

Issue: Group III Written Notice with termination (patient abuse); Hearing Date: 01/22/08; Decision Issued: 02/13/08; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 8762; Outcome: No Relief – Agency Upheld in Full;  
**Administrative Review: AHO Reconsideration Request received 02/28/08;**  
**Reconsideration Decision issued 03/13/08; Outcome: Original decision affirmed;**  
**Administrative Review: DHRM Ruling Request received 02/28/08; Outcome pending.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8762**

Hearing Date: January 22, 2008  
Decision Issued: February 13, 2008

**PROCEDURAL HISTORY**

On September 7, 2007, Grievant was issued a Formal Performance Improvement Counseling Form of disciplinary action with removal for serious misconduct.

On September 24, 2007, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On December 10, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 22, 2008, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Counsel  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Formal Performance Improvement Counseling Form?

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not.

### **FINDINGS OF FACT**

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

The University of Virginia Health System employed Grievant as a Patient Care Assistant until her removal effective September 7, 2007. Grievant's Job Summary is:

Performs a variety of patient care and administrative support functions under the supervision of Medical Center professionals in an inpatient or outpatient setting or in a patient's home.<sup>1</sup>

On August 23, 2007, the Patient had surgery to remove fibroids. She had an incision on her stomach resulting from the surgery. The Patient asked a nurse on duty if the Patient could possibly exchange beds once the Patient's roommate had been discharged. The Patient is a Certified Nurses Assistant.

On August 24, 2007, Grievant began her shift at approximately 3 p.m. At approximately 6 p.m., one of Grievant's supervisors told Grievant to help the Patient use the bathroom and move her to the other bed in the room. When Grievant entered the Patient's room, the Patient asked Grievant if Grievant had spoken to the nurse about the Patient being able to exchange beds in the room. The Patient then asked Grievant if she would hand the Patient a box of tissues. Grievant murmured something under her breath. Grievant placed the box of tissues on the Patient's bed but out of the Patient's reach. The Patient told Grievant that she could not reach the tissue box. Grievant hit the bed rail with the palm of her hand and threw the box of tissues at the Patient hitting the Patient's surgical incision. The Patient began to cry from the pain of being hit on her incision. Grievant said "that didn't hurt". As Grievant began to leave the room, Grievant

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<sup>1</sup> Agency Exhibit 9.

said “now you get to the other bed the best way you can, and you can get to the bathroom the best way you can.”

### **CONCLUSIONS OF POLICY**

Under the Agency’s Employee Standards of Performance, an employee who engages in serious misconduct may be removed from employment. Serious misconduct includes:

Mistreatment, including verbal and physical abuse or harassment, of the patient, visitor or fellow employee, or patient neglect.

Grievant engaged in serious misconduct because she threw a tissue box at a patient. The box hit the Patient’s surgery incision causing the Patient pain. The pain was sufficient to upset the Patient and cause her to begin crying. As Grievant left the Patient’s room, Grievant told the Patient she could get to the other bed or the bathroom “the best way you can” even though the Patient needed assistance to move from her bed. The Agency has presented sufficient evidence to issue Grievant a Formal Performance Improvement Counseling Form with removal.

Grievant denies that she threw the tissue box at the Patient. She testified she placed the tissue box on the Patient’s abdomen so that the Patient could reach a tissue. She contends she was panicked because the Patient appeared in distress with loud coughing and was yelling for immediate assistance. Although Grievant testified at the hearing, the Agency only presented hearsay statements from the Patient. In most cases, the Hearing Officer would give greater weight to the testimony of a witness who testified at a hearing than to a witness whose observations were presented to the Hearing Officer through written documents or statements made to others. This case is very close. The question arises as to why the Agency’s account of the facts should be believed instead of Grievant’s testimony. The answer is revealed by Ms. R’s testimony.

