

Issue: Group III Written Notice with termination (patient abuse); Hearing Date: 12/11/06; Decision Issued: 12/14/06; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8459; Outcome: Agency upheld in full;
Administrative Review: HO Reconsideration Request received 12/29/06; Reconsideration Decision issued 01/04/07; Outcome: Original decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8459

Hearing Date: December 11, 2006
Decision Issued: December 14, 2006

APPEARANCES

Grievant
Attorney for Grievant
Four witnesses for Grievant
Program Manager
Representative for Agency
Six 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 abusing a patient.¹ As part of the disciplinary action, grievant was removed from state employment effective October 3, 2006. Following failure of 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 four years as an active treatment specialist. Grievant has received training in the best methods of dealing with residents who display inappropriate behavior.³ Grievant has also received training on conflict, maladaptive behavior, Mandt® behavior techniques, and physical management.⁴ The training does not teach employees to grab a patient's legs when they are lying down resisting verbal directions.

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 The policy requires all employees (including contract employees) to immediately report allegations of abuse or neglect of residents to the facility director.

On September 17, 2006, resident S. had been acting up during the afternoon. Resident S is 29 years old and autistic; he is sometimes aggressive. At times he attempts to wander away from his cottage; staff is required to keep him in sight at all times. Sometimes when he doesn't want to go where directed by staff, the resident will sit down or lie down on his back; during previous such episodes, he has never injured himself. Generally, if left alone, he will eventually respond to voice direction from staff. Grievant has attended a training class that addressed this patient's behavior pattern and how to address his behavior.⁶ In the late afternoon, the resident began to wander up a grassy hill behind the cottage. Grievant followed him up the hill and convinced him to return to the cottage to play basketball. After awhile, grievant went inside the cottage to perform other duties while another employee watched resident R. A few minutes later, she reported to grievant that the resident was again starting up the hill. Grievant went after him but this time he could not cajole the resident into returning to the cottage. Grievant used a nearby telephone to call security.

¹ Agency Exhibit 1. Group III Written Notice, issued October 3, 2006.

² Agency Exhibit 2. *Grievance Form A*, filed October 9, 2006.

³ Agency Exhibit 9. Knowledge and Concepts Assessment, August 23, 2006.

⁴ Agency Exhibit 7. Grievant's training transcript, 2002-2006.

⁵ 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." See also Agency Exhibit 5. Facility Instruction 10, *Resident Abuse*, revised September 14, 2004.

⁶ Agency Exhibit 8. Inservice Training Documentation, July 10, 2006.

When the resident saw a security officer approaching, he agreed to walk back to the cottage.

When grievant and the resident got to a rough-textured, concrete patio just outside the cottage's rear door, the resident sat down, lay on his back, and began kicking out because he did not want to enter the cottage. At this point, by grievant's description, the resident's feet were at least three feet from the door because grievant was standing between the door and the resident. About that time, another resident exited the back door. Grievant grabbed resident R's legs and dragged him through the doorway into the cottage. A coworker in the cottage witnessed grievant drag the resident through the door. The coworker was temporarily assigned to grievant's cottage for the evening of September 17, 2006. She had not previously worked with grievant. The resident was wearing an undershirt and a sport shirt. The resident then got up and walked to his room. Grievant followed him and noticed that his shirt was partway up his back and that his back was scraped. Grievant called one of the other employees and then a nurse was called. The nurse came to the cottage and found that the resident had superficial friction burns over a large area of his back with slight bleeding at some points.⁷ She told staff to put some Bacitracin ointment on the scraped area.⁸ The following day the agency physician examined the resident and continued the same treatment with antibacterial ointment. The facility director visited the resident to observe the injury and then immediately assigned an investigator to the case.

When the investigation concluded that grievant had physically abused the resident, the Facility Director met with grievant and gave him an opportunity to respond to the charge. The Director considered possible mitigating circumstances but determined that the circumstances warranted removal from employment. One of the aggravating circumstances cited by the Director is the fact that, prior to termination, grievant did not demonstrate or express any remorse for the resident, either to his supervisor or to the Director.

