

Issues: Group III Written Notice (client abuse) and Termination; Hearing Date: 05/29/08; Decision Issued: 06/06/08; Agency: DMHMRSAS; AHO: John V. Robinson, Esq.; Case No. 8823; Outcome: No Relief – Agency Upheld in Full.

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 8823

Hearing Officer Appointment: March 20, 2008

Hearing Date: May 29, 2008

Decision Issued: June 6, 2008

PROCEDURAL HISTORY AND ISSUES

In her Grievance Form A concerning this proceeding (the "Form A"), the grievant requested a hearing to challenge the termination of her 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 her Grievance Form A, including reinstatement to her former position or, if occupied, to an objectively similar position; rescission of the Group III Written Notice that was issued December 20, 2007; full back pay; full restoration of benefits and seniority; and payment of attorney's fees.

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 her attorney. Following a first pre-hearing conference held by telephone on March 25, 2008, the hearing officer issued a Scheduling Order entered on March 26, 2008, which is incorporated herein by this reference.

During the first pre-hearing conference call on March 25, 2008, the parties scheduled the hearing for April 22, 2008 and scheduled the exchange of exhibits and witness lists for April 15, 2008. The deadline for the issuance of the hearing officer's decision was originally April 24, 2008. The Agency's advocate stated that she would be unavailable, on vacation with her husband who returned from Iraq, from April 2-18, 2008. The Grievant's attorney undertook to send his document requests by the time the advocate left for her vacation but, unfortunately, was unable to do so.

The attorney sent a request for an order for documents to the hearing officer on April 8, 2008. Because both the attorney in his letter and the hearing officer anticipated Departmental objections to the request, the hearing officer decided to await the advocate's return to schedule a conference call to address the documentary issues.

This second pre-hearing conference call was duly held at 3:00 p.m. on Monday, April 21, 2008. Both parties, by their representatives, argued their respective positions concerning the document requests in the Grievant's attorney's letter of April 8, 2008. Because the hearing officer decided that resolution of the issues concerning the document request after hearing both sides' arguments was crucial to a fair disposition of this proceeding, the hearing officer decided that a relatively short continuance would serve the interests of justice. Accordingly, the hearing officer found that just cause existed for a relatively short continuance and the hearing officer's deadline for issuance of the written decision was extended until June 6, 2008.

The hearing officer recommended during the second pre-hearing conference call that if any party was aggrieved by his decision entered April 22, 2008 (incorporated herein by this reference) concerning document production that such party immediately appeal such decision to EDR for a compliance ruling. No open issues concerning document production remained at the time of the hearing.

At the hearing held on May 29, 2008, pursuant to the First Amended Scheduling Order entered May 9, 2008, 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 10 and Grievant Exhibits 1 through 4.<sup>1</sup> The hearing officer issued several orders for witnesses and/or documents, at the request of the grievant's counsel and also entered a Protective Order, incorporated herein by this reference, upon motion of the parties.

### APPEARANCES

Representative for Agency  
Three Additional Witnesses for Agency (including one rebuttal witness)  
Grievant  
Three Additional Agency Witnesses Called by Grievant

### FINDINGS OF FACT

1. The grievant was a Direct Support Associate II ("DSA"), previously employed by the Agency at a residential services facility. AE 6.
2. The grievant worked at a residential unit or cottage (the "Cottage") within the facility which housed eight (8) disabled patients.

---

<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.

3. All of the clients in the Cottage are severely mentally retarded, suffering from profound developmental delays in their cognitive functioning, which is only at the 1 – 1 ½ year old level. Most are nonverbal.
4. On October 10, 2007, a trainee DSA (the “Trainee”) was assigned to the Cottage to observe as part of her training how to handle the clients.
5. The Trainee’s shift ran from approximately 1:00 p.m. to 9:00 p.m. The Trainee was not assigned to any particular clients but was in the Cottage to observe and learn.
6. Prior to this observation, the Trainee had previously undergone significant training in direct care provided by the Agency, including four (4) weeks of classroom training and Therapeutic Options of Virginia (“TOVA”) concerning physical management of clients. In her prior work experience, the Trainee also had significant experience supervising staff and working with children with disabilities.
7. The Trainee was hired by the Department on approximately September 10, 2007 and the Grievant had been employed by the Department for a little over a year at the time of the incidents.
8. On Wednesday, October 10, 2007, around 5:00 p.m., while sitting in the living area of the Cottage, the Trainee saw the Grievant hit a client (“Client X”) who appeared to be asleep, on the head with a television remote control. AE 3. This action startled Client X.
9. On October 10, 2007, between 3:00 p.m. and 9:00 p.m., the Trainee saw the Grievant slap a nonverbal client (“Client Y”) across the face. The Grievant was not provoked. AE 4.
10. Also on October 10, 2007, around 8:00 p.m., the Trainee saw the Grievant abuse another nonverbal client (“Client Z”). The Grievant placed Client Z in the shower, saturated his face and body with soap and “then proceeded to rinse [Client Z] off very forcefully and made comment ‘take it, take it.’” The Trainee observed Client Z become very upset and could see the distress on his face. AE 5. After Client Z dressed for bed, the Grievant kicked Client Z in the rear and made the comment “Get [your] ass out of here.” AE 5.
11. The Trainee did not report the abuse immediately as she was required by policy to do but met with the Facility Director and subsequently security approximately 9:30 a.m. on Friday, October 12, 2007. The Trainee was very emotionally upset by the abuse she observed and it took her the intervening period to summon the courage to come forward to report the abuse. The Trainee received a verbal

counseling from her Program Director reprimanding her that the Departmental policy required immediate reporting of any abuse.

12. The investigations conducted by the Department were thorough and the conclusions reached were reasonable. At the hearing, however, another DSA II clarified that he did not feel threatened by comments the Grievant had made to him and which he had relayed to the Trainee.
13. The testimony of the witnesses called by the Agency, including the Trainee, was both credible and consistent on the material issue before the hearing officer of whether the Grievant abused clients. The demeanor of such Agency witnesses at the hearing was candid and forthright. By contrast, positions taken by the Grievant during the investigation and the hearing conflict with documents she has signed, defy logic and common sense and undercut her positions and her credibility. For example, the Grievant signed a written statement stating that “Recently I did hit [Client X] on his head with a Television Remote. . .” When asked about obvious discrepancies, the Grievant implied that she merely glimpsed and signed the document assuming it was written as she told it. However, the Grievant later admitted that the statement was very short and that she initialed her changes to the document.
14. The Department’s actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
15. The Department’s actions concerning this grievance were reasonable and consistent with law and policy.
16. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant.

#### 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 abuse 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 7.

Departmental Instruction 201-3 defines abuse in part as follows:

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:

- . . .
- Assault or battery;
- Use of language that demeans, threatens, intimidates or humiliates the person;
- Misuse or misappropriation of the person's assets, goods or property . . .

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. 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 short period of the Grievant's employment by the Agency and the gravity of the violations in the context of a residential mental health facility preclude a lesser sanction. The hearing officer agrees.

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.

#### 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:

---

John V. Robinson, Hearing Officer

cc: The persons on the Attached Distribution List (by U.S. Mail, e-mail transmission and/or facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

Z:\Hearing Officer\DMHMRSAS (Lee)\Final Decision 6-6-08.doc