

Issues: Group III Written Notice (criminal conviction) and Termination; Hearing Date: 04/16/08; Decision Issued: 04/29/08; Agency: DMHMRSAS; AHO: Lorin A. Costanzo, Esq.; Case No. 8827; 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. 8827

Hearing Date: April 16, 2008  
Decision Issued: April 29, 2008

**PROCEDURAL HISTORY**

On November 7, 2007, Grievant was issued a Group III Written Notice (date of offense 10/26/07) with removal effective date October 26, 2007.<sup>1</sup>

On November 14, 2007, Grievant filed a grievance to challenge the Group III Written Notice and disciplinary action taken of removal.<sup>2</sup>

On February 25, 2008 the matter was qualified for hearing by Agency Head who indicated that "Disciplinary actions involving termination must be qualified for hearing".

On March 26, 2008, the Department of Employment Dispute Resolution assigned this grievance to the undersigned Hearing Officer.

On April 16, 2008 a hearing was held at Facility where Grievant worked. By agreement of the parties the exhibits were admitted *en masse*.

**APPEARANCES**

Agency Presenter  
Agency Party Designee  
Grievant (who also testified as a witness)  
Grievant Presenter

**ISSUES**

Were the Grievant's actions such as to warrant disciplinary actions under the Standards of

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<sup>1</sup> Agency Exhibit. page 7, Written Notice.

<sup>2</sup> Agency Exhibit. pages 2 to 4, Grievance Form A.

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:

01. Grievant has been an employee of Agency for approximately 16 years. At times relevant to this matter she was employed by Agency as an “Administrative Office Specialist II at Facility.”<sup>3</sup>

02. Grievant works in the Information Center at Facility. The Facility provides psychiatric and other services to adult mentally ill patients.

03. Facility is associated with another nearby Agency Facility which provides psychiatric and other services to mentally ill minors.

04. Grievant’s duties included answering the telephone after hours for the nearby Facility and included taking admission information over the telephone for minors being admitted to the nearby Facility.<sup>4</sup>

05. In April of 2007 Grievant was charged with three Felony charges and one Class 1 Misdemeanor charge, all involving a minor. Grievant was charged as an “Accessory Before the Fact” in the felony charges. Grievant’s spouse, additionally, was charged with felonies involving a minor.<sup>5</sup>

06. Grievant entered into a plea agreement resulting in her pleading guilty to and being found guilty of one Class 1 misdemeanor charge only. In October of 2007 Grievant plead guilty to and was convicted of “Contributing to the Delinquency of a Minor”.<sup>6</sup>

07. On November 7, 2007, Grievant was issued a Group III Written Notice with “Removal” (effective 10/26/07). The *Date of Offense* was indicated as 10/26/07. The *Nature of Offense and Evidence* in the Written Notice indicated, “Criminal conviction – 1 that is a barrier crime”.<sup>7</sup>

08. On November 14, 2007, Grievant filed a timely Grievance of the Group III Written Notice with removal. Upon the matter not being resolved to the agreement of the parties, Grievant, on January 3, 2008, requested matter be Qualified for a Hearing. Agency Head qualified the matter for a hearing on February 25, 2008. In her response, dated March 5, 2008, Grievant advanced the grievance to hearing.<sup>8</sup>

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<sup>3</sup> Agency Exhibit, page 2, Grievance Form A.

<sup>4</sup> Agency Exhibit, page 2, Grievance Form A. and testimony.

<sup>5</sup> Agency Exhibit, pages 11 to 14, Warrants of Arrest.

<sup>6</sup> Agency Exhibit, pages 21 and 22, Virginia Courts Case Information.

<sup>7</sup> Agency Exhibit, page 7, Written Notice.

<sup>8</sup> Agency Exhibit, pages 2 to 4, Grievance Form A.

## 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>9</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>10</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."

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 of Conduct* 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. of Policy No. 1.60, effective 9/16/93, provides that offenses are organized into three groups according to the severity of the behavior. Group I being the least severe behavior and Group III being of such a serious nature that a first occurrence normally should warrant removal.

The *Standards of Conduct* provide, as an example of a Group III offense, "Criminal convictions for illegal conduct occurring on or off the job that clearly are related to job performance or are of such a nature that to continue employees in their positions could constitute

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<sup>9</sup> §5.8, Department of Employment Dispute Resolution, Grievance Procedure Manual, effective August 30, 2004.

<sup>10</sup> §9, Department of Employment Dispute Resolution, Grievance Procedure Manual, effective August 30, 2004.

negligence in regard to agencies' duties to the public or to other state employees".<sup>11</sup>

The *Standards of Conduct* also provide that the offenses set forth therein are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Any offense that, in the judgment of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of the *Standards of Conduct*.<sup>12</sup>

Grievant and her husband were charged with criminal offenses involving a minor. Documents admitted into evidence indicated Grievant's husband was convicted of felonies involving a minor and Grievant was charged as an "Accessory Before the Fact" in the three felony charges alleged against her. However, she was not convicted of any of the felonies so charged. She entered a plea of guilty to one Class 1 Misdemeanor, "Contributing to the Delinquency of a Minor". Agency Exhibit entitled "Virginia Courts Case Information" indicated in pertinent part, as to the three felonies for which Grievant was charged, as follows:

- a. Charge: FORC. SODOMY/ ACC BEFORE FACT  
Disposition Code: "Nolle Prosequi"<sup>13</sup>
- b. Charge: OBJECT PEN./ACC BEFORE FACT  
Disposition Code: "Nolle Prosequi"<sup>14</sup>
- c. Charge: CARNALLY KNOW/ACC BEFORE FACT  
Final disposition ..... Amended Charge: "Contrib To Deliq Of Minor"  
Amended Charge Type: "Misdemeanor"  
Concluded By: "Guilty Plea"<sup>15</sup>

It is not contested Grievant entered a guilty plea to a Class 1 Misdemeanor of "Contributing to the Delinquency of a Minor" and was found guilty of this. Furthermore, it is not contested that Grievant was not convicted of any felony.

