

Issue: Group III Written Notice with termination (patient neglect); Hearing Date: 07/14/06; Decision Issued: 07/25/06; Agency: DMHMRSAS; AHO: John V. Robinson, Esq.; Case No. 8362; Outcome: Agency upheld in full.

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 8362

Hearing Officer Appointment: June 20, 2006

Hearing Date: July 14, 2006

Decision Issued: July 25, 2006

PROCEDURAL HISTORY AND ISSUES

In her Grievance Form A concerning this proceeding (the "Form A"), the grievant requested a hearing to challenge the termination of her employment by the Department of Mental Health, Mental Retardation, Substance Abuse Services (the "Department" or the "Agency") and is seeking the relief requested in her Grievance Form A, including reinstatement, lost wages and attorneys' fees.

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the termination was warranted and appropriate under the circumstances.

The agency was represented by Beverly C. Black, an advocate from BCB Agency Advocates in Richmond and the grievant was represented by her attorney, Stephen C. Hall of the Richmond law firm of Hairfield, Morton, Watson, Adams & Sommers, PLC. The hearing officer issued a Scheduling Order entered on June 28, 2006, a copy of which is incorporated herein by this reference.

Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely Agency Exhibits 1 through 10 and Grievant Exhibits 1 through 5.<sup>1</sup> After the deadline specified in the Scheduling Order for exchange of exhibits and witness lists, the grievant, by counsel, attempted to submit two (2) additional exhibits faxed on July 13, 2006. The agency objected to the introduction of these exhibits and the hearing officer declined to admit these documents, noting the grievant's objection.

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<sup>1</sup> References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number.

The hearing officer issued several orders for witnesses. No issues concerning non-attendance remained by the conclusion of the hearing. However, the hearing officer also issued, at the request of the grievant, an Order for documents dated June 28, 2006. While producing most of the documents requested by the grievant, the Agency, citing patient privacy concerns, refused to produce to the grievant excerpts from the "Green" nursing report book, further narrowed or focused from the original Order by the grievant's counsel. The Facility Director during the hearing voiced his opinion that these documents could have been produced to the grievant if the patients' names were redacted.

Similarly, the hearing officer sees absolutely no valid reason why the requested documents could not have been produced to the grievant by the agency subject to certain procedural safeguards, which the hearing officer discussed with the parties well before the hearing, such as redacting names, a Confidentiality Agreement an *in camera* review by the hearing officer, etc. Accordingly, the hearing officer has determined that if he chooses to exercise such discretion, he has the power to draw adverse inferences against the agency based on its unwarranted refusal to produce these ordered documents.

#### APPEARANCES

Representative for Agency  
Three Additional Witnesses for Agency  
Grievant  
One Agency Witness called by Grievant

#### FINDINGS OF FACT

1. The grievant is a registered nurse, previously employed by the agency at a facility.
2. The grievant was employed as a nursing supervisor of a unit at a facility on March 9, 2006.
3. As a nursing supervisor, the grievant was responsible for ensuring that patients were properly cared for in accordance with agency policies and procedures, including proper administration of medications, and the grievant also attended to clients or patients herself.
4. On March 9, 2006, the grievant failed to administer to a patient under her direct care a prescribed medication, Xalatan eye drops (the "Failure").
5. The Failure was not an oversight but was conscious and deliberate on the part of the grievant.

