

Issues: Group III Written Notice with termination (patient abuse); Hearing Date: 09/29/07; Decision Issued: 10/03/07; Agency: DMHMRSAS; AHO: Lorin A. Costanzo, Esq.; Case No. 8694; Outcome: No Relief, Agency Upheld in Full.

## **Commonwealth of Virginia**

### **DEPARTMENT OF MENTAL HEALTH, MENTAL RETARDATION AND SUBSTANCE ABUSE SERVICES**

#### **DECISION OF HEARING OFFICER**

In re: Grievance Case No. 8695

Hearing Date: September 25 and 29, 2007

Decision Date: October 3, 2007

#### **PROCEDURAL HISTORY**

On February 21, 2007, Grievant was issued a Group III Written Notice with removal (effective date 2/21/07) for violation of DI 201 involving patients ....<sup>1</sup> On March 29, 2007, Grievant filed a grievance to challenge the disciplinary action indicating he had received a certified letter on 3/1/07 containing the Written Notice.<sup>2</sup> On 5/24/07 the matter was qualified for hearing by Agency Head. On August 29, 2007, the Department of Employment Dispute Resolution assigned this grievance to the Hearing Officer. A hearing was held on September 25, 2007 and September 28, 2007.

#### **APPEARANCES**

Agency Representative  
Agency Party Designee  
Grievant (who also testified)  
Attorney for Grievant  
19 Agency Witnesses Presented  
6 Grievant Witnesses Presented

#### **ISSUES**

Were the Grievant's actions such as to warrant disciplinary actions under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

#### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Grievant filed a timely appeal from a Group III Written Notice for violation of DI 201

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<sup>1</sup> Agency Exhibit. Grievance Tab – G-15: Written Notice (re-issued) and G-9.

<sup>2</sup> Agency Exhibit. Grievance Tab – G-10: Grievance Form A.

involving patients. As a part of the disciplinary action, Grievant was removed from state employment effective February 21, 2007.

The Department of Mental Health, Mental Retardation and Substance Abuse Services (“Agency”) established and published Departmental Instruction 201, issued 10/31/03 (“DI-201”). Section 201-1 of which states, in pertinent part: “The Department has zero tolerance for acts of abuse or neglect.” Abuse is defined in DI-201 as:

Abuse means any act or failure to act by an employee or other person responsible for the care of an individual in a Department facility, 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.

DI-201 also provides, “Examples of abuse include, but are not limited to, acts such as: Use of language that demeans, threatens, intimidates or humiliates the person.”<sup>3</sup> Grievant was aware of and had received training on Agency policy as to abuse or neglect and on DI-201.

Grievant was employed by Agency at Facility operated by Agency which provides care and treatment for patients with mental illness. Grievant was employed as a Registered Nurse at Facility approximately 7 ½ years.

On December 3, 2006 Agency initiated an investigation into allegations concerning Grievant allowing, and possibly encouraging, Patient D to assault Patient MC on October 28, 2006. Statements made during the investigation gave rise to additional concerns and allegations of verbal/psychological patient abuse by Grievant. During the investigation a number of matters were reported including matters of Grievant:

- a. telling Patient M to “use more muscle” when the patient complained another patient took his money for a cigarette but did not give him a cigarette or give back his money;
- b. scaring irritating/teasing Patient M with fake spiders, irritating/teasing Tina Turner music, “passing gas”, and laughing at patient: and
- c. holding up his keys to a patient and telling a patient, “I’ve got keys. I get to go home.”

On 10/28/06 at approximately 11:00 A.M Patient D entered a hospital ward and told staff that Patient MC took money in exchange for a cigarette however Patient MC did not give him the cigarette and refused to give him his money back. One staff witness reported Grievant told Patient D to “use more muscle” when the patient raised this matter with staff. Patient D left, a sound was heard and Patient MC came back to the ward with a cut on his head. Hospital investigation confirmed witnesses vary as to what Grievant said to Patient D. One witness indicated statements of, “Use more Muscle” another indicated statements of “Do what you have to.” Patient D confirmed Grievant told him, “Do what you’ve got to do.”

Patient M. was receiving treatment for mental illness at Facility on A5. She had a fear of spiders and would become very agitated and upset by spiders or references to spiders. She was also obsessed with people “passing gas” and would become very upset and agitated when she believed people had “passed gas”. She is a female African American who often would wear a blond wig. Tina Turner music played in her presence often would greatly agitate and anger her.