Ms. R called Grievant at her home to schedule a meeting between Ms. P and Grievant. In the past, Ms. R had had difficulty contacting Grievant because Grievant was not often at her home. Ms. R did not expect Grievant to answer the telephone on the first attempt and was surprised that she reached Grievant. During their conversation about a meeting with Ms. P, Grievant said, “I know I know I threw a box of tissues ....” Shortly after the telephone call, Ms. R sent Ms. P an email stating, “She actually answered the phone this time .... she said I know I know I threw a box of tissues ....” Ms. R interpreted Grievant’s statement to have been made out of frustration because Grievant knew she had thrown the tissue box and would have to deal with the consequences. Ms. R did not have a lot of prior interaction with Grievant. Ms. R had no motive to testify against Grievant.

Grievant’s statement to Ms. R is sufficient to corroborate the Agency’s hearsay evidence. Grievant denies making the statement. Ms. R’s testimony was credible. The crux of this case depends on whether Grievant threw a box of tissues. The Hearing

Officer cannot ignore Grievant's admission to Ms. R that Grievant threw a box of tissues at the Patient.

Grievant argues that the Patient's perception of the facts was not accurate. Grievant points out that the Patient was rude, abrasive, and loud. At approximately 2:30 p.m. on August 27, 2007, a cleaning crew attempted to clean the Patient's room. The Patient felt the employees were making too much noise. She told them to "close her g\_\_ d\_\_ curtain". The Patient called them "m\_\_\_\_ f\_\_\_\_s" several times and said they were making too much noise. The Patient was complaining that she was in a lot of pain and wanted quiet. Grievant argues that the Patient's demeanor makes her assertions against Grievant less credible. This argument is not as strong as Grievant asserts. If the Patient was as rude and abrasive with Grievant as she was with the cleaning crew, the Patient's behavior would give Grievant a reason to respond negatively towards the Patient. Throwing a box of tissues at the Patient would not be a surprising response to someone who was yelling and complaining. When all of the evidence in this case is considered, the Agency has presented sufficient evidence to carry its burden of proof.

*Va. Code § 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 rules established by the Department of Employment Dispute Resolution...."<sup>2</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Formal Performance Improvement Counseling Form of disciplinary action with removal is **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:

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<sup>2</sup> *Va. Code § 2.2-3005.*

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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that 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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 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 a copy of all of your appeals to the other party and to the EDR Director. 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. 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>3</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed

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<sup>3</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8762-R**

Reconsideration Decision Issued: March 13, 2008

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

(1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

By failing to call the Patient as a witness, the Agency placed itself in the position of having to rely upon hearsay evidence with respect to its central witness.<sup>4</sup> In general, the Hearing Officer gives less weight to hearsay evidence than to the testimony of an individual appearing at the hearing and subject to cross-examination. Although the Hearing Officer would have preferred to hear directly from the Patient and questioned the Agency's counsel as to whether the Patient would be testifying at the hearing, the Agency decided not to call the Patient as a witness. In this case, the Agency has presented more than the Patient's account of her interaction with Grievant. The Agency presented evidence that Grievant admitted to throwing the box at the Patient.

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<sup>4</sup> The Hearing Officer can ask parties to produce witnesses but cannot compel them to do so.



Grievant's admission along with the Patient's written statement enables the Agency to meet its burden of proof.

Grievant presented an Affidavit from the Director of the UVA Medical Center Department of Chaplaincy Services stating that the Patient "has not been a registered visiting clergy since June 21, 2007 and does not have a current badge."<sup>5</sup> Grievant offers this affidavit to impeach the written statement of the Patient who said she was visiting clergy. The weight given to the Patient's written statement is diminished already because it is hearsay evidence. A further reduction in the weight given to the Patient's statement because of a possible inaccurate reference to visiting clergy is not sufficient to offset the credible testimony of Ms. R. Ms. R testified Grievant admitted she threw the tissue box at the Patient. In short, the Affidavit is not evidence that would require the Hearing Decision to be amended.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

### **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 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.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>5</sup> It is not clear that the Affidavit completely rebuts the Patient's written statement. The Patient did not indicate where or when she was visiting clergy. The Affidavit does not say that the Patient was never visiting clergy at the UVA Medical Center prior to June 21, 2007. The Director could not address whether the Patient was visiting clergy at other medical facilities.