

Issues: Group II Written Notice (failure to follow policy) and Transfer; Hearing Date: 02/13/08; Decision Issued: 02/20/08; Agency: DMHMRSAS; AHO: William S. Davidson, Esq.; Case No. 8781; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 8781

Hearing Date: February 13, 2008  
Decision Issued: February 20, 2008

**PROCEDURAL HISTORY**

On August 30, 2007, the Grievant was issued a Group II Written Notice for failure to follow Facility Policy I.C.1 and Departmental Instruction 201(RTS) related to abuse investigation requirements. Pursuant to the issuance of this Group II Written Notice, the Grievant was transferred from one building to another with no loss of pay and she remained in the same pay band.

On September 20, 2007, the Grievant timely filed a Grievance to challenge the Agency's action. The outcome of the Second Resolution Step was not satisfactory to the Grievant and she requested a hearing. On January 16, 2008, the Department of Employment Dispute Resolution assigned this Appeal to a Hearing Officer. On February 13, 2008, a hearing was held at the Agency's location.

**APPEARANCES**

Grievant  
Representative for Grievant  
Agency Representative  
Witnesses

**ISSUE**

1. Whether the Grievant failed to follow Facility Policy I.C.1 and Departmental Instruction 201(RTS).

**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. Grievance Procedure Manual ("GPM") §5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM §9.

**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 Agency and the Grievant submitted written Exhibits to the Hearing Officer and those Exhibits were placed into a notebook and they are divided as Agency Exhibit 1 and Grievant's Exhibit 1. Both the Agency and Grievant agreed that all of those Exhibits would be introduced in this single notebook.

The Department of Mental Health, Mental Retardation and Substance Abuse Services employed the Grievant as a Direct Service Associate. This position is responsible for maintaining control over a patient population and always providing for their safety.

On June 25, 2007, a fellow employee of the Grievant struck a patient on his face. Pursuant to that event, that employee was dismissed from service at the facility. A third employee who was finishing her training saw this event and testified that the Grievant was standing beside her and had to have seen the event as well. She testified that, after the patient was struck, she turned and she and the Grievant exchanged a look of surprise at what had just happened. When questioned about this in the original investigation, the Grievant told the investigators that she did not see anything take place and she had no knowledge regarding the original incident. The Grievant testified that she did not see anything. She did testify that she heard a noise, but she did not look up to see what had caused the noise.

Departmental Instruction 201(RTS) states in part as follows:

Any action by an employee that compromises the integrity or outcome of a factual investigation may be cause for disciplinary action. Employees shall be subject to a full range of disciplinary actions, up to and including termination, as outlined in the Employee Standards of Conduct and Performance when they: (I) Fail to report incidents of suspected abuse or neglect of individuals receiving service; (ii) withhold information regarding abuse or neglect; (iii) deliberately or knowingly misstate facts when questioned in an investigation or administrative proceeding.<sup>1</sup>

Facility Policy I.C.1(a)(5) states in part as follows:

Any workforce member who fails to report abuse and/or neglect or who fails to cooperate with an investigation may be subject to disciplinary action. Furthermore, any action by a workforce member that compromises the integrity or outcome of a factual investigation may be subject to disciplinary actions. Employees shall be subject to the full range of disciplinary actions, up to and including termination, as outlined in the Employee Standards of Conduct when they: (I) Fail to report incidents of suspected abuse or neglect of individuals receiving services; (ii) withhold information regarding abuse or neglect;

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<sup>1</sup> Agency Exhibit 1, Tab 6, Page 7

(iii) deliberately or knowingly misstate facts when questioned in an investigation or administrative proceeding.<sup>2</sup>

The Standards of Conduct, as set forth in Policy 1.60, clearly establishes that failure to comply with established written policy can be deemed behavior that supports a Group II Written Notice.<sup>3</sup>

The evidence before the Hearing Officer was that a patient of this Institution had been struck by an employee and that that employee had subsequently been fired. A disinterested witness clearly and distinctly testified that she saw that event and that the Grievant was standing beside her and that the Grievant saw the event as well. The Grievant testified that she was working with her patient and did not see the event nor was she even aware that it took place. The Hearing Officer is confronted with a fact pattern where one witness testified very distinctly and clearly to one set of facts and the Grievant testified to an opposite set of facts. The Hearing Officer observed the demeanor of each of the witnesses and gives more credibility to the disinterested witness who observed the event and alleged that the Grievant had to have seen the incident as well.

### **MITIGATION**

*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>4</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.

The Hearing Officer finds no basis for mitigation in this matter. The Grievant received a Group II Written Notice and was moved from one building to another. There was no financial detriment to her, she was not suspended without pay for any time and the Written Notice will come off of her records at the expiration of the appropriate time frame.

### **DECISION**

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<sup>2</sup> Agency Exhibit 1, Tab 7, Page 5

<sup>3</sup> Agency Exhibit 1, Tab 10, Page 6

<sup>4</sup> Va. Code § 2.2-3005

For reasons stated herein, the Agency's issuance of the Group II Written Notice 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:

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> Street, 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 Street, 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 a copy of your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>5</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>6</sup>

[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]

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William S. Davidson  
Hearing Officer

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<sup>5</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>6</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.