Grievant presents that she should not receive a Group III Written Notice and be terminated as the Facility where she works only provides services to adult clients and she does not have contact with minors. She further contends that her only conviction was for the one misdemeanor of "Contributing to the Delinquency of a Minor" and this is not sufficient to act as a basis for a Group III Written Notice with removal from her job.

Grievant worked at Agency Facility which provides treatment for mentally ill adult patients. Grievant worked in the information center at Facility. She testified that she does, at times, answer the telephone after hours for the nearby Facility that provides treatment to mentally ill minors and does receive information concerning minors.

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<sup>11</sup> Agency Exhibit, page 29, Standards of Conduct.

<sup>12</sup> Agency Exhibit, pages 28, Policy No. 1.60 - Standards of Conduct.

<sup>13</sup> Agency Exhibit, pages 23 and 24.

<sup>14</sup> Agency Exhibit, pages 25 and 26.

<sup>15</sup> Agency Exhibit, pages 21 and 22.

In her duties, Grievant has access to information concerning the minors being treated at the nearby Facility even though she is not in physical contact with the minors. Grievant's duties as an Administrative Assistant II include having to answer the telephone for the nearby Facility and taking admission information concerning minors for the nearby Agency Facility that provides services to those minors.

There is no evidence that "Contributing to the Delinquency of a Minor" is a specifically listed "Barrier Crime". However, the *Code of Conduct* provides, as an example of a Group III Offense, criminal convictions for illegal conduct that are of such a nature that to continue employees in their positions could constitute negligence in regard to the agencies' duties to the public. The Agency has concerns over this provision, their duty to the public, and their duty to clients receiving services.

Ordinary or simple negligence is the failure to use "that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury to another". *Griffin v. Shively*, 227 Va. 317, 321, 315 S.E.2d 210, 212-213 (1984).

The Agency has expressed concern that it is a public institution responsible for the care and treatment of at risk individuals and responsible to the citizens of the Commonwealth to do so in a way that provides for the public trust.<sup>16</sup> Grievant works at a Facility that treats adults with mental illness and her duties place her in contact with private information concerning minors being served by Agency at the nearby Facility. At various times Grievant provides admission/intake services concerning minors. Her duties within the Agency provide her access to information concerning minors being served by the Agency including a child's name, social security number, date of birth, what the child was admitted for, and other information that is not available to the general public.

Grievant plead guilty to and received a criminal conviction for illegal conduct involving a minor. The nature and circumstances concerning Grievant's plea and criminal conviction were taken into consideration by the Agency. The Agency was concerned with the conviction involving a minor. The Agency expressed concern in the *Response to Grievance* with the nature of matters which led to Grievant's plea to a misdemeanor and the Grievant's plea of guilty to and conviction for "Contributing to the Delinquency of a Minor".<sup>17</sup>

The Agency's clients are both adults (at the Facility) and minors (at the nearby Facility) who are mentally ill and in need of services. While Grievant contends she should retain her employment as she does not have contact with minors it is also apparent from the evidence that she has access to information of a confidential nature about minors receiving services from Agency.

Consideration is given to the nature of the individuals served by the Agency as well as the duties and the responsibilities that Agency has to the individuals receiving care at both the Facility and at the nearby Facility. There are valid concerns of Agency to provide care to individuals in a manner that maintains the public trust. The individuals served by Agency are at

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<sup>16</sup> Agency Exhibit, page 5, Response to Grievance, 21 December 2007.

<sup>17</sup> Agency Exhibit, page 5, Response to Grievance, 21 December 2007.

risk individuals who are requiring psychiatric/psychological services from the Agency. The Agency is responsible for the individuals at the Facility where Grievant works and at the nearby Facility. Moreover, Agency responsibility does not necessarily end upon a client's discharge. While contact or lack of contact with minors may be a consideration it is not the only consideration. The totality of the circumstances surrounding matters is a relevant consideration in this cause. Access to information concerning minors is an important consideration and that information can impact both the individual and the Agency. The duties owed to individuals being served by the Agency, both minors and adults, involve more than just who has contact with the individuals at a facility. The duties owed can extend past a patient's discharge from a facility.

Grievant contended, in her testimony, that she was convicted on 10/26/07 of "Contributing to the Delinquency of a Minor" for having alcohol in the house. It is also noted that Grievant indicated that the minor erroneously contended the minor was given alcohol in the house. Grievant testified that she was with her husband the night the alleged incidents took place, the minor spent the night, and the minor raised the allegations that gave rise to the charges and convictions. Grievant challenged versions of events contained in articles admitted into evidence describing matters. Also, she declined to state if her husband was convicted anything.

The *Code of Conduct* provides, as an example of a Group III Offense, criminal convictions for illegal conduct that are of such a nature that to continue employees in their positions could constitute negligence in regard to the agencies' duties to the public. The Agency is responsible to the individuals it serves. The Agency raised concerns over the duties and responsibilities it owed to the public and to the individuals being served by the Agency. Grievant was convicted of "Contributing to the Delinquency of a Minor" and, under the totality of the circumstances, there was sufficient basis for Agency to issue a Group III Written Notice with removal.

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.

**Mitigation** .... 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 and the public.

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>18</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.

## DECISION

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:

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<sup>18</sup> Va. Code Section 2.2-3005(C)(6).

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