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<sup>3</sup> Agency Exhibit, Policies Tab, pages P1-P21. Departmental Instruction 201 (RTS)03.

Patient M. stated she believed she was Caucasian and a reference to her being Black could also greatly agitate and upset her. Grievant was aware of Patient M.'s obsessions and was aware of the reaction these matters could evoke in her.

Grievant played Tina Turner music in Patient M's presence to agitate and upset her on multiple occasions. A number of times she became agitated and angry told him to stop playing the music and Grievant's response was to laugh. Witnesses observed Grievant tease her about her wig and make fun of her. Grievant was aware of Patient M's fear of spiders. Grievant acted to bring out a reaction to her fear of spiders showing her pictures of spiders, and indicating spiders were near her or her belongings when they were not. Grievant laughed at her reaction.

Grievant was aware of Patient M.'s obsession with others "passing gas" and that this greatly agitated and upset her. This was discussed in staff meetings and also common knowledge among staff working with her. Grievant was observed by a number of staff members at Facility purposely passing gas in front of her on a number of occasions. Grievant purposely passed gas in her presence and laugh when Patient M. got upset. Grievant on one occasion stated "She got some good gas this weekend".

Patient held up his keys saying to a patient at Facility, "I've got the keys and I can go home". Additionally, he has been observed holding up his keys to a patient and saying "I get to go home, sister".

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances.<sup>4</sup> A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.<sup>5</sup>

### **CONCLUSIONS OF LAW AND POLICY**

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 of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in 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 employee 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>4</sup> §5.8, Department of Employment Dispute Resolution, Grievance Procedure Manual, effective August 30, 2004.

<sup>5</sup> §9, Department of Employment Dispute Resolution, Grievance Procedure Manual, effective August 30, 2004.

To establish procedures on Standards of Conduct and Performance for employees pursuant to §2.2-1201 of the Code of Virginia, the Department of Human Resource Management (“DHRM”) promulgated the *Standards of Conduct, Policy No. 1.60, effective 9/16/93*. 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 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. It is expected that the facility director shall terminate any employee found to have abused or neglected a patient unless, based on established mitigating factors, the facility director determines that disciplinary action warrants a penalty less than termination.<sup>6</sup>

The Department of Mental Health, Mental Retardation and Substance Abuse Services (“Agency”) established and published Departmental Instruction 201, issued 10/31/03 (“DI-201”). Section 201-1 of DI-201 states, in pertinent part: “The Department has **zero tolerance** for acts of abuse or neglect.” Abuse is defined in DI-201 as:

“Abuse means any act or failure to act by an employee or other person responsible for the care of an individual in a Department facility, 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.”

Examples of abuse include, but are not limited to, acts such as: Use of language that demeans, threatens, intimidates or humiliates the person.<sup>7</sup>

Grievant denies any and all allegations. Grievant contends the matter started because an employee was angry about having to notifying the RN when he went off ward and made the allegations to retaliate. Additionally, he contends other staff is angry about having to sign a form related to the notification.

During the investigation by Agency additional matters came to Agency’s attention concerning allegations concerning Grievant’s acts and language that was considered to demean, threaten, intimate, or humiliate patients. These included instances involving:

- a. *Encouraging or allowing action by Patient.*
- b. *Holding up keys and stating he gets to go home.*
- c. *Patient’s fear of spiders being used.*
- d. *Patient’s reaction to Tina Turner music and her blond wig being used.*
- e. *“Passing Gas” obsession and reaction of patient to same being used.*

a. *encouraging or allowing action ...* Agency initially began an investigation in to an allegation that on 10/28/06 Grievant may have allowed or encouraged a patient to assault another patient. Patient D had stated in front of Grievant that Patient MC had taken approximately 20 cents from him for a cigarette and then refused to give him the cigarette. A staff member reported that Grievant told Patient D, “Use more muscle.” Patient D left the ward, a sound was

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<sup>6</sup> Agency Exhibit, Policies Tab, page P-15, DI-201-9.

<sup>7</sup> Agency Exhibit, Policies Tab, page P-1, DI-201.

heard, and Patient MC came into the ward bleeding from the head. This staff member also raised issues that this was only one incident in a pattern of verbal/psychological patient abuse, that this takes place on weekends when only Grievant's regular shift members are working, and occurs only with patients whose acuity is poor.

