Issue: Group III Written Notice with Termination (patient neglect); Hearing Date: 01/10/11; Decision Issued: 01/25/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9477; Outcome: Partial Relief; **Administrative Review: AHO Reconsideration Request received 02/04/11; Reconsideration Decision issued 02/07/11; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 02/04/11; DHRM Ruling issued 03/09/11; Outcome: Remanded to AHO; Remand Decision issued 03/14/11; Outcome: Original decision reversed; Judicial Review: Appealed to Roanoke County Circuit Court; Court Ruling issued 07/22/11; Outcome: Hearing Officer's Remand Decision affirmed; Judicial Review: Appealed to Virginia Court of Appeals; Court of Appeals Ruling issued 03/20/12; Outcome: Circuit Court's Ruling affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9477

Hearing Date: January 10, 2011
Decision Issued: January 25, 2011

PROCEDURAL HISTORY

On September 23, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On October 7, 2010, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On December 8, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 10, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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 evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

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 Department of Behavioral Health and Developmental Services employed Grievant as an Administrative and Office Specialist II at one of the Facilities. The purpose of her position was:

> Provide clerical support to Nursing units; maintain timely, accurate record keeping and filing of HIM information; interact effectively with patients, visitors and staff directly and via phone.[1]

On October 2009, Grievant received an overall rating of "Contributor" for her annual performance evaluation. The Supervisor wrote, "[p]aying more attention to details and meeting deadlines remain areas [Grievant] needs to target for improvement."[2]

On a monthly basis, a Doctor in the community visited the Facility to conduct an orthopedic clinic for the Agency's patients. The Doctor would examine patients and then dictated his recommendation regarding how the Agency medical staff should treat the patients. Grievant was responsible for listening to the Doctor's dictated recommendation, typing the Doctor's recommendation accurately within three workdays and ensuring that each transcribed recommendation was available for review by the Agency's Licensed Independent Practitioner (LIP). The LIP relied on the transcribed

[1] Agency Exhibit 7.

[2] Agency Exhibit 8.

recommendation in order to determine patient medical treatment. She would implement her medical orders shortly after receiving transcriptions of the Doctor's recommendations and before the Doctor reviewed and signed the transcription when he returned to the Facility in the following month.

On August 26, 2010, the Doctor conducted a clinic at the Facility. Approximately seven patients attended the clinic. The Doctor dictated his recommendations for each patient. Grievant received the Doctor's tapes but failed to timely dictate the recommendations. Grievant wrote the Date of Transcription for each patient as follows:

Patient	Date of Transcription
VB	September 3, 2010
KO	September 10, 2010
GG	September 10, 2010
JS	September 13, 2010
MC	September 14, 2010
BW	September 14, 2010
EM	September 14, 2010

As a result of Grievant's delay in transcribing the Doctor's recommendations, the LIP was not informed of the Doctor's recommendations and was unable to timely order services for those patients. For example, the Doctor recommended pain medication for patient MC. Because the LIP did not receive a transcript of the Doctor's recommendation until September 14, 2010, the LIP did not prescribe medication for patient MC as soon as patient MC needed the medication. It is likely that patient MC unnecessarily experienced pain because of Grievant's delay.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[3] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

The Agency argued that Grievant should receive a Group III Written Notice for violating the Agency's client abuse and neglect policy, Departmental Instruction 201.

Departmental Instruction ("DI") 201 defines[4] client abuse as:

[3] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

[4] See, Va. Code § 37.1-1 and 12 VAC 35-115-30.

> Abuse means any act or failure to act by an employee or other person responsible for the care of an individual 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 for mental illness, mental retardation or substance abuse. Examples of abuse include, but are not limited to, acts such as:
>
> - Rape, sexual assault, or other criminal sexual behavior
> - Assault or battery
> - Use of language that demeans, threatens, intimidates or humiliates the person;
> - Misuse or misappropriation of the person's assets, goods or property
> - Use of excessive force when placing a person in physical or mechanical restraint
> - Use of physical or mechanical restraints on a person that is not in compliance with federal and state laws, regulations, and policies, professionally accepted standards of practice or the person's individual services plan; and
> - Use of more restrictive or intensive services or denial of services to punish the person or that is not consistent with his individualized services plan.
>
> Client neglect is defined as:
>
> This means failure by a person, program, or facility operated, licensed, or funded by the Department responsible for providing services to do so, including 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. (Emphasis Added).

Grievant worked as a Secretary at the Facility. Her duties were clerical in nature. She did not have responsibility to treat any patients. She was not responsible for the care of any patients. Grievant was not responsible for providing services to patients. Grievant was not a medical provider with any independent duty for medical care. Grievant was responsible for providing clerical support to other employees working at the Facility. Within the context of the facts of this case, Departmental Instruction 201 does not apply to Grievant.[5] Because Departmental Instruction 201 does not apply to Grievant in this case, it cannot form a basis for disciplinary action against her. Accordingly, the Agency's issuance of a Group III Written Notice cannot be upheld.

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[5] No evidence was presented to show the Grievant had been placed on notice that her failure to perform clerical services could be interpreted as client neglect.

Failure to follow written policy is a Group II offense.[6] Facility Policy number 6.102 states:