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

⁷ Agency Exhibit 3. RN's witness statement, September 21, 2006.

⁸ Agency Exhibit 3. Interdisciplinary notes and photograph of resident R's back.

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

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.¹⁰ It is expected that a facility director will terminate the employment of an employee who has abused or neglected a client.¹¹

Grievant admitted that he grabbed the resident's legs while the resident was lying on the concrete patio. Grievant said that he "might have fallen or slipped backwards and accidentally pulled the resident for a short distance." However, an eyewitness to the event testified that grievant pulled the resident across the door threshold all the way into the cottage. The eyewitness first worked with grievant on the night of the incident. There is no evidence that the witness had any motivation to fabricate what she saw. It is therefore, more likely than not that the eyewitness's testimony is more accurate than grievant's assertion that the injury was sustained by accident.

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

¹⁰ Agency Exhibit 6. Facility Instruction 106, *Standards of Conduct*, January 13, 2004.

¹¹ Agency Exhibit 4. Section 201-9, DI 201(RTS)00, *Id.*

Grievant suggests that the resident may have caused the friction burns on his back when he was lying on the ground flailing around and kicking out. While it is possible that the resident might have caused some redness to his back in this manner, it is far more likely that most, if not all of the injury, occurred when grievant pulled the resident by his legs across the concrete patio, across the threshold, and into the cottage. Since the resident was initially lying three feet outside the door, grievant must have pulled him approximately eight or nine feet to a point where the resident's head was inside the cottage. Pulling someone this distance across a rough concrete patio accounts for the resident's shirt being pulled up and most, if not all, of the friction burns to his back.

Another factor that supports this conclusion is resident B's prior behavior. The evidence indicates that the resident often lies on his back and kicks out when he doesn't want to comply with verbal instructions. However, he has never sustained friction burns to his back when exhibiting this behavior in the past. The agency also pointed out that grievant has never expressed to his supervisor or the Director that he was remorseful for what happened. In response, grievant contends that he did feel bad about what happened and that he had told resident B that he was sorry. While this may be true, such feelings would have carried far more weight if he had expressed them to agency management at or soon after the incident. Accordingly, the agency has demonstrated by a preponderance of evidence that grievant used an unauthorized restraint on a resident, dragged him across a concrete surface and over a door threshold, and thereby caused significant injury to the resident.

Grievant asserts that during a meeting with the Director, the Director attempted to dissuade him from filing a grievance. The Director acknowledged that he had told grievant that requiring witnesses to come in and testify might make some of them uncomfortable. He denies telling grievant that he should drop his grievance. Employees have the right to grieve a disciplinary action. It is inappropriate for an agency to attempt to persuade a grievant to drop a grievance.¹² In this case, telling a grievant that his desire to pursue a grievance might make others uncomfortable is an inappropriate attempt to dissuade grievant from pursuing the process. Nonetheless, grievant has now received a complete and full due process hearing before an independent hearing officer. That effectively remedies the agency's inappropriate comment to grievant.

Grievant cited (but did not proffer a copy of) a policy that he says permits the use of unapproved restraint holds in an emergency situation. Since grievant did not proffer this policy as evidence, his assertion cannot be corroborated. Nonetheless, even if such a policy exists, grievant did not demonstrate that the

¹² There are situations when an agency and grievant may negotiate for a reduction in discipline if the grievant agrees to drop the grievance. Since this involves a *quid pro quo*, it is a reasonable part of the negotiating process. However, an agency should not attempt to dissuade a grievant from pursuing the grievance if the employee wishes to pursue the process.

situation he was dealing with constituted an emergency. The resident was lying on his back on the patio and was not a threat to anyone else. He was simply kicking out to express his reluctance to return to the cottage. Testimony regarding the other resident who exited the door established that he knew enough to keep away from resident B at this point.