6. On the Medication/Treatment Record or Medication Administration Record (“MAR”), the grievant indicated medication not given, providing as her reason that the prescription had expired.
7. By agency policy and procedure, the expiration of a prescription is not a valid reason for not giving prescribed medication to a patient. The Instructions on the reverse of the MAR further emphasize this fact. AE 6.
8. In further violation of agency policy and procedure, as specified in the agency’s SOP/P #20, Resident Affairs – Health (Administration of Medications), the grievant made no attempt to obtain the medication from the documented or from other available sources. AE 4.
9. On March 13, 2006, the grievant told the agency’s Health Service Coordinator (“HSC”) that she was too busy to administer the medication. As the HSC stressed, if the grievant was so busy, as the supervisor, she could have got another nurse on her unit to assist or could have called the clinic for support.
10. The HSC supervises the nurses and reports to the Director of Nursing, who in turn reports to the Facility Director.
11. The Director of Nursing, the Facility Director and the Department’s investigations manager, exercising their considered professional judgment within the area of their professional discretion, each determined that the grievant’s admitted conscious decision not to administer the medication removed this case from mere medication error to a case of neglect. *See*, for example, AE 2, A1.
12. The agency terminated the grievant’s employment because of her violation of Departmental Instruction 201 “Reporting and Investigating Abuse and Neglect of Individuals Receiving Services in Department Facilities.” AE 6.
13. The grievant had available to her numerous options to obtain and administer the medication, including the documented, notifying the pharmacist and even, if necessary, notifying a physician for further instruction. AE 4.
14. In a written memo dated March 13, 2006, the grievant told the Director of Nursing that she did not give the Xalatan because it was very busy on the unit and the prescription had expired. AE 2, C4.
15. Subsequently, during the afternoon of March 16, 2006, the Director of Nursing received another memo from the grievant in which the grievant maintained her steadfast position, also exhibited at the hearing, that she was justified in not giving the patient the medication. AE 2, C4 and AE 2, A3.

16. The grievant did administer the Xalatan eye drops to the patient on the afternoon of March 12, 2006, obtaining the medication from the documented on that occasion. AE 2, C4 and AE 2, A2 and A3.
17. An investigation performed by the facility's investigator found neglect. AE 2.
18. The Investigator's Summary cites and quotes Paragraph D.2. of SOP #20, as in effect on March 9, 2006:  
  
"If medications are not available in client's cassette, the nurse will obtain them from 'STAT' box, emergency box or documented. If the medications are not available in the documented, the nurse will notify the pharmacist. If the pharmacist is unable to fill the prescription, the nurse will notify the physician for further instructions." AE 2, page 3.
19. Accordingly, the applicable policy or procedure is substantially identical to that in effect currently. AE 4.
20. The grievant currently has an active Group I Written Notice for an unrelated disciplinary infraction.
21. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
22. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
23. The testimony of the Agency witnesses was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

#### 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).

*Va. Code § 2.2-3000(A)* 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. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct 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 the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct 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.

Pursuant to Departmental Instruction 201 and consistent with the Standards of Conduct, an act of neglect can clearly constitute a Group III offense:

#### **“201-1 Background**

[The Department] has a duty to provide individuals receiving services in state facilities with a safe and secure environment. The Department has zero tolerance for acts of abuse or neglect. Therefore, whenever an allegation of abuse or neglect is made, the Department shall take immediate steps to protect the safety and welfare of individuals who are the victims of the alleged abuse or neglect, conduct a thorough investigation pursuant to Central Office direction, and take any action necessary to prevent future occurrences of abuse and neglect.

#### **201-2 Purpose**

The purpose of this Departmental Instruction is to establish policies, procedures, and responsibilities for reporting, responding to, and investigating allegations of abuse and neglect of individuals receiving services in Department facilities.” AE 6.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the termination of the grievant's employment was warranted and appropriate under the circumstances.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4<sup>th</sup> Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

As the agency argued in this proceeding, the decision of the grievant, a nurse supervisor, to not administer the medication, was conscious and deliberate. The Department takes the position that this element of willfulness removed the infraction from the realm of mere oversight or medication error squarely into the Department's definition of patient "neglect". The Department, exercising its professional judgment through the appropriate personnel, and applying the Commonwealth's policy of progressive discipline, decided that termination of the grievant's employment was warranted and appropriate under the circumstances. Such a decision was entirely appropriate and justified. The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The grievant's refusal to recognize and accept the seriousness of her violations of Agency policy and procedures and the gravity of such violations preclude a lesser sanction. The hearing officer agrees.

The hearing officer has exercised his discretion and decided that the failure of the Agency to turn over the Green Book documents shall not change the outcome of his decision under the facts and circumstances of this proceeding, where the grievant admits she consciously did not administer the medication, made no attempt to retrieve it from the documented or other available sources and where she maintains she was justified in her deliberate actions.

## DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in removing the grievant from her employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

## APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the



issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

**Judicial Review of Final Hearing Decision:** Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

ENTER:

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John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by Certified Mail, Return Receipt Requested, U.S. Mail, e-mail transmission and facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).