

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 09/16/09;  
Decision Issued: 09/28/09; Agency: DBHDS; AHO: Thomas J. McCarthy, Jr., Esq.;  
Case No. 9162; Outcome: No Relief – Agency Upheld in Full.

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

**In re: Case Number 9162**

**Hearing Date: September 16, 2009**  
**Decision Issued: September 28, 2009**

**APPEARANCES:**

Grievant  
Agency Representative  
5 Witnesses for Grievant  
3 Witnesses for Agency

**ISSUE**

“Was the Group II Written Notice for failure to report abuse when discussed with case manager properly issued?”

**FINDINGS OF FACTS**

Grievant is a Direct Support Professional employee of the Agency.

On April 9, 2009, she witnessed an incident which she was not sure if it was abuse of a facility resident by a staff member.

Grievant testified that after the incident on April 9, she went to the Residential Case Manager, and asked if acts by a staff member twisting the arm of a resident to force him into his room could be done within the facility rules. This contact and exchange was denied by the Case Manager.

On April 14, 2009, Grievant called the Facility Director to tell him about the incident which occurred on April 9, 2009, and that she was unsure if the incident was abuse. She characterized the incident as a “situation”.

The Facility Director determines if an incident needs investigation as abuse.

On January 6, 2009, Grievant had received a Notice of Improvement Needed about reporting abuse in a timely manner.

On March 25, 2009, in response to the previous incident which precipitated the Notice of Improvement, Grievant answered all the questions on an abuse/neglect test administered by

the Facility staff. Grievant answered "true" to the statement, "As soon as anything happens that makes you suspect that something might possibly be abuse or neglect, you should call the Director immediately."

On January 6, 2009, Grievant signed off that she had read and understood Policy No. 10.

ON February 23, 2004, Grievant acknowledged by signature that she had received a copy of Departmental Instructions 201 - Reporting and Investigating Abuse of Clients, and Facility Instruction 10 - Resident Abuse. Grievant on the same Personnel Publication Receipt, acknowledged that she had the opportunity without prejudice or reprimand to ask her supervisor, department head, and/or Human Resources Department about rules, regulations, policies or procedures she may not fully understand.

Grievant was given ample opportunity to respond to the proposed Group II Written Notice. She received full due process.

### **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.

Grievant's due process rights were observed and adhered to by conferences with her supervisor about her failure to follow instructions. She was given ample opportunity to respond to her failures by the agency.

Departmental Instruction 201 (RTS) 03 requires the facility director to be notified in case of suspected abuse.

Facility Instruction 10 calls for “immediate” reporting of any incident that could constitute abuse.

Facility Instruction 106 – Standards of Conduct in Attachment A gives as an example of misconduct that significantly impacts agency operation as basis for a Group II Written Notice “Failure to follow supervisor’s instruction or comply with written policy ...”.

### DECISION

Grievant had received training on abuse or questionable abuse incidents after a previous “failure to report” an incident.

From the evidence, she clearly did not report the incident immediately to the facility director.

Her due process rights were not violated as she was given a reasonable time to respond to the policy violation before the Group II Written Notice was issued.

From the evidence presented, the Grievant did not prove by a preponderance of the evidence that the Group II Written Notice was inappropriate. The Agency bore the burden and proved the Group II Written Notice was appropriate and warranted. The Agency’s action in issuing the Group II Written Notice is sustained.

### 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, Main Street Centre, 600 East Main, Suite 301, 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