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 only four years (not considered long service) but has otherwise satisfactory performance. Grievant's reputation is one of being concerned and caring about residents. The agency determined that the severity of the resident's injuries is an aggravating circumstance that counterbalances the mitigating circumstances. 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 removal from state employment 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.¹³ 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.¹⁴ 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

¹³ 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).

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

RECONSIDERATION DECISION OF HEARING OFFICER

In re:

Case No: 8459-R

Hearing Date:	December 11, 2006
Decision Issued:	December 14, 2006
Reconsideration Request Received:	December 29, 2006
Response to Reconsideration:	January 4, 2007

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. 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.¹⁵

OPINION

Grievant's request for reconsideration lists ten points which he believes require a different decision. This opinion addresses those points in the same order as presented in grievant's request.

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

- Grievant asserts that the Hearing Officer must establish that he was trained in “TOVA.” The Hearing Officer is not obligated to establish any facts; that burden is on the agency. The testimony of agency witnesses established that, of all the training ever given to grievant, *none* teaches employees to grab a patient’s legs when they are lying on their back resisting direction.
- The testimony established that grievant did not express remorse to his supervisor. Grievant argues that he did not see his supervisor until after he was fired. While that is undisputed, nothing prevented grievant from telephoning or e-mailing his supervisor to express remorse. Grievant asserts that he expressed remorse to co-workers. However, none of his witnesses corroborated that assertion. Even if grievant had expressed remorse to coworkers, he never expressed that remorse to his supervisor, the Director, or anyone in a position of authority.
- Grievant correctly observes that, at one point, he testified that he lost his balance. At another point he said he might have fallen or slipped backwards. Regardless of semantics, the point is that grievant claimed his pulling of the patient was not intentional. However, the more credible evidence established that grievant did intentionally pull the patient across the concrete floor.
- Contrary to grievant’s assertion, page 5 does not state that the patient’s clothing was pulled all the way up. As stated in the Findings of Fact (page 3), the patient’s shirt was “*partway* up his back” (Italics added). Also contrary to grievant’s assertion, the patient did sustain injury to his left shoulder. In fact, the photograph reveals friction burns from two inches above the waist line to within two inches of the top of the left shoulder.
- On three different occasions during her testimony, direct care aide P.C. testified that grievant did drag the patient through the doorway. She also expressed her opinion that grievant had done everything he could to protect the resident. However, as a relatively inexperienced coworker (one year of service), she is not an authority on whether the resident was protected pursuant to agency policy.
- The hearing officer concluded from the preponderance of evidence that the resident was pulled for eight to ten feet. This conclusion is inferred from grievant’s description of where the patient was lying on the patio when he grabbed the patient’s legs and the fact that the direct care aide saw him drag the patient inside far enough so that the door could be closed.

- Grievant correctly notes a typographical error. References on page five to resident B should be corrected to read resident R.
- It is correct that the evidence is silent as to whether resident R had previously gone down on his back on a concrete surface. However, the evidence is clear that he had never sustained an injury while lying on his back.
- While the agency did not rebut grievant's testimony about a policy he claims permits the use of unapproved restraint holds in an *emergency*, the fact is that there was no emergency. Thus even if the policy exists, it has no relevance in this case because the existence of an emergency is a condition precedent to the policy's applicability.
- The Mitigation section states that grievant had "otherwise satisfactory performance." This precludes the lack of prior disciplinary action. If grievant had prior discipline, his prior performance would have been less than satisfactory. Thus, the lack of prior discipline was considered as a mitigating factor. As stated previously, the preponderance of evidence established that grievant's actions were not accidental or inadvertent.

Conclusion

Grievant takes issue with certain Findings of Fact, and with the hearing officer's Opinion. The grievant's disagreements, when examined, simply contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, or the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

DECISION

Grievant has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered grievant's arguments and concludes that there is no basis to change the Decision issued on December 14, 2006.

APPEAL RIGHTS

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 HRM, 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.¹⁶

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).