

Issue: Group III Written Notice with termination (verbal abuse of patient);  
Hearing Date: 06/27/06; Decision Issued: 06/28/06; Agency: DMHMRSAS;  
AHO: David J. Latham, Esq.; Case No. 8363; Outcome: Agency upheld in  
full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8363

Hearing Date: June 27, 2006  
Decision Issued: June 28, 2006

**PROCEDURAL ISSUES**

Grievant was given instructions during a pre-hearing conference. She contacted the agency advocate several days prior to the hearing to inquire about a witness and a videotape. However, grievant failed to submit any documents or witness list to the hearing officer prior to the hearing. She also failed to appear for the hearing, failed to call the hearing officer to request a postponement, and failed to call to explain why she did not attend the hearing. The hearing was conducted with those witnesses who appeared at the docketed time and date.

Grievant requested as part of her relief that other employees be reprimanded. A hearing officer does not have authority to reprimand other employees.<sup>1</sup> Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

**APPEARANCES**

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<sup>1</sup> § 5.9(b)6 & 7. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

Employee Relations Manager  
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>2</sup> As part of the disciplinary action, grievant was removed from state employment effective February 24, 2006. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.<sup>3</sup> The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant for approximately one year as a forensic mental health technician (FMHT).

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>4</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 demeans, threatens, humiliates, or intimidates a person.

For some time, grievant and patient J had not gotten along well. Patient J is young (18), immature, juvenile, and had a reputation of playing one employee against another. Grievant had said to others that she believed employees on the day and evening shifts were spoiling patient J; she stated that she was not going to spoil him.

On December 30, 2005, grievant and patient J had a verbal confrontation when the patient requested to take his shower before other patients and grievant

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<sup>2</sup> Agency Exhibit 1. Group III Written Notice, issued February 24, 2006.

<sup>3</sup> Agency Exhibit 1. *Grievance Form A*, filed March 23, 2006.

<sup>4</sup> Agency Exhibit 3. 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."

denied his request.<sup>5</sup> At about 11:15 p.m. on the evening of December 31, 2005, grievant was beginning her work shift. As grievant entered the dayroom, two patients and two FMHTs were sitting at a table. Grievant asked if there were any clothes in the washer. When one coworker mentioned that patient J's clothes were in the washer, patient J said, "I don't want her [grievant] to put my clothes in the dryer," and asked another FMHT to do it. As grievant passed the table and went toward the room containing the refrigerator, patient J said, "She [grievant] doesn't like me and she is going to the refrigerator to take candy out of my bag." The second patient said to the first patient that he shouldn't accuse staff of stealing. Grievant returned from the refrigerator room, walked past the table, turned around to face the table and said, "I'm not worried about that punk."

Patient J subsequently complained to an RN that grievant had called him a punk, and that grievant picks on him every night she works. A videotape of the incident does not have an audio track. The tape was not offered as evidence because the video portion sheds no light on who said what.

#### 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

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<sup>5</sup> Patient J did not like to take showers with the older patients, preferring instead to take his shower before or after other male patients.

circumstances. In all other actions the grievant must present her evidence first and prove her claim by a preponderance of the evidence.<sup>6</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>7</sup> It is expected that a facility director will terminate the employment of an employee who has abused or neglected a client.<sup>8</sup>

The agency has shown by a preponderance of evidence that grievant called patient J a punk. While grievant denies making the statement, a witness testified under oath that grievant had made the statement. Additionally, there is corroborative testimony from an RN that patient J complained to her that grievant had called him a punk. Their written statements were entirely consistent with their testimony under oath. These two statements are also consistent with the investigator's interviews with the relevant witnesses in the days following the incident. Grievant failed to attend the hearing and, therefore, offered no testimony to rebut the testimony of these witnesses.

The agency considers the term "punk" to be demeaning and humiliating. Given that the various definitions of this term are not complimentary,<sup>9</sup> it is concluded that grievant used this term as a derogatory appellation because she intended to demean and/or humiliate the grievant. Using demeaning and/or humiliating language to confront a patient constitutes abuse as that term is defined in agency policy.

### 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)

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

<sup>7</sup> Agency Exhibit 7. DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

<sup>8</sup> Agency Exhibit 3. Section 201-8, DI 201(RTS)00, *Ibid*.

<sup>9</sup> *Merriam-Webster's Collegiate Dictionary* defines "punk" variously to include: young, inexperienced person, petty gangster, hoodlum, ruffian, and a youth used as a homosexual partner.

an employee's long service or otherwise satisfactory work performance. In this case, grievant has been employed for only one year and therefore, does not have long state service. Grievant has not presented evidence of any mitigating circumstances. 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 considered 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 24, 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 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.<sup>10</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>11</sup> 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*

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David J. Latham, Esq.  
Hearing Officer

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<sup>10</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>11</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.