

Issues: Group III Written Notice and termination (patient neglect and/or abuse);  
Hearing Date: 08/28/07; Decision Issued: 09/04/07; Agency: DMHMRSAS; AHO:  
John V. Robinson, Esq.; Case No. 8662; Outcome: No Relief, Agency Upheld in Full;  
**Administrative Review: DHRM Ruling Request received 09/19/07; Outcome  
pending**

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 8662

Hearing Officer Appointment: July 30, 2007

Hearing Date: August 28, 2007

Decision Issued: September 4, 2007

PROCEDURAL HISTORY AND ISSUES

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

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 an advocate and the grievant was represented by his attorney. Following a pre-hearing conference held by telephone on August 3, 2007, the hearing officer issued a Scheduling Order entered on August 8, 2007, 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 6 and Grievant Exhibits 1 through 14.<sup>1</sup> The hearing officer also issued several orders for witnesses and/or documents, at the request of the grievant's counsel.

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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.

## APPEARANCES

Representative for Agency  
Four Additional Witnesses for Agency  
Grievant  
One Agency Witness Called by Grievant

## FINDINGS OF FACT

1. The grievant was a forensic mental health technician (“FMHT”), previously employed by the Agency at a forensic mental health facility.
2. The grievant was executing a 1:1 assignment on a two-hour rotation for a patient in a dayroom in a forensic mental health facility on February 11, 2007.
3. The grievant did not continuously remain within an arm’s length of the patient during his shift. GE 14.
4. During his shift, the grievant was informed on more than one occasion that there was a concern that the patient needed to be changed because he was wet from his own urine. AE 2.
5. The grievant did not take the patient to the bathroom to check him and did not otherwise adequately determine that the grievant was not wet, instead insisting on his position that the patient was not wet.
6. During the hearing, the grievant admitted that the diaper which the patient was wearing could hold a lot of water or urine and that the patient could have wet himself anywhere between 7:30 a.m. to 11:45 a.m. on February 11, 2007.
7. The grievant’s 1:1 assignment with the patient was from 9:30 a.m. to 11:30 a.m.
8. The grievant handed over responsibility to another FMHT (the “Subsequent FMHT”) shortly before 11:30 a.m. and left to go on his lunch break.
9. Shortly before the transition, the Subsequent FMHT asked the grievant whether the patient was wet and offered to help the grievant change the patient. The grievant stated that it was his lunch break and he was going to lunch, which he did.
10. The Subsequent FMHT determined that the patient was indeed wet when he stood up and she could even see that the chair he was sitting in was wet. The Subsequent FMHT informed her and the grievant’s supervisor what had

transpired and the supervisor instructed the Subsequent FMHT to wait for the grievant to return from lunch when the supervisor said he would instruct the grievant to change the patient.

11. When the grievant returned from his lunch break, the supervisor instructed the grievant to change the patient. The grievant refused.
12. Only after this refusal, did the Subsequent FMHT taken the patient to the bathroom to change him because he had urinated on himself.
13. The Subsequent FMHT and two other FMHTs who were in the dayroom during the relevant period are still employed by the Agency but were each disciplined because of their actions or inactions concerning this matter.
14. During the relevant period, the grievant was in an uncomfortable, agitated and fidgety physical state. GE 14.
15. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
16. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
17. The testimony of the Agency witnesses was both credible and consistent on the material issues before the hearing officer. The demeanor of the 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 5.

Departmental Instruction 201-9 further provides:

In consultation with the Office of Human Resources Development and Management in the Central Office, the facility director shall

issue a Group III Written Notice and terminate any employee found to have abused or neglected an individual in a state facility unless, based on established mitigating factors, the facility director determines that disciplinary action warrants a penalty less than termination.

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 policy requires dismissal. At the hearing, the grievant conceded, by counsel, that he did not comply with the Agency's policy, as written, of continuously remaining within an arm's length of a patient while executing a 1:1 assignment. The grievant appeared to accept at the hearing that discipline short of termination may be appropriate for this infraction but also argued at the hearing that this policy is consistently not followed or enforced by the Agency. However, the grievant still refuses to concede that he did anything at all wrong or improper concerning the patient's request to go to the bathroom or the wet state of the patient from his own urine.

At the hearing, the grievant admitted that the diaper the patient was wearing is designed to hold a lot of water or urine and that the patient could conceivably have wet himself anywhere between 7:30 a.m. and 11:45 a.m. during the subject period. The FMHT who changed the patient testified that she could see the patient was wet when he stood up and that he was wet when she changed him. The grievant stated his position in the hearing that the Subsequent FMHT might have lied about the patient being wet. However, the grievant's position is

undermined by the fact that it would have been contrary to this Subsequent FMHT's personal interests to lie concerning this important matter. If the patient had not been wet, the Subsequent FMHT believed she would not have received any discipline from the Agency and the issue would have gone away.

The Agency points to the refusal by the grievant to accept any culpability for his handling of the patient's wetness as an exacerbating element and a factor which militates against a sanction less than termination. Even after his supervisor instructed the grievant to change the patient upon the grievant's return from lunch, the grievant refused to do so. 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 gravity of the violation in the context of a forensic mental health facility precludes a lesser sanction. The hearing officer agrees.

### DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in removing the grievant from his 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).