

Issues: Group II Written Notice (failure to follow policy), Group II Written Notice (workplace harassment), Group II Written Notice (inappropriate, non-therapeutic behavior) and termination; Hearing Date: 09/15/08; Decision Issued: 09/30/08; Agency: DMHMRSAS; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 8940; Outcome: Partial Relief; **Administrative Reviews: AHO Reconsideration Request, EDR Admin Review request, and DHRM Admin Review request received on 10/14/08; Requests withdrawn 11/25/08.**

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

**In re: Case Number 8940**

**Hearing Dates: September 15 and 16, 2008**

**Decision Issued: September 30, 2008**

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Representative  
9 Witnesses for Agency  
3 Witnesses for Grievant

**ISSUES**

"Were the three (3) Group II written notices properly issued to Grievant under the Standards of Conduct?; and

"Was termination proper?"

**FINDINGS OF FACTS - ISSUE 1**

The Grievant, a psychiatrist for a department or agency of the Commonwealth, was given a Group II Written Notice on June 23, 2008 for violation of Department Instruction No. 703, which deals with access to information networks.

The Grievant was employed on April 1, 1999, as an attending physician (psychiatrist) and at all times pertinent was so employed by the department.

Grievant had signed a departmental "INFORMATION NETWORK USE AGREEMENT" acknowledging that the telecommunication lines linking the Department to the Internet had limited capacity and agreeing to limit his access to the minimum required to perform his job and that any infraction of the above would result in disciplinary action.

Analysis of Grievant's computer's hard drive, by the department's IT security group with aid from the Commonwealth Crime Lab forensics over a ninety (90) day

period showed use of large amounts of bandwidth and viewing time for non-medical, financial, sites.

Testimony was uncontroverted that employees at the facility had been told to leave their computers turned on during the period in question due to an installation of a new system.

Testimony was heard as to the difference of "turned on" and "logged on" for computers. "Logged on" uses up bandwidth, "turned on" does not. Locking the computer does not log the user off. At times the Grievant's computer was logged on for over 10 hours per day.

If the Grievant's computer was logged on and left logged on, changes to the sites would show as hits. Much time was used at nights, between 1 and 7 a.m., and on Saturdays, when Grievant was at home and did not work.

Grievant admitted violation of computer use of Department Instruction No. 703, to obtain financial information, but not for a great number of hours and not on Saturdays and not from 1:00 a.m. to 7:00 a.m.

## **FINDINGS OF FACTS - ISSUE 2**

On June 23, 2008, Grievant was issued a Group II Written Notice for actions that allegedly rose to the level of workplace harassment in that he created an intimidating/offensive work environment for the Complainant in violation of Department Instruction No. 507.

Grievant, a psychiatrist and Ward Team Leader on a ward populated by patients who had been found not guilty by reason of insanity (NGRI) of very serious crimes, or were chronic mental patients or sex offenders, was accused of being hostile toward a recently assigned female team member.

No sexual harassment by Grievant was charged or proven.

A work place investigation by a non-medically qualified investigator from the Department's Central Office found one of the allegations by the new team member founded.

Testimony confirmed that the Grievant had attempted to integrate the new team member into the team of nurses, doctors, aids and social workers on the ward.

Testimony confirmed that the complaining employee was and had been sensitive about being called stupid until she received her master's degree. There was no testimony that Grievant directly called her "stupid".

The Complainant also admitted to having a weight control problem and having had gastric bypass surgery to aid in weight loss.

Testimony confirmed that the complaining employee initiated the conversations, impliedly consenting thereby to discussions about her weight and personal problems with her significant other with the team, and the Grievant joined in.

The complaining employee did not understand the treatment methods by the Grievant and the ward team and took explanations as attempts to intimidate, harass and “talk down” to her.

Grievant used movie plot examples in explaining patient behavior to the team.

### **FINDINGS OF FACTS - ISSUE 3**

On June 23, Grievant was issued a Group II Written Notice based on administrative findings of inappropriate and non-therapeutic behavior including violations of Facility Policies 8018, Assurance of Patient Rights and 8019 Ethical Behavior and Employee Patient Relationships. The culture of the original treatment team as modeled by Grievant reflected differential treatment of certain patients not accounted for by differing treatment needs, and lack of respect for certain patients and their families as demonstrated through the use of profanity and other derogatory language.

The Grievant has been a psychiatrist at the facility since 1999. He headed the treatment team on Ward J which was characterized as having chronic patients and those who were NGRI, and sexual offenders.

Testimony was that Grievant was often crass and used vulgar language to describe patient incidents.

Testimony also showed different means of treatment for different patients. Example: One patient touched a female employee about her bra strap and kissed her hand. Another patient who witnessed the incident asked to kiss the employee’s hand. The first patient was not put on Constant Observation (CO), the second was placed on CO for 30 days which was not timely reviewed. The Grievant’s supervisor reviewed the matter and did not change the restriction. A psychologist reviewed the same and didn’t change the restriction.

Testimony was heard that the patients were often of low mental ability and limited vocabulary. Vulgar terms had to be used for them to understand their problem. Example: “sucking dicks” for “fellatio”.

