

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 08/20/10; Decision Issued: 08/24/10; Agency: DBHDS; AHO: William S. Davidson, Esq.; Case No. 9376; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 9376

Hearing Date: August 20, 2010  
Decision Issued: August 24, 2010

**PROCEDURAL HISTORY**

The Grievant was issued a Group III Written Notice on May 27, 2010 for:

Client Abuse/Neglect. Grievant was reported by the hospital-[center] for being asleep when sitting one to one with an individual which resulted in the individual pulling out G-Tube.<sup>1</sup>

Pursuant to the Group III Written Notice, the Grievant was terminated on May 28, 2010.<sup>2</sup> On June 2, 2010, the Grievant timely filed a grievance to challenge the Agency's actions.<sup>3</sup> On July 19, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On August 20, 2010, a hearing was held at the Agency's location.

**APPEARANCES**

Agency Representative  
Advocate for Agency  
Grievant  
Witnesses

**ISSUE**

1. Did the Grievant commit abuse and/or neglect to her patient by falling asleep and allowing him to remove his G-Tube?

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<sup>1</sup> Agency Exhibit 1, Tab 1, Page 1

<sup>2</sup> Agency Exhibit 1, Tab 1, Page 1

<sup>3</sup> Agency Exhibit 1, Tab 1, Page 3

## **AUTHORITY OF HEARING OFFICER**

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

## **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") §5.8. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.<sup>4</sup> However, proof must go beyond conjecture.<sup>5</sup> In other words, there must be more than a possibility or a mere speculation.<sup>6</sup>

## **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Agency provided the Hearing Officer with a notebook containing six (6) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant did not provide the Hearing Officer with a notebook. However, the Grievant stated that the documents that she would have entered were contained within the Agency's notebook and she would rely on those specific documents in Agency Exhibit 1.

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<sup>4</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>5</sup> *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>6</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

In this matter, the Grievant was a Direct Support Associate for the Agency.<sup>7</sup> In that capacity, she provided one on one support for clients of the Agency. One on one support requires that she work with only one client, that she maintain visual contact with that client continuously during her work hours and that she always be within arm's reach of that client. During the early morning hours of May 5, 2010, the Grievant was providing such one on one support for a client at the [Center]. Simultaneously, there was a Registered Nurse at that same location who was also attending to the client, but not on a one on one basis. The nurse was an independent contractor and not an employee of the Agency. At 6:25a.m. on the morning of May 5, 2010, the nurse reported to another employee of the Agency that the Grievant had been sleeping when the nurse entered the client's room at 2a.m.<sup>8</sup> The conversation, which this employee of the Agency had with the nurse, is memorialized in an e-mail which he sent to his supervisor.<sup>9</sup> In the e-mail, the fellow employee reports that the nurse stated to him as follows:

- 2am: RN enters room to check on (IS-E.B.). At this point RN noticed [Grievant's] eyes closed. RN reports that [Grievant] did not speak or acknowledge that she was in the room the whole time she attended to E.B.
- 2:50am: RN entered room again to notice [Grievant's] eyes closed. RN reports that [Grievant] did open her eyes, spoke and remained alert while she was attending to E.B.
- 3am: RN received page from (IS) room. Upon entering noticed that E.B. removed his G-Tube.<sup>10</sup>

Eventually this matter reached the desk of the Administrative Assistant to the Facility Director who then forwarded it to the Institutional Investigator. The Investigator never talked to the nurse who reported the incident. The Investigator testified before the Hearing Officer and a summary of her investigation was contained in the Agency's evidence notebook.<sup>11</sup> The Investigator had no knowledge regarding how a G-Tube was inserted and what it would take for a client to remove a G-Tube. The Investigator testified that the Grievant had told her that the client kicked the G-Tube out with his knee as he moved around in his bed.

