

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 10/19/09; Decision Issued: 11/06/09; Agency: DBHDS; AHO: John R. Hooe, III, Esq.; Case No. 9189; Outcome: No Relief – Agency Upheld in Full; **Judicial Review: Appealed to Circuit Court in Roanoke County; Outcome pending.**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of : Case No. 9189

Hearing Date: October 19, 2009
Decision Issued: November 6, 2009

PRELIMINARY MATTERS

During the pre-hearing telephone conference conducted on September 18, 2009 between the Hearing Officer, the Grievant and her representative, and the representative of the Agency, it was agreed that the hearing in this matter would be conducted on Tuesday, October 6, 2009. It was further agreed during the pre-hearing telephone conference, and set out in the Hearing Officer's letter dated September 23, 2009, that if the Grievant needed the Hearing Officer to order the attendance of witnesses to advise the Hearing Officer immediately and further to advise if an Order for the Production of Documents is needed.

During the second pre-hearing telephone conference conducted on October 1, 2009 between the Hearing Officer, the Grievant's representative and the representative for the Agency, it was agreed that the hearing would be rescheduled to be conducted on Monday, October 19, 2009 commencing at 10:00 a.m. The hearing was rescheduled at the request of the Grievant to serve the ends of justice. The Grievant's representative waived the requirement that the written decision be issued by the Hearing Officer no later than thirty-five (35) calendar days after September 16, 2009 being the effective date of the Hearing Officer's appointment.

By letter dated October 1, 2009 from the Grievant's representative, the Grievant requested that the Hearing Officer issue orders for the attendance of witnesses and that orders be issued for the Production of Documents. As requested, the Hearing Officer issued the orders for the appearance of witnesses and the order for production of documents.

APPEARANCES

Grievant
Representative for Grievant
Representative for Agency
Four Witnesses for Agency
Six Witnesses for Grievant

ISSUES

1. Did the Grievant commit the offense set out in the written notice, namely: that she knowingly secluded a patient in the patient's room in violation of Human Rights Regulations, and in violation of policies and procedures? If so, what was the appropriate level of disciplinary action for the conduct at issue?
2. Should mitigating factors result in less severe discipline?

EXHIBITS

The Agency Exhibits admitted into evidence were the following:

- Ex. 1 - Investigator's summary
- Ex. 2 - Witness statement
- Ex. 3 - Witness statement
- Ex. 4 - Witness statement
- Ex. 5 - Policy No. 06.011-Continuous Support of Observation
- Ex. 6 - Policy No. 01.56-Seclusion, Restraint, Use of
- Ex. 7 - Competency assessment 2008/Test
- Ex. 8 - Patient admission history
- Ex. 9 - Departmental instruction 201 (RTS) 03
- Ex. 10 - Standards of Conduct
- Ex. 11 - Suspension letter dated July 1, 2009
- Ex. 12 - Written Notice; Group III-Termination dated July 8, 2009
- Ex. 13 - Grievant's form A dated July 28, 2009

The Grievant introduced a single Exhibit as follows:

- Ex. A - Letter from [practice] dated August 6, 2009

FINDINGS OF FACT

The Grievant timely appealed her termination which resulted from the Group III Written Notice issued on July 8, 2009.

The Agency's first witness was the Lead Aide working in Grievant's area at the time the events occurred. The witness had worked for twenty-three years at the facility, had worked together with the Grievant for seven years and had no prior involvement with any complaints against the Grievant. The witness testified that on July 1, 2009 she heard a geriatric resident yelling "help, help, help." The witness testified that she then observed the resident standing inside the doorway of the resident's room and that the Grievant was blocking the doorway sitting in a wooden chair with one foot extended across the doorway and resting on the door jam. She testified that if the resident wanted to exit the room it would

have been necessary for the resident to step up and over the Grievant's leg which was blocking the doorway. The witness testified that the Grievant did not whistle for help, whistling being the normal procedure if help is required in dealing with a resident. The witness further testified that five to ten minutes later she reported the event as required by policy.