Grievant admitted anonymously providing funds for staff to take a patient out to lunch. This was described as a therapeutic means of treatment for the patient by another psychiatrist. The contribution was against policy, but not for any gain to Grievant and was done anonymously to the patient.

No evidence was heard about the Grievant being counseled for perceived policy violation. His supervisor and replacement let his treatment orders stand.

Witnesses for Grievant, psychiatrists, came to say grievant was an outstanding psychiatrist and that they would refer family members to him for treatment if needed. They admired his treatment results on Ward J.

Evidence was presented that the Department's Investigations Manager in Richmond, Virginia, wrote to the Facility Superintendent telling her to contact the Central Office Human Resources Development and Management Office before beginning disciplinary action as a result of investigation of the above matter. There was no evidence presented that this had been done.

There was an allegation in the testimony of a psychiatrist, Grievant's former supervisor, that the Superintendent of the institution had a "vendetta" against the Grievant and had asked that his performance review be lowered. This was strongly denied.

### **APPLICABLE LAW AND OPINION**

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to the 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 the workplace." Murray v. Stokes, 237 Va. 653, 656 (1989).

Code Section 2.2-3000 et seq. sets forth the Commonwealth's grievance procedure and provides, in 2.2-3000A:

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 Section 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.

### **ISSUE 1**

While there was admitted violation of departmental instruction, a preponderance of the evidence did not prove the clearly excessive intentional use by Grievant of his

computer. From the evidence, the very large use of bandwidth appeared attributable to Grievant following instructions to leave his computer on and not understanding the need to “log off”.

The Group II, based on the evidence presented, was not warranted. The Department did not meet the preponderance of the evidence standard.

## **ISSUE 2**

The alleged harassment and attempted intimidation started from discussion of weight, personal problems and problems with her significant other initiated by the complaining woman. She thereby consented to the discussions by initiating them. These were coupled with a poor self image and inability to adapt to the treatment patterns of the Grievant.

## **ISSUE 3**

This Group II Written Notice, one of three, issued on June 23, 2008, resulted from an unsubstantiated complaint of patient abuse/neglect, the investigation of which found no patient abuse/neglect, but found violations of facility policies 8018 and 8019 from violation of patient’s rights and violation of Ethical Behavior and Employee-Patient Relationships because of differential treatment of patients not accounted for by differing treatment needs and lack of respect for certain patients and their families by use of profanity and derogatory language.

Testimony ranged widely from treatment team members to Grievant’s supervising physician. Grievant placed a sex offender on constant observation (CO) for asking to kiss a female employee’s hand. He did not further restrict another patient for touching and kissing the female employee and kissing her hand. Testimony by well qualified psychiatrists was that different treatment was proper for the different patients for different reasons. Doctors and a psychologist who reviewed Grievant’s actions did not advocate changing the one patient’s restrictions for medical reasons and the fact that the patient who was not given CO was already on CO when he went off the unit.

## **DECISION**

### **ISSUE 1**

The Department did not meet the preponderance of evidence to elevate the failure to follow department policy as instructed to a Group II offense. The Group II for use of agency information networks resources for non-work related purposes, inconsistent with the mission of the Department resulting in excessive consumption of facility network bandwidth which diminished resources available to other employees to carry out their work-related activities was not proved by a preponderance of explained evidence. Grievant did use the computers in his office to secure financial data. The vast amount of individual use occurred on weekends and night time hours most likely from not understanding how to leave his computer on as directed.

The Group II is reduced to a Group I Written Notice.

### **ISSUE 2**

The Department did not meet the preponderance of evidence to sustain a Group II for violation of Department harassment policy.

The Group II Written Notice for harassment is dismissed.

### **ISSUE 3**

From the evidence presented, the Department did not prove its case by a preponderance of the evidence. There was strong affirmation of Grievant's actions by other M.D.'s, who testified that Grievant's actions were both proper, and therapeutically necessary. Even the uses of derogatory, profane and to the Hearing's Office vulgar language were necessary to deal with mentally challenged low verbal skill patients. They had to be made to understand what the Grievant was talking about.

For the above reasons, after careful review of the evidence and exhibits, the Group II Written Notice for administrative findings of inappropriate and non-therapeutic behavior is not sustained. The pre-disciplinary contact with Central Office Human Resources Development and Management Office set out in the Memorandum from the Investigations Manager to the Facility Director was also not done.

The Department with lengthy evidence attempted, but did not prove, inappropriate and non-therapeutic behavior by a preponderance of the evidence. The admitted anonymous donation for staff to take a patient out for lunch violated policy was testified to by Grievant's previous supervisor as being therapeutic.

The departmental investigative conclusions were rebutted by credible testimony by very highly qualified psychiatrists.

The department did not prove its case by a preponderance of qualified medical evidence. The Group II Written Notice for inappropriate non-therapeutic behavior is dismissed.

Two of the three Group II Written Notices are dismissed by this Hearings Officer. The third one is reduced to a Group I Written Notice. The Grievant is reinstated with full back pay and benefits.

### **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 faxes 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 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 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.

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**Thomas J. McCarthy, Jr., Esquire**  
**Hearing Officer**