Witnesses to the 10/28/07 incident provided written statements that Grievant did not tell the patient to "use muscle" on the other patient to resolve their dispute over the cigarette. LPN testified Grievant told Patient "you can handle it can't you". Further review by Agency led to the conclusion "A review of the available evidence and witness statements provided a mixed and non-conclusive description of what transpired between Grievant and Patient D on 10/28/06."

*b. holding up keys ....* At hearing three witnesses testified to observing Grievant holding up keys and telling patients words to the effect that he has the keys and can go home. The Agency investigation indicated these three also made these statements to the investigator.<sup>8</sup> One staff member observed Grievant holding up keys and telling patients "I've got keys. I get to go home".<sup>9</sup> A second staff observed Grievant standing in the hall shaking his keys saying "I have keys. I can go home. You can't".<sup>10</sup> And, a third staff member reporting seeing Grievant holding up his keys and saying, "I get to go home, sister"<sup>11</sup>. PNA testified also that he had seen this a number of times. Grievant engaged in incidents holding his keys up and making statements about his getting to go home to psychiatric patients at Facility. Further review of Agency indicated concern that, "Staff showing one's keys to patients as a means of communicating that the employee can go home and the patients cannot is a known, now infrequent, put-down behavior in mental hospitals."<sup>12</sup>

*c. fear of spiders used ....* The evidence indicated that Grievant scared and teased Patient M. utilizing her fear of spiders. Grievant was aware of Patient M's fear of spiders. Four witnesses, (one RN and three PNA's) gave information concerning their observations to hospital investigator and three of this group also testified at hearing. In reply to written questions of "Did you ever see (Grievant) "tease" or "scare (Patient M.) with fake spiders? The 4 replied "yes". At hearing three witnesses testified to their observations of Grievant making use of Patient M.'s fear of spiders to scar her. On a number of occasions pictures of spiders, representations of spiders, and saying there were spiders were utilized by Grievant to evoke a reaction in Patient M. Grievant was observed to scared Patient M. utilizing her fear of spiders and to laugh at her reaction when she got upset. Witnesses testified to seeing Grievant showing Patient M. pictures of spiders and placing pictures of spiders around to tease/scare her with. Another witness, a RN, testified she observed Grievant say to Patient M. there's a spider when there were no spiders and laugh when she got upset.

*d. Tina Turner music and blond wig ....* Patient M. would often become extremely agitated and angry when "Tina Turner music" was played in her presence or when she was called "Tina Turner". Testimony indicated that Tina Turner music would often cause her to get mad and angry and at times holler. Grievant was aware of this. One witness expressed concern that

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<sup>8</sup> Agency Exhibit, Tab 1, page 1-9. and testimony.

<sup>9</sup> Agency Exhibit Tab 1, page 1-4 and testimony.

<sup>10</sup> Agency Exhibit Tab 1, page 1-5 and testimony.

<sup>11</sup> Agency Exhibit Tab 5, page 5-1 and 5-2 and testimony.

<sup>12</sup> Agency Exhibit Grievance Tab, page G-13.

Grievant would be getting a kick out of her reaction. Patient M. was an African American female who often wore a blond wig. The blond wig appeared to have a significant value/meaning to Patient M.

Three staff members stated Grievant played Tina Turner Music to irritate her when she was wearing her blond wig. Grievant on a number of occasions, when Patient M. would start to enter the ward, run up to the front door and start to play Tina Turner music on his cell phone. He was also observed doing this at times when Patient M. would be coming down the hall and at other times. Patient M. would tell Grievant to stop it but he would not stop. He would laugh and keep on doing it.

