

Issues: Group II Written Notice (unsatisfactory performance/resident neglect), Termination (due to accumulation), and Retaliation; Hearing Date: 09/11/09; Decision Issued: 09/22/09; Agency: DVS; AHO: John R. Hooe, III, Esq.; Case No. 9171; Outcome: No Relief – Agency Upheld in Full; **Administrative Review:** **AHO Reconsideration Request received 10/06/09; Reconsideration Decision issued 10/15/09; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 10/06/09; EDR Ruling #2010-2449 issued 12/10/09; Outcome: Remanded to AHO – Reopened Hearing held 04/29/10; Remand Decision issued 05/26/10; Outcome: Original decision affirmed; Administrative Review: AHO Reconsideration Request on Remand Decision received 06/10/10; Second Reconsideration Decision issued 07/22/10; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request on Remand Decision received 06/10/10; EDR Ruling #2010-2677 issued 08/10/10; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 10/06/09 on original decision and on 06/10/10 on Remand Decision; DHRM Ruling issued 07/30/10; Outcome: Declined to review Judicial Review: Appealed to Circuit Court in City of Roanoke on 08/20/10; Outcome pending.**

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

**DIVISION OF HEARINGS**  
**DECISION OF HEARING OFFICER**

**In the matter of : Case No. 9171**

Hearing Date: September 11, 2009  
Decision Issued: September 22, 2009

**PRELIMINARY MATTERS**

During a telephone pre-hearing conference conducted on August 27, 2009 it was agreed by the Grievant and the Agency's representative that the hearing in this matter would be conducted on September 11, 2009 commencing at 9:30 a.m. at the Agency's facility.

It was further agreed that a list of witnesses and a copy of all exhibits a party intends to introduce at the hearing would be provided to the Hearing Officer and to the other party no later than Tuesday, September 8, 2009 at 5:00 p.m.

As requested by the Grievant, the Hearing Officer issued Orders for the appearance of witnesses. In addition, as requested by the Grievant, the Hearing Officer issued an Order for the Production of Documents.

In addition to the documents which the Hearing Officer ordered the Agency to produce, the Grievant requested the following records to be produced: computer records for all activity staff from June 6, 2008 to June 16, 2009 showing where they have been on their computers and how much time was spent on their computers, phone records for all activity staff from June 16, 2008 to June 16, 2009 showing incoming and outgoing numbers as well as amount of time spent on each call. The Hearing Officer did not order the production of these additional documents because the burden placed on the Agency to produce these documents outweighed any possibly that relevant or material evidence would be discovered by the Grievant from these documents.

By letter dated August 31, 2009, the Agency requested the Hearing Officer to reconsider the earlier Order for the production of Item #3. By letter dated September 1, 2009, the Hearing Officer ruled that the Agency did not have to produce these documents because the burden placed on the Agency to produce the documents outweighed any possibility that relevant or material evidence would be discovered by the Grievant from these documents. In response, the Grievant by memo dated September 4, 2009 requested that the Hearing Officer

reconsider the Hearing Officer's decision set out in the Hearing Officer's letter dated September 1, 2009. The Hearing Officer during a pre-hearing telephone conference conducted on September 9, 2009 with the Grievant and Agency's representative denied the Grievant's request.

### **APPEARANCES**

Grievant  
Representative for Agency  
Two Witnesses for Agency

### **ISSUES**

1. Did the Grievant commit the offense set out in the written notice, namely: inadequate/unsatisfactory work performance/resident safety? If so, what was the appropriate level of disciplinary action for the conduct at issue?
2. Should mitigating factors result in less severe discipline?
3. Did the Agency retaliate against the Grievant by terminating the Grievant's employment?

### **EXHIBITS**

The Agency Exhibits admitted into evidence were contained in a single notebook with the following contents:

- Tab 1 - The Written Notice issued June 10, 2009 with attachment
- Tab 2 - Standards of Conduct and Resident Abuse
- Tab 3 - Employee receipt for Personnel Manual
- Tab 4- Grievant's package, including Grievant's work profile and performance evaluation
- Tab 5- Written Notice issued February 25, 2009
- Tab 6- Agency's resident rights and responsibilities

The Grievant did not introduce any Exhibits in addition to those offered by the Agency.

### **FINDINGS OF FACT**

The Grievant timely appealed his termination which resulted from the Group II Written Notice issued on June 11, 2009, which was a second Group II notice, the first having been issued on February 25, 2009.