The Agency next called the Program Director as a witness. This witness testified that the client was a very active person. She further testified that a one on one sitter must sit within

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<sup>7</sup> Agency Exhibit 1, Tab 3, Page 1

<sup>8</sup> Agency Exhibit 1, Tab 2, Page 4

<sup>9</sup> Agency Exhibit 1, Tab 2, Page 4

<sup>10</sup> Agency Exhibit 1, Tab 2, Page 4

<sup>11</sup> Agency Exhibit 1, Tab 1, Pages 1 through 4

arm's length of the client. She testified that she tells her employees that, if they become tired, they should get up and walk around and/or get a drink of water. Of course, that probably makes it impossible to stay within arms length of their client. She testified that she was aware that G-Tubes had been pulled out by other clients. The Agency did not call as a witness the nurse who reported this matter, nor was the Agency able to call as a witness the person to whom she made the report and who was the author of the e-mail of May 5, 2010, summarizing the nurse's statements to him. The Agency attempted to contact this witness telephonically, but no one answered the phone on two (2) different occasions during the hearing. The Hearing Officer notes that the Agency did not request the Hearing Officer to compel any witnesses to be present.

The Grievant called as a witness a Licensed Practical Nurse who has worked for the Agency for many years. This witness testified that the particular client in question has pulled his G-Tube out on occasion. She estimated that the G-Tube has come out three (3) to four (4) times per year. She further testified that, if the water balloon which holds the G-Tube leaks, they can fall out of their own accord. She testified that, in the normal course, such a client would be sleeping with pajamas on and would be under a sheet and/or a blanket. The G-Tube is under all of these.

Finally, the Grievant herself testified and categorically stated that she was not asleep and she felt the client had removed the G-Tube with his knee as he was moving about in the bed. This is consistent with her written statement which is found in Agency Exhibit 1.<sup>12</sup> The Grievant further testified that the client did have pajamas on and was under a sheet. The G-Tube was covered by both the pajamas and by the sheet.

In this matter, the Agency's entire case rises and falls on the conversation that the nurse, not an employee of the Agency, had with an employee of the Agency. Neither the nurse, nor the person with whom she had the conversation, testified before the Hearing Officer. The Investigator, who did testify before the Hearing Officer, did not personally question the nurse. Accordingly, the Agency's evidence is at best, hearsay several times removed. The Grievant, who did testify personally, vehemently denied that she was ever asleep. It is instructive that the nurse never indicated that she attempted to wake the Grievant at the 2a.m. time slot. It is further instructive that the nurse did not report that the G-Tube was unattached at either the 2a.m. time slot or the 2:50a.m. time slot. Assuming that the nurse was performing her duties in this matter, the Hearing Officer can only conclude that the G-Tube was removed between 2:50a.m. and 3a.m. The nurse reported that the Grievant was awake and alert at 2:50a.m.

In this matter, the Agency has not even met its burden of proof to prove by a preponderance of the evidence that the Grievant was asleep. The Agency relies on a nurse's statement to an employee who summarized that statement into an e-mail and ultimately that e-mail became the sole basis for an Investigator's finding. The Hearing Officer had direct and believable testimony from the Grievant that she was not asleep. The Hearing Officer would have liked to hear testimony from the nurse as to why she felt it appropriate to not awaken the Grievant at 2a.m. The Hearing Officer would like to have heard from the nurse as to whether or not she visually saw that the G-Tube was in place at 2a.m. and 2:50a.m. The Hearing Officer would like to have heard from the nurse as to whether or not the G-Tube was visible or if it was covered by pajamas and a sheet. The Hearing Officer would also like to have heard from the

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<sup>12</sup> Agency Exhibit 1, Tab 2, Page 8

nurse as to how difficult it would be for a client to remove a G-Tube. For whatever reason, the Agency chose not to produce the nurse or the person to whom she made her report.

### **MITIGATION**

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the Agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution...”<sup>13</sup> Under the Rules for Conducting Grievance Hearings, “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. If the Hearing Officer mitigates the Agency’s discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

### **DECISION**

For reasons stated herein, the Hearing Officer finds that the Agency has not borne its burden of proof regarding this matter. Accordingly, the Hearing Officer orders that the Grievant be reinstated to her former position or, if such position is occupied, to an objectively similar position. Further, the Hearing Officer orders that the Agency award to the Grievant full back pay from May 28, 2010 until such time as the Agency complies with the Hearing Officer’s Order to reinstate the Grievant. The Hearing Officer orders that the Agency restore all benefits and seniority to the Grievant.

### **APPEAL RIGHTS**

You may file an administrative review request 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.

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<sup>13</sup>Va. Code § 2.2-3005

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 to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
600 East Main Street, Suite 301  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party and to the EDR Director. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>14</sup> You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>15</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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William S. Davidson  
Hearing Officer

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<sup>14</sup>An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>15</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.