While one witness indicated she never observed her being upset with the music being played she did note that Patient M. is a person picked out for people to kid her. Other witnesses noted that Patient M. would some days holler and fuss at the playing of Tina Turner Music and some days would get angry. Additionally, Grievant was observed to tease Patient about her blond wig making fun of it and Patient M. didn't like this. The evidence indicates that Grievant intentionally played "Tina Turner music" in the presence of Patient M. knowing it would agitate and anger her.

e. *Passing gas ....* Patient M. was obsessed with people "passing gas" and this would cause her to be very agitated and angry. Staff, as well as Grievant was aware of this. Four staff members had observed multiple occasions of Grievant "passing gas" in front of Patient M. One witnesses observed Grievant purposely pass gas in front of Patient M. and noted Grievant had talked of having had a staff member bend over to pass gas in front of Patient M.<sup>13</sup> Additional witness testimony indicated observations of Grievant purposely passing gas and hearing Grievant make the statement that Patient M got some good gas this week-end.<sup>14</sup> Another witness observed Grievant with a machine that he would activate and give a sound of passing gas as Patient M. came near and him using that machine.<sup>15</sup> The evidence established that Grievant on a number of occasions passed gas to evoke a reaction from Patient M. knowing she was obsessed with this and knowing this would agitate and make her angry.

In the *Response to Grievance* the Agency determined that the acts related to keys, flatulence, playing music, and spiders were demeaning both directly and by the lack of professionalism demonstrated. The Agency found such actions were thus covered under DI-201 and support the positive findings issued by the Investigations Manager. The termination was supported with the Written Notice re-issued to better reflect the findings of the review.<sup>16</sup>

At hearing multiple witnesses were presented to each matter and multiple witnesses related their personal observations of Grievant as to each of the concerns raised by Agency in this action. There was some discrepancy between the allegations concerning what was said by Grievant to Patient D. on 10/26/07 which the Agency took note of and which was related in the "Response to Grievance.

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<sup>13</sup> Agency Exhibit, Tab 5, page 5-1, and testimony.

<sup>14</sup> Agency Exhibit, Tab 8, page 8-1 to 8-2, and testimony.

<sup>15</sup> Agency Exhibit, Tab 9, page 9-2, and testimony.

<sup>16</sup> Agency Exhibit, Grievance Tab, G-12 to G-15.

Multiple witnesses testified as to their observations on each of the additional matters raised relating to the incidents involving keys, spiders, music and wig, and flatulence. Both their written reports and their testimony raise concern as to Grievant's actions. The evidence presented as to these matters showed a consistency between the written statements presented to the investigator and what was testified to at hearing. During the hearing, various staff members testified to their personal observations concerning occurrences of these incidents. As to any one matter it is noted that multiple and varied staff members witnessed the events and as to any one matter there were a number of incidents concerning that matter presented.

By a preponderance of the evidence the Agency has met its burden in this case and demonstrated Grievant's violation of DI 201 involving patients on A4, including (Patient M.) and has, by a preponderance of the evidence, established that Grievant engaged in acts, including use of language, that demeans, threatens, intimidates or humiliates a patient.

DHRM Policy No. 1.60, effective 9/16/93, Section (VII) (C)(I), Standards of Conduct, provides that while disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as: a.) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or b.) an employee's long service or otherwise satisfactory work performance. Agency took into consideration Grievant's service with Agency however Agency also took into consideration the duty owed to patients under the care of the Agency, the nature of the allegations, DI-201, and the Agency policy of zero tolerance for acts of abuse or neglect.

The Code of Virginia, Section 2.2-3005.1, authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action". Mitigation must be in accordance with the rules established by the Department of Employment Dispute Resolution.<sup>17</sup> The Hearing Officer is required under the EDR Director's *Rules for Conducting Grievance Hearings* to consider management's right to exercise its good faith business judgment in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy. If an agency presents facts sufficient to support the level of disciplinary action it has chosen, the Hearing officer must give deference to that selection.

Upon reviewing the facts de novo (afresh and independently, as if no determinations had yet been made) it is determined that (i) Grievant engaged in the behavior described in the Written Notice; (ii) The behavior constituted misconduct; (iii) the Agency's discipline was consistent with law and policy. Furthermore the Agency's discipline did not exceed the limits of reasonableness. The Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group III Written Notice with removal was warranted and appropriate under the circumstances.

## DECISION

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<sup>17</sup> Va. Code Section 2.2-3005(C)(6).



For the reasons stated herein, the Agency's issuance of a Group III Written Notice with removal is **UPHELD**.

## **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 are the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state policy 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:

Director, Department of Human Resources Management  
101 N. 14th Street, 12th Floor  
Richmond, Virginia 23219

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:

Director, Department of Employment Dispute Resolution  
830 East Main St., Suite 400  
Richmond, VA 23219.

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 the 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 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. You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Lorin A. Costanzo, Hearing Officer