The Agency's first witness was the Activities Director who issued the Group II written notice on June 10, 2009. According to the witness, the basis for the written notice was as set out on the attachment to the written notice found at tab 1 in the Agency's exhibit notebook. The witness testified that the Grievant brought a resident from the secured Alzheimers ward to the lobby for the purpose of taking the resident, along with other residents, on the activities bus for an outing. The resident was left in the lobby by the Grievant unattended for approximately one and one-half hours and was not taken on the outing with the other residents. The witness testified that the resident was in danger because he needs staff with him if he is off the secured unit due to the nature of his diagnosis. The witness testified that the Grievant's negligence represented a Group II offense under the Standards of Conduct. She also testified that the Grievant's behavior constituted resident "neglect" as set out in section 11.2 of Chapter 11 of the Standards of Conduct. The definition of "neglect" at section 11.2 includes failure by an individual to provide care necessary to the safety of a person receiving care. The witness pointed out that section 11.2 states that the Agency has "zero" tolerance for acts of abuse or neglect and that the standards normally require a Group III written notice.

The Grievant testified that he simply forgot the resident. However, the Grievant did testify that he told the receptionist in the lobby that he was leaving the resident there and would be right back to take the resident to the activity van.

The receptionist testified that she did not recall the Grievant speaking to her regarding the resident.

In that the Grievant did not dispute the act of neglect in leaving the resident in an unsecured area, the hearing officer ruled that evidence of retaliation was not relevant and the Grievant did not proceed with evidence in that regard.

The Grievant pointed out that on his recent performance evaluation as "activities assistant" the Activities Director (the Agency's witness) stated on September 25, 2008 that the Grievant was a "great asset to the activities department." The Grievant also testified as to his great respect for the residents and his attempts to serve the residents well.

### **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).

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.

To establish procedures on Standards of Conduct and Performance 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 to provide appropriate corrective action.

The Agency Exhibit at Tab 2, Chapter 11: Standards of Conduct and Resident Abuse make clear that the Grievant's neglect is at least at Group II offense, and could be classified as a Group III offense. The evidence is undisputed, and in fact admitted by the Grievant that a resident with Alzheimers, who is normally kept in a secured area, was left by the Grievant in an unsecured area for approximately one and half hours.

The Agency has demonstrated by a preponderance of the evidence that the Grievant's neglect was of such a serious nature that it should be considered at least a Group II violation. The Agency further demonstrated that the Group II written notice issued on June 11, 2009 was a second group II written notice, the first having been issued on February 25, 2009. The two Group II notices support termination of employment.

In that the Grievant admitted that the Grievant simply forgot the resident and left the resident in an unsecured area, any claim that termination was an act of retaliation cannot be supported.

## **DECISION**

The Agency's termination of the Grievant 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 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 Capital Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (8-4) 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 5 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes **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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John R. Hooe, III  
Hearing Officer

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

**DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
ON  
REQUEST TO RECONSIDER OR REOPEN**

**In the matter of : Case No. 9171**

Hearing Date: September 11, 2009  
Original Decision Issued: September 22, 2009  
This Decision Issued: October 15, 2009

**DECISION**

The Hearing Office on October 6, 2009 received from the Grievant a letter dated September 30, 2009 requesting that the Hearing Officer reconsider the original decision or reopen the hearing for additional evidence to be presented.

In that the Grievant did not dispute that his act of neglect occurred and was an act for which the Agency could terminate his employment either as a first Group III offense or as a second Group II offense, the Hearing Officer hereby DENIES the Grievant's request to reconsider the original decision or reopen the hearing for additional evidence. The Grievant's request is not based on newly discovered evidence.

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John R. Hooe, III  
Hearing Officer



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

**DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER**

**UPON REMAND**

**In the matter of : Case No. 9171**

Remand Hearing Date: April 29, 2010  
Remand Decision Issued: May 26, 2010

**PRELIMINARY MATTERS**

In a decision dated September 22, 2009, the Hearing Officer upheld the disciplinary action and termination of employment imposed by the Department of Veteran Services. By Compliance Ruling Number 2010-2449, dated March 10, 2010, the Director remanded the case to the Hearing Officer to reopen the hearing for the limited purpose of allowing the Grievant to present evidence (and the Agency to present rebuttal evidence) relevant to mitigating circumstances, particularly evidence of an improper motive for the disciplinary action, such as retaliation or discrimination, or the inconsistent application of discipline among employees.

During a telephone conference conducted on March 31, 2010, the parties agreed to conduct the hearing in this matter on Thursday, April 29, 2010.

**APPEARANCES**

Grievant  
Representative for Agency  
Five Witnesses called by the Grievant

**ISSUES**

1. Should mitigating factors result in less severe discipline?
2. Did the Agency retaliate against the Grievant by terminating the Grievant's employment?

