

Issue: Group III Written Notice with Termination (patient neglect); Hearing Date: 11/04/09; Decision Issued: 11/24/09; Agency: DBHDS; AHO: John V. Robinson, Esq.; Case No. 9219; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9219

Hearing Officer Appointment: October 13, 2009

Hearing Date: November 4, 2009

Decision Issued: November 24, 2009

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge termination of his employment effective August 7, 2009, pursuant to a Group III Written Notice issued by Management of the Department of Behavioral Health and Developmental Services as described in the Grievance Form A dated September 3, 2009. At the hearing, in closing argument, the Grievant stated that he is no longer seeking his position back or reinstatement but still wants the Group III Written Notice removed from his record.

The parties duly participated in a first pre-hearing conference call scheduled by the hearing officer on October 16, 2009 at 9:00 a.m. The Grievant, the Department's advocate and the hearing officer participated in the call.

Following the first pre-hearing conference, the hearing officer issued a Scheduling Order entered on October 17, 2009 (the "Scheduling Order"), which is incorporated herein by this reference.

In his Form A and in the hearing, the Grievant asserts that he was not trained at all concerning the particular techniques for securing wheelchairs on the wheelchair-type of bus at issue in this proceeding.

At the hearing, the Agency was represented by its advocate and the Grievant represented himself. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also

received various documentary exhibits of the parties into evidence at the hearing, namely Agency exhibits 1-15 and Grievant's exhibits A and B¹.

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant was a Direct Service Associate ("DSA") II, previously employed by the Agency before the termination of his employment by the Agency.
2. On April 27, 2009, the Grievant was working as a DSA II at a mental health institution (the "Facility") in which he was formerly employed.
3. On April 27, 2009, three (3) staff members, including the Grievant, transported three (3) patients, including R, to a local mall for a pleasant evening.
4. The patient's were all wheelchair-bound and accordingly a wheelchair bus was utilized for transportation.
5. Both on the way to the Mall, which passed without incident, and on the return trip to the Facility from the Mall, the Grievant was primarily responsible for securing the patients' wheelchairs in the bus using the Facility's mandated four (4) point strapping technique (the "Technique"). AE 15.
6. At approximately 8:00 p.m. on April 27, 2009 as the bus turned onto a road exiting the Mall, R's wheelchair tipped over on its right side, causing a cut and other injuries to R's face and head. AE 6.

¹ References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number.

7. R (who has since recently passed away for other unrelated reasons) was non-verbal and received first aid from the staff on the bus and was also treated at the Facility's medical clinic.
8. The Grievant did not follow Agency and Facility policies for wheelchair bus and van operating procedures:

“all wheelchairs must be secured to the bus flooring by safety locks before the bus is put into motion. The escort staff is responsible for seeing that the wheelchairs are secured to the floor by safety locks, four point wheelchair tie downs, and lap and shoulder harnesses.” (AE 1).
9. The Grievant failed to properly secure the straps firmly to the floor while attempting to use only three (3) straps instead of the required four (4).
10. The Grievant admitted to using only three (3) floor straps, knowing that it was his responsibility to secure the wheelchair. During closing argument, the Grievant apologized a number of times that R was hurt.
11. The Grievant received initial preservice and ongoing training concerning the Technique and the proper anchoring of a wheelchair to the bus floor. AE 15.
12. The Grievant was issued a Group III Written Notice on August 7, 2009 with termination of employment effective August 7, 2009 for patient/client neglect. AE 14.
13. At the time of termination, the Grievant had an active Group II Written Notice for patient/client neglect. Management had expressly mitigated this offense down to Group II offense, with a 10-day suspension, from a possible Group III offense with termination. AE 13.
14. The investigation conducted by the Department's certified investigator was thorough and impartial. The conclusions reached by the investigator were reasonable.
15. The testimony of the Agency witnesses was credible and consistent. The demeanor of such witnesses was open, frank and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. 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. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances 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. AE 7. The Standards of Conduct (the "SOC") provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC 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.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

Facility Policy mirrors Departmental Instruction 201. *See* AE 10 and 15. Pursuant to Departmental Instruction 201 and consistent with the SOC, the Grievant’s neglect could clearly constitute a Group III offense, as asserted by the Department.

Group III Offense:

Offenses in the 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.

...

- One Group III Offense normally should result in termination unless there are mitigating circumstances.

AE 11.

“201-1 Background

[The Department] has a duty to provide individuals receiving services in state facilities with a safe and secure environment. The Department has zero tolerance for acts of abuse or neglect. Therefore, whenever an allegation of abuse or neglect is made, the Department shall take immediate steps to protect the safety and welfare of individuals who are the victims of the alleged abuse or neglect, conduct a thorough investigation pursuant to Central Office direction, and take any action necessary to prevent future occurrences of abuse and neglect.

201-2 Purpose

The purpose of this Departmental Instruction is to establish policies, procedures, and responsibilities for reporting, responding to, and investigating allegations of abuse and neglect of individuals receiving services in Department facilities.”

Departmental Instruction 201-3 defines neglect as follows:

Neglect means failure by an individual, program, or facility responsible for providing services to provide nourishment, treatment, care, goods or services necessary to the health, safety or welfare of a person receiving care or treatment for mental illness, mental retardation or substance abuse.

Departmental Instruction 201-9 further provides:

In consultation with the Office of Human Resources Development and Management in the Central Office, the facility director shall issue a Group III Written Notice and terminate any employee found to have abused or neglected an individual in a state facility unless, based on established mitigating factors, the facility director determines that disciplinary action warrants a penalty less than termination.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's advocate that the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group III offense.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant, including his service to the Department. However, the Department also had to account for the active Group II Written Notice also for patient/client neglect described above, which had already been mitigated.

Accordingly, because the Department assessed mitigating factors, the Rules only allow this hearing officer to mitigate the discipline further if this hearing officer upon consideration of the evidence finds that the Department's discipline exceeded the limits of reasonableness.

While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered many factors including those specifically referenced above and all of those listed below in his analysis:

1. the Grievant's service to the Agency;
2. the Grievant's volunteering for the Mall assignment; and
3. the hearing officer also agrees with the Grievant that the other two (2) staff on the bus could and should have checked that the wheelchairs were properly anchored. However, the hearing officer does not agree with the Grievant that he has been subject to disparate treatment by Management. Concerning this disparate treatment/scapegoat argument, the Grievant fails to recognize that he assumed primary responsibility for securing R's wheelchair and he also failed to prove that under any such circumstances, any such offending DSA was not disciplined. *See*, EDR Ruling No. 2010-2368 (October 27, 2009).

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense of neglect was very serious. Clearly, the mitigation decision by the Department was within the permissible zone of reasonableness.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful

not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

DECISION

The Department has sustained its burden of proof in this proceeding and the action of the Department in issuing the Group III Written Notice and in terminating the Grievant's employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Department's action concerning the Grievant is hereby upheld, having been shown by the Department, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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, Main Street Centre, 600 East Main Street, Suite 301, Richmond, Virginia 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 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.

ENTER:

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).