

Issues: Group III Written Notice with termination (patient abuse); Hearing Date: 04/04/07; Decision Issued: 04/09/07; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8564; Outcome: Employee granted Full Relief. Fees Addendum issued 05/02/07.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8564

Hearing Date: April 4, 2007  
Decision Issued: April 9, 2007

**APPEARANCES**

Grievant  
Attorney for Grievant  
Six witnesses for Grievant  
Program Director  
Advocate for Agency  
Three 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 violation of Departmental Instruction 201.<sup>1</sup> As part of the disciplinary action,

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<sup>1</sup> Agency Exhibit 1. Group III Written Notice, issued December 29, 2006.

grievant was removed from state employment effective December 29, 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 26 years as a direct service associate.<sup>3</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>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 assault or battery as an example of abuse.

On September 25, 2006, one of grievant's coworkers called the facility director to report that staff in her cottage had been hitting clients with sticks. The following morning, the coworker came to the director's office and repeated her allegations to the director, a detective, and an investigator. All of the clients were physically examined that day but there was no evidence of any injuries. The coworker wrote a statement alleging that three staff members had hit clients on the head with a stick and/or a plastic tube.<sup>5</sup> The coworker's statement did not make any specific allegation against grievant. However, more than a month later, the investigator obtained a second written statement from the coworker. In this second statement, the coworker alleged that at about 3:15 p.m. on September 23, 2006, grievant had prevented a client from getting away from another staff person who was hitting the client on the head with a red stick.<sup>6</sup>

Over the course of three days (September 26-28, 2006), the investigator interviewed and obtained written statements from 13 employees who work in the cottage. One housekeeper said he had seen unidentified staff strike clients with sticks.<sup>7</sup> However, in his written statements and in his testimony, the housekeeper did not identify grievant as one of the alleged abusers. A second housekeeper said she had heard clients hollering while in the bathroom and had seen some younger staff members hitting clients but she also did not identify

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<sup>2</sup> Agency Exhibit 1. *Grievance Form A*, filed December 29, 2006.

<sup>3</sup> Agency Exhibit 3. Employee Work Profile, undated.

<sup>4</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>5</sup> Agency Exhibit 2, Attachment C-1. Statement of accuser, September 26, 2006.

<sup>6</sup> Agency Exhibit 2, Attachment C-14. Second statement of accuser, October 27, 2006.

<sup>7</sup> Agency Exhibit 2, Attachments C-2 & C15. Statements of male housekeeper, September 22, 2006 and October 22, 2006, respectively.

grievant as an alleged abuser.<sup>8</sup> Neither of the housekeepers was working when grievant arrived for work at 2:59 p.m. on September 23, 2006.<sup>9</sup>

The ten remaining employees interviewed by the investigator denied ever abusing or witnessing abuse of clients.<sup>10</sup> One of those interviewed is the day shift supervisor who testified that she did not hear or witness any abuse. During the hearing, two additional employees from grievant's shift (evening shift) testified that they have never heard or witnessed any physical abuse of clients. When grievant was removed from employment, the evening shift supervisor submitted a written statement to the facility director stating that she worked on September 23, 2006 and that grievant did not abuse any clients.<sup>11</sup>

Grievant was suspended from September 26 until December 29, 2006 – the date of his removal from employment.

### 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.

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<sup>8</sup> Agency Exhibit 2, Attachments C-3, C-16, & C-17. Statements of female housekeeper, September 26, 2006, November 3, 2006, & December 1, 2006, respectively. [NOTE: The female housekeeper did not testify and therefore did not identify grievant as an abuser.]

<sup>9</sup> Grievant Exhibit 4. Sign in sheet, September 23, 2006, evening shift.

<sup>10</sup> Agency Exhibit 2, Attachments C-4 through C-13. Statements of ten employees who work in the cottage, dated variously September 26-28, 2006.

<sup>11</sup> Grievant Exhibit 10. Evening shift supervisor's written statement, December 28, 2006.

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.<sup>12</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>13</sup> It is expected that a facility director will terminate the employment of an employee who has abused or neglected a client.<sup>14</sup>

The agency has provided limited evidence suggesting that there may have been client abuse involving the use of a stick and/or a plastic tube. However, the agency has not demonstrated, by a preponderance of evidence, that *grievant* struck any client with a stick or tube. In fact, grievant was not accused of striking any client with a stick or tube; the sole allegation involving grievant is that he purportedly prevented a client from getting away from another employee who was allegedly hitting a client. Of the 14 people from whom written statements were obtained or who testified under oath, 11 denied that any abuse took place in the cottage. The two housekeepers who alleged abuse by others did not corroborate the allegation against grievant because they had already left work for the day before grievant arrived for work on the evening shift. Only the accuser alleged that grievant facilitated abuse by others. Grievant denied restraining the client. There is no other evidence to corroborate the accuser's allegation.

Accordingly, this case pits the accuser's allegation against grievant's denial. Normally, when equally credible witnesses disagree, the agency cannot carry its burden of proof without some corroborating evidence or testimony to swing the weight of evidence in its favor. In this case, there is no witness or any other evidence to corroborate the accuser's allegation. Moreover, there are factors that weigh in grievant's favor. First, grievant and several witnesses testified that the accuser had reason to be upset at her coworkers. The coworkers felt that the accuser had not carried her weight in doing required chores in the cottage. One coworker had twice reported the accuser for shirking

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<sup>12</sup> § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

<sup>13</sup> Agency Exhibit 5. DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

<sup>14</sup> Agency Exhibit 4. Section 201-8, DI 201(RTS)00, *Ibid*.

work. The supervisor counseled the accuser about her work responsibilities. Another coworker had twice reminded the accuser that she was violating the procedure for close monitoring of the one-on-one client whom she was assigned to watch. These incidents gave the accuser multiple reasons to be upset with her coworkers.

