

Issue: Group III Written Notice with Termination (patient/inmate neglect); Hearing Date: 09/17/10; Decision Issued: 09/21/10; Agency: DBHDS; AHO: William S. Davidson, Esq.; Case No. 9394; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9394

Hearing Date: September 17, 2010
Decision Issued: September 21, 2010

PROCEDURAL HISTORY

The Grievant received a Group III Written Notice on June 15, 2010 for:

[Grievant] was assigned to one-to-one monitoring of a resident. While the resident was in one-to-one visual monitoring. [Grievant] allowed the resident to retrieve the soda can that [Grievant] earlier discarded in the trash can and return to his resident room. The resident then began inappropriate sexual behavior. [Grievant] failed to intervene and instead closed the door to the room. The resident then tore the can in half and threatened self mutilation. [Grievant] has a previous finding of Patient Neglect. He allowed a resident fight to progress to resident injury on 4/14. He received Notice of Poor Performance for the April incident and was reinstated on a supervisory plan. Two months later, [Grievant] again allowed a resident's safety to be compromised. After two findings of Neglect and Abuse this Direct Care Associate III can not remain employed. ¹

Pursuant to the Written Notice, the Grievant was terminated on June 15, 2010. ² On June 29, 2010, the Grievant timely filed a grievance to challenge the Agency's actions. ³ On August 16, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On September 17, 2010, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Grievant
Witnesses

¹ Agency Exhibit 1, Tab A, Page HO-1

² Agency Exhibit 1, Tab A, Page HO-1

³ Agency Exhibit 1, Tab A, Page HO-2

ISSUE

1. Did the Grievant neglect the resident to whom he was assigned and did he compromise the resident's safety?

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.⁴ However, proof must go beyond conjecture.⁵ In other words, there must be more than a possibility or a mere speculation.⁶

FINDINGS OF FACT

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

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

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

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 nine (9) tabbed sections (labeled A-I). The Grievant objected to the Exhibits contained at Sections I(2) through I(5). Pursuant to that objection, the Agency's notebook was accepted in its entirety, with the exception of the objected pages. The Hearing Officer stated that, to the extent that the Agency chose to rely on those Exhibits through a particular witness, the Hearing Officer would make a ruling at such time as the Agency called the witness who was to use those pages in his or her testimony. During the course of the hearing, the Agency never relied upon those pages with regards to any witness testimony.

The Grievant provided the Hearing Officer with a notebook containing two (2) tabbed sections, but the Grievant decided to rely on the Agency's notebook as it contained all of the written evidence which the Grievant chose to rely upon during the course of the hearing.

Neither the Grievant nor the Agency introduced as evidence the Group III Written Notice nor the Grievance Form A where the Grievant actually initiated his grievance. The Hearing Officer received those documents when he was appointed to this matter and has, for purposes of this Decision, inserted the five (5) pages that represent the Written Notice and the Grievance Form A under Exhibit A of Agency Exhibit 1. They are labeled as pages HO-1 through HO-5. The Hearing Officer notes that neither the Agency nor the Grievant raised any objections to the failure of the Agency to provide as an Exhibit the Written Notice nor the failure of the Grievant to provide Grievance Form A.

Immediately after the commencement of the hearing, the Hearing Officer discussed with both the Grievant and the Agency certain stipulations of fact. Both the Grievant and the Agency agreed to stipulate the following facts in this matter. On June 2, 2010, the Grievant reported to work and he was assigned to Unit 4A. When the Grievant reported to work, he had a metal soda can which he deposited into a trash can within Unit 4A. During the course of the day, the resident in question, hereinafter ("Mr. Smith"), removed the soda can and secreted it on his body and then transferred it to his room. Some time later that day, Mr. Smith, with the door to his room fully open, commenced masturbating in his room. He was fully visible to anyone who looked into his room, including the Grievant and another female employee. Both the Grievant and the other female employee attempted to redirect Mr. Smith and have him stop masturbating. Neither of them was successful. The female employee asked the Grievant to "say something to Mr. Smith or close his door so I don't have to watch what he is doing."⁷ After being unable to redirect Mr. Smith, the Grievant closed the door to his room. Shortly thereafter, the Grievant reopened the door to Mr. Smith's room and saw him with the metal soda can. Mr. Smith stated that he was going to use the can to cut himself. The Grievant took the can away from Mr. Smith and, as a result, Mr. Smith was unable to harm himself. Both the Agency Representative and the Grievant agreed to these stipulations.