### **EXHIBITS**

No additional exhibits were introduced at the Remand Hearing.

### **FINDINGS OF FACT**

The Grievant called five witnesses and directed questions to each witness regarding the witness' knowledge of any improper motives for the disciplinary action taken against the Grievant, such as retaliation or discrimination, or the inconsistent application of discipline among employees. None of the Grievant's five witnesses recalled any acts of retaliation against the Grievant. In addition, none of the five witnesses were aware of any inconsistent treatment of employees who committed the same or a similar violation as that committed by the Grievant. None of the five witnesses testified as to any action on the part of the Agency that indicated improper motives in disciplining and terminating the Grievant.

Upon the conclusion of the Grievant's case, the Agency called the Grievant to testify. When asked to describe what constituted the retaliation alleged by the Grievant, the Grievant said it was the act of a fellow employee "threatening to write me up." However, the fifth witness called by the Grievant stated that the employee in question did not "write up" the Grievant and further stated that she was not aware of any retaliation against the Grievant by that particular employee.

### **APPLICABLE LAW AND OPINION**

For a Hearing Officer to mitigate a disciplinary action, EDR's Rules For Conducting Grievance Hearings require a finding that, upon consideration of the record evidence, the Agency's discipline exceeded the limits of reasonableness.

The Rules specifically provide that among the grounds for mitigating discipline are a showing by the Grievant of an improper motive for the disciplinary action, such as retaliation or discrimination, or the inconsistent application of discipline among employees. Section VI (B)(1).

It is the Hearing Officer's opinion that the Agency's discipline did not exceed the limits of reasonableness and that no mitigating circumstances exist. The Grievant presented no evidence of an improper motive for the disciplinary action.

### **DECISION**

The disciplinary action of the Agency is upheld.

### **APPEAL RIGHTS**

Pursuant to Section 7.2(d) of the Grievance Procedure Manual, a Hearing Officer's original decision becomes the final hearing decision once all time of request for administrative review have been decided. Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the Circuit Court of the jurisdiction of which the grievance arose. Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.

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John R. Hooe, III  
Hearing Officer

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

**DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER**

**In the matter of : Case No. 9171**

Remand Hearing Date: April 29, 2010  
Remand Decision Issued: May 26, 2010  
This Decision Issued: July 22, 2010

**DECISION**

The Hearing Officer on June 10, 2010 received from the Grievant a letter dated June 5, 2010 stating that the Grievant was “appealing” the Hearing Officer’s Remand Decision. On July 19, 2010 the Hearing Officer was advised by the Division of Hearings that the Grievant’s letter should be treated as a request to reconsider.

The Hearing Officer hereby DENIES the Grievant’s request to reconsider the Decision on Remand. The Hearing Officer does not agree with the Grievant’s assertions in his letter dated June 5, 2010 that the Hearing Officer reached incorrect legal conclusions.

Contrary to the assertion in the Grievant’s letter that there was no mention in the Remand Decision of the “exceeds the limits of reasonableness standard”, the Remand Decision expressly states on page 3 “it is the Hearing Officer’s opinion that the Agency’s discipline did not exceed the limits of reasonableness and that no mitigating circumstances exist.”

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John R. Hooe, III  
Hearing Officer

July 30, 2010

RE: **Grievance of [Grievant] v. Department of Veterans Services**  
**Case No. 9171**

Dear [Grievant]:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
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.

In each instance where a request is made to this Agency for an administrative review based on inconsistent application or misinterpretation of policy, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In your original request for an administrative review dated October 3, 2009, you stated, "I am not 100% sure if I can cite one particular mandate in state or agency policy or several but I am sure that the decision to terminate me was tainted due to mitigating circumstances as defined in the EDR rules as well as other state and agency policies that were enforced against me but not imposed on other employees, there [sic] infractions were simply ignored." In a subsequent request for administrative reviews by this Department, you stated that you based your appeal "...on what appears to be non-compliance with State policy in regards to the existence of mitigating circumstances as detailed in the grievance procedure, in my case, chiefly inconsistent application of disciplinary action of which

several were verified as well as retaliation that was on going and also verified...” You also indicated that VVCC management officials applied disciplinary actions inconsistently.

In our opinion, your request does not identify any human resource management policy, either state or agency, that the hearing officer violated in making his decision. Rather, your concerns are evidentiary in nature and are beyond the authority of the DHRM to address. In addition, it appears that you are disagreeing with the evidence the hearing officer considered, how he assessed that evidence, and the resulting conclusions he drew. We must therefore respectfully decline to honor your request to conduct the review.

Sincerely,

Ernest G. Spratley