Second, the accuser was familiar with the abuse policy and had reported alleged abuse on a previous occasion. She knew that policy requires *immediate* reporting of abuse and that her identification badge contains the facility director's telephone number in order to facilitate immediate reporting. Part of the reason for immediate reporting is so that injuries can be assessed immediately before such evidence disappears. The accuser failed to report the allegation of abuse until September 25, 2006 – two days after the incident. The accuser contends that she delayed reporting the alleged incident because she was afraid of losing her job. However, the accuser knew that it is failure to immediately report abuse that can result in disciplinary action. The agency does not discipline people who report abuse; rather, it encourages the immediate reporting of potential abuse. Moreover, the accuser did not make any specific allegation against grievant until more than one month after she had been interviewed and submitted a written statement about the alleged abuse. The accuser did not explain why she failed to document the alleged incident in her first written statement.

It must be emphasized that this decision does not conclude that abuse did not occur. It is indeed possible that someone may have abused a client. Assuming, for the sake of discussion, that some employee(s) may have abused clients, the agency has not *proven*, by a preponderance of evidence, that grievant abused a client or that he was aware of others who may have done so. Without such proof, there is no basis for disciplinary action in this case.

### DECISION

The disciplinary action of the agency is reversed.

The Group III Written Notice and the removal of grievant from state employment on December 29, 2006 are hereby RESCINDED. Grievant is reinstated to his former position or, if occupied, to an objectively similar position. Grievant is awarded full back pay, and benefits and seniority are restored. The award of back pay must be offset by any interim earnings, and by any unemployment compensation received.

The grievance statute provides that for those issues qualified for a hearing, the hearing officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the hearing officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special

circumstances would make an award unjust.<sup>15</sup> For an employee to “substantially prevail” in a discharge grievance, the hearing officer’s decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.<sup>16</sup>

Therefore, grievant is entitled to recover a reasonable attorney’s fee, which cost shall be borne by the agency.<sup>17</sup> Grievant’s attorney is herewith informed of his obligation to timely submit a fee petition to the Hearing Officer for review.<sup>18</sup>

### 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:

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<sup>15</sup> Va. Code § 2.2-3005.1.A.

<sup>16</sup> § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. Section VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.

<sup>17</sup> Va. Code § 2.2-3005.1.A & B.

<sup>18</sup> See Section VI.D, *Rules for Conducting Grievance Hearings*, effective August 30, 2004. Counsel for the grievant shall ensure that the hearing officer *receives*, within 15 calendar days of the issuance of the hearing decision, counsel’s petition for reasonable attorneys’ fees.

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>19</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>20</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>19</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>20</sup> 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

**ADDENDUM TO DECISION OF HEARING OFFICER**

In re:

Case No: 8564

Hearing Date:	April 4, 2007
Decision Issued:	April 9, 2007
Fee Addendum Issued:	May 2, 2007

APPLICABLE LAW AND PROCEDURE

The grievance statute provides that for those issues qualified for a hearing, the hearing officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the hearing officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.<sup>21</sup> For an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.<sup>22</sup>

DISCUSSION

Following issuance of the hearing officer's decision which resulted in the grievant substantially prevailing on the merits of the grievance, grievant timely submitted a petition for attorney's fees. Grievant's petition includes attorneys'

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<sup>21</sup> Va. Code § 2.2-3005.1.A.

<sup>22</sup> § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. Section VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.

fees for services rendered by his attorney prior to the qualification of the grievance for hearing. Not all grievances proceed to a hearing; only grievances that challenge certain actions qualify for a hearing.<sup>23</sup> The hearing officer may award relief only for those issues that qualify for hearing. Further, the statute provides that an agency is required to bear only the expense for the hearing officer and other associated *hearing* expenses including grievant's attorneys' fees.<sup>24</sup> Attorney fees incurred during the grievance procedure's Management Resolution Step stage are not expenses arising from the hearing. Accordingly, a hearing officer may award only those attorney fees incurred subsequent to qualification of the grievance for hearing and as a direct result of the hearing process. In this case, the agency head qualified this case for hearing on February 19, 2007. Attorney fees for services prior to that date (.5 hours) are not reimbursable.

The petition also includes a fee for attorney travel time. Time spent traveling to and from a hearing does not involve legal work, counsel, or attorney work product and is, therefore, not compensable. Accordingly, time billed for travel (.8 hours) on the day of hearing is not included in the award. Therefore, grievant's attorney fees for services performed prior to qualification and for travel time on the day of hearing are not included in the award.

#### AWARD

The petition for fees for travel and for services rendered prior to qualification of the grievance is denied. The grievant is awarded attorney fees incurred from February 22, 2007 through April 10, 2007 in the amount of \$1,790.70 (14.1 hours x \$127.00 per hour).<sup>25</sup>

#### APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees

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<sup>23</sup> *Va. Code* § 2.2-3004.A. See also §4, Qualification for a Hearing, *Grievance Procedure Manual*, August 30, 2004.

<sup>24</sup> *Va. Code* § 2.2-3005.1.B.

<sup>25</sup> Section VI.D. *EDR Rules for Conducting Grievance Hearings*, effective August 1, 2006, limits attorney fee reimbursement to \$127.00 per hour.

addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

*S/ David J. Latham*

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David J. Latham, Esq.  
Hearing Officer