⁷ Agency Exhibit 1, Tab B, Page B(25)

On June 10, 2010, the Agency's Abuse and Neglect Investigator produced a Report regarding this incident.⁸ Pursuant to his investigation, on June 3, 2010, the Investigator interviewed the Grievant. The summary of the Grievant's statement is contained in the Investigator's Report at Agency Exhibit 1, Tab B, Pages B(19) and B(20). The relevant part of that summary is that the Grievant stated that he, "partially closed [Mr. Smith's] door."⁹

The Investigator interviewed the female Security Officer who was present at this time. She told the Investigator that the Grievant "closed" Mr. Smith's door.¹⁰ On June 10, 2010, the Investigator spoke to Mr. Smith and he stated that "[Grievant] walked up to his room and closed the door."¹¹

The Agency introduced, as part of its evidence, video footage of this incident which was produced from Camera 97 that clearly showed that the Grievant closed Mr. Smith's door. That camera footage further showed that the Grievant had no ability to maintain eye contact with Mr. Smith with that door closed.

Mr. Smith was moved to Unit 4A pursuant to a physician's Order. That Order stated as follows:

Resident may be moved to 4A; maintain modified 1:1 within eyesight.¹²

Modified 1:1 Within Eyesight means that the Grievant must keep Mr. Smith within eyesight at all times. When the Grievant was questioned by the Investigator on June 3, 2010, the Grievant, when questioned about his understanding of what Modified 1:1 meant, stated as follows:

I had worked for the 4A Unit the day before and [Nurse C] had come by and explained what a Modified 1:1 was, that I did not have to be within arm's reach of him, only have a visual on him.¹³

Pursuant to his own testimony, the Grievant acknowledged this understanding of what a Modified 1:1 Within Eyesight meant. Pursuant to his own testimony, the testimony of the female Security Officer, the Investigative Report filed by the Investigator wherein the Grievant was questioned, Mr. Smith's responses to the Investigator and the visual evidence provided by Camera 97, it is quite clear that the Grievant closed Mr. Smith's door and no longer had Mr.

⁸ Agency Exhibit 1, Tab B, Pages B(17) through B(30)

⁹ Agency Exhibit 1, Tab B, Page B(20)

¹⁰ Agency Exhibit 1, Tab B, Page B(20)

¹¹ Agency Exhibit 1, Tab B, Page B(21)

¹² Agency Exhibit 1, Tab B, Page B(20)

¹³ Agency Exhibit 1, Tab B, Page B(22)

Smith within eyesight. The Grievant acknowledged in his own testimony that he was aware that he must keep Mr. Smith in his eyesight at all times.

The Hearing Officer is wholly sympathetic with the Grievant that it would be extraordinarily unpleasant to watch someone masturbate. The Hearing Officer also sympathizes with the Grievant's statement that the female Security Officer requested that he either stop Mr. Smith from masturbating or close the door. The problem here is that the Grievant's job, as unpleasant as it may have been, was to either redirect Mr. Smith or keep him within his eyesight. The Grievant was unsuccessful in redirection and, by closing Mr. Smith's door, made it impossible for him to keep Mr. Smith within his eyesight which is required by his job.

As it turns out, the Grievant was able to prevent Mr. Smith from harming himself in this matter. However, that is exactly why he was supposed to keep this resident within eyesight. While it was fortuitous that Mr. Smith was unable to harm himself, the Agency cannot rely on the Grievant being fortuitous or lucky. Accordingly, the Hearing Officer finds that the Grievant did in fact neglect Mr. Smith, and in so doing, compromised Mr. Smith's safety.

The Hearing Officer notes that the Written Notice form states that the offense date was June 4, 2010. All of the evidence in the case states that the offense date was June 2, 2010. However, no objection was raised as to this discrepancy in dates.

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..."¹⁴ 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.

Pursuant to a prior issue, on May 13, 2010 the Grievant received a Notice of Improvement Needed/Substandard Performance document.¹⁵ Pursuant to this matter, the Grievant was counseled for poor performance and placed on a supervisory plan. The reason for this plan was because the Grievant had allowed two (2) residents to get to a position where State property was destroyed and the residents could have harmed themselves. Less than three (3) weeks later, the incident before this Hearing Officer occurred. The Hearing Officer has considered all of the delineated items in mitigation as set forth in this paragraph as well as any

¹⁴Va. Code § 2.2-3005

¹⁵ Agency Exhibit 1, Tab I, Page I(1)

and all other possible sources of mitigation which were raised by the Grievant at the hearing and the Hearing Officer finds that no further mitigation is required in this matter.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof regarding this matter.

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.

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 14th Street, 12th 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.¹⁶ 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.¹⁷

¹⁶An 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).

[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]

William S. Davidson
Hearing Officer

¹⁷Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.