient who was designated for "patio accompaniment." Grievant told the patient that if he wouldn't get in the tub, he would have to return to the unit because grievant had other things to do. The patient began to yell and continued to express his disagreement and displeasure about grievant's presence. Grievant loudly argued with the patient.

Another DSA, who was in the adjoining nurses' station, heard loud voices coming through the wall although she could not distinguish whose voices they were or what they were saying. She left the nurses' station, walked to the adjoining men's bathroom and opened the door. She saw grievant and the patient standing face-to-face less only inches apart; both appeared angry and upset. Grievant had the patient by the arm but the patient snatched his arm away. The patient told the arriving DSA that she was his witness but did not state what it was that she was purportedly a witness to. As grievant and the patient continued to yell at each other, the female DSA stepped between the two. She suggested to grievant that he leave the bathroom but grievant did not do so. Two other DSAs and an RN then arrived. One of the DSAs heard the patient tell grievant, "You better not put your hands on me." The RN observed that both grievant and the patient were angry and upset. Grievant was telling the patient to return to his unit and the patient was telling grievant to "get out of my face."⁸ The RN twice directed grievant to move away from the patient but grievant did not comply. The entire group then moved from the bathroom into the hall. At this point, the RN directed grievant to come with her to her office while other staff dealt with the patient; grievant complied with this instruction. The patient was still upset and showed the female DSAs how he was going to fight with grievant.⁹

Several minutes later, after the incident was over, the patient walked up to grievant in the hallway and said, "Maybe it was just a misunderstanding, are we good?"¹⁰ Grievant responded, "Yes, we are good."

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

⁸ Agency Exhibit 3. Written statement of RN, January 18, 2006.

⁹ Agency Exhibit 3. Written statement of first DSA to arrive in bathroom, January 20, 2006.

¹⁰ Agency Exhibit 3. Written statement of another DSA, January 22, 2006.

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.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 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.¹² It is expected that a facility director will terminate the employment of an employee who has abused or neglected a client.¹³

The agency has demonstrated, by a preponderance of evidence, that grievant's behavior toward the patient was intimidating. Grievant was in a physical face-off with the patient; witnesses indicate that he was just inches away from the patient's face and was loudly arguing with him. Based on witness testimony, grievant had already placed his hands on the patient and the patient angrily jerked his arm away from grievant. He then told grievant not to put his hands on him. Grievant suggests that his voice is naturally loud. While it is undisputed that grievant has a strong voice, the preponderance of testimony

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

¹² Agency Exhibit 7. DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

¹³ Agency Exhibit 4. Section 201-8, DI 201(RTS)00, *Ibid*.

established that grievant was significantly louder on this occasion than he usually is, and that he was angry and upset.

Grievant contends that he did not leave the bathroom when told to do so because he felt that the patient might become physical and hurt the female employees. However, at that time, there were four other staff members present who should have been capable of handling one patient. From the totality of the evidence, it is more likely than not that grievant did not leave when so directed because he was angry, upset, and wanted to maintain control over the patient. In all likelihood, grievant did not want it to appear that the patient had prevailed in their verbal confrontation. In any case, witness' testimony reflects that grievant was determined to continue his verbal argument with the patient even after being repeatedly told by a supervisor to back away. This demonstrates that grievant's anger was overriding his ability to rationally react to supervisory instructions. This, in turn, supports the agency's contention that grievant was so angry and upset that he was intimidating and possibly threatening to the patient.

When the investigator interviewed grievant on January 20, 2006, grievant stated that he was trying to get the patient into the tub but the patient did not want to do so in grievant's presence.¹⁴ However, when grievant filed his grievance in March, he asserted that another patient was already occupying the tub. Two paragraphs later, grievant contradicts this assertion when he states, "No one was in the bathroom but the patient and me..."¹⁵ At the hearing, grievant reversed himself again and testified that there was a patient occupying the tub. These inconsistent statements about the alleged presence of another patient in the tub taint grievant's credibility. Although grievant contends he yelled to other staff for help, no one heard grievant call for help.

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 three years and therefore, does not have long state service. His performance prior to this incident has been generally satisfactory, however, he had been warned only a week earlier not to have inappropriate verbal altercations with patients. The agency decided that the appropriate disciplinary 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.

¹⁴ Agency Exhibit 3. Investigative interview with grievant, January 20, 2006.

¹⁵ Agency Exhibit 2. Letter from grievant to facility director, March 7, 2006.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and the removal of grievant from state employment on February 8, 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 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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute

Resolution. 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.¹⁶ 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.¹⁷ You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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]

S/ David J. Latham

David J. Latham, Esq.
Hearing Officer

¹⁶ 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).

¹⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.