The Agency's first witness further testified that all employees, including the Grievant, are trained in TOVA (Therapeutic Options in Virginia) which prohibits seclusion of a resident.

The Agency's second witness testified that she has been a registered nurse for twenty years and has worked at the facility for seven months during which time she has supervised the Grievant for six months. She testified that on July 1, 2009 she was the charge nurse on the "acute geriatric ward" when the events occurred. She testified that she saw the Grievant blocking the resident's doorway but did not observe the Grievant's foot resting on the door jam. She testified that when she arrived at the room the Grievant and the first witness were talking. She testified that the Grievant told her that she was trying to keep the resident in her room because the resident was upset. The witness further testified that in any event of seclusion, it is policy that an abuse investigation must occur. She also testified that if there was a finding of abuse or neglect an employee would be dismissed.

The Agency's second witness also referred to Agency Exhibit 7. On page 4 of the 2008 restraint test taken by the Grievant, question 11 was correctly answered by the Grievant, namely "Seclusion is the involuntary placement of a patient in a room with the door blocked, locked or secured in a manner that prevents the individual from leaving." The witness further stated when asked by the Grievant's representative if the resident could have stepped over the Grievant's leg, that the resident would have been in danger of falling. She also testified that the resident said that she wanted to get out of the room.

The Agency's third witness was the person who investigated the events. She stated that she has worked at the facility for ten years working in the areas of staff development, investigation and TOVA instruction. She testified that when she asked the Grievant what happened the Grievant first wrote the statement contained as Agency's Exhibit 4, which statement makes no reference to blocking the door with a chair or with her legs. The witness pointed out that the Grievant's written statement only mentions that she put her hand on the door so that the resident could not slam the door. She testified that when the Grievant was asked specifically about her legs blocking the door, the Grievant stated that her legs were out straight but that at no time were her feet up on the wall or pressed against the door jam. The investigator further stated that the Grievant made no mention of retaliation and that if she had it would have been included in the investigator's written report. Further, the witness testified that the Grievant never brought up any medical issues or gave any medical explanations for

her conduct.

The Agency's fourth witness was the Chief Nurse Executive whose role at the facility is to design and implement policy. She referred to Agency Exhibit 6 and Agency Exhibit 9 which clearly require "least restrictive care" and prohibit actions or neglect which "abuse" or "punish" residents. She testified that in considering the Grievant's case, mitigating factors were considered. She testified that the Grievant had worked in another part of the facility but over a period of time problems developed in her relationship with residents resulting in the residents petitioning to have the Grievant moved from the Adult Unit where the Grievant was working. The witness testified that as a result of the Grievant's problems on the adult unit the Grievant was moved to the Acute Geriatric Unit, in order to give the Grievant "an opportunity to succeed in a less stressful environment." She further testified that the Grievant refused to sign contract terms which were required before the Grievant could be moved back to the Adult Unit.

Finally, the witness testified that she checked with the central office in Richmond to confirm that termination was consistent with state policy and procedures, namely "zero tolerance" for the Group III offense (Agency Exhibit 10). She further testified that she would recommend termination in any event of "abuse", regardless of an employee's past record.

The Grievant testified that when she was approached by the Agency's investigator she did not know that her blocking the door was the point of the investigation. She testified that she thought the investigation was about the resident accusing the Grievant of hitting the resident. The Grievant testified that the resident was brushing her teeth when the Agency's first witness came by and told the Grievant to move from the doorway. When the Agency's first witness left, the resident tried to slam the door and yelled "help, help." The Grievant testified that she did not have time to whistle before the Agency's witnesses responded.

The Grievant further testified that she was not in the doorway, that she was in the hallway in her chair. She demonstrated to the Hearing Officer by positioning herself with relation to the doorway leading into the hearing room. The Grievant further testified that after the Grievant reviewed the investigator's report she asked the investigator to include the Grievant's medical information in the report. The Grievant testified that she was not provided with "handoff" information about the resident on the day the events occurred.

The Grievant's first witness was the lead CNA on the second floor and the TOVA instructor. She testified that in the past the Grievant's work was good and that she had received a commendation.

The Grievant's second witness was a CNA with TOVA training. The witness demonstrated that the Grievant's chair was in the doorway and stated that the Grievant's legs "might have been stretched out." The witness further testified that she had never seen the Grievant abuse a patient, that "handoff" information is given routinely but did not know if the

Grievant had received “handoff” information regarding the resident on the day of the events.

The Grievant’s third witness was the Unit Manager and has worked at the facility for twenty-eight years. She testified that she has been a supervisor of the Grievant since the Grievant came to the Acute Geriatric Unit. She stated that in June of 2007 the Grievant had had problems and that the Grievant had filed pervious grievances.

The Grievant’s fourth witness was the facility director. When asked by the Grievant’s representative if he asked the Grievant “If we make this a Group II what would you do?” the witness stated that he did not recall making such a statement. He confirmed that he would terminate in all instances of a founded group III abuse charge regardless of mitigating circumstances.

The Grievant’s fifth witness did not testify as to any information relevant to this matter.

The Grievant’s sixth and final witness is the Grievant’s mother who confirmed that the Grievant had suffered a knee injury falling on ice, that the Grievant suffers from spina bifida and that the Grievant’s legs go to sleep.

In addition to the Grievant’s testimony and the testimony of the witnesses called by the Grievant, a proffer was received by the Hearing Officer that an additional witness who did not appear would have testified that he saw the resident in the hall the evening in question and that the Grievant was following the resident in the hall in an appropriate manner.

At the conclusion of testimony, the Agency representative made a closing statement and the Grievant’s representative made a closing statement.

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 10, Standards of Conduct, Policy: 1.60 provide at page 8 the following:

Group III Offense:

Offenses in this category include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws.

The Agency Exhibit 6, Policy No. 01.56, Seclusion, Restraint, Use Of states:

Policy:

To provide treatment that is the least restrictive, most effective intervention consistent with patient health and safety needs, and help create a physical and social environment that limits restraint use. Seclusion is not an intervention used at (the facility).

It is not disputed that the Grievant was made aware of the relevant policies and procedures related to the use of seclusion. Agency Exhibit 7 demonstrated that the Grievant knew that the involuntary placement of a patient in a room with the door blocked in a manner that prevents the individual from leaving is considered seclusion.

Agency Exhibit 9, Departmental Instruction 201 (RTS) 03, Reporting And Investigating Abuse And Neglect defined Abuse as follows:

Abuse means any act or failure to act....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...examples of abuse include but are not limited to, acts such as...use of more restrictive or intensive services or denial of services to punish the person or that is not consistent with individualized services plan.

The Agency has demonstrated by preponderance of the evidence that the Grievant's action was in violation of the Standards of Conduct, policies and procedures of the Agency, that such action constituted "seclusion" and that such action on the part of the Grievant constituted "abuse." The Agency further demonstrated that the Group III written notice was thus justified and due to the "zero tolerance" policy regarding patient abuse, termination of employment was necessary despite any mitigating factors in favor of the Grievant.

The Grievant's statements to the investigator and her testimony at hearing regarding her conduct on the day in question, July 1, 2009, were inconsistent and not credible. It was curious that even though the Grievant testified and demonstrated to the Hearing Officer that she was not blocking the doorway to the resident's room by sitting in a chair in the doorway, the second witness called by the Grievant demonstrated that the Grievant was sitting in the chair in the doorway and that the Grievant's legs "might have been stretched out."

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. 14th Street, 12th 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, Department of Employment Dispute Resolution Main Street Centre 600 East Main Street, Suite 301 Richmond, VA 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 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.

John R. Hooe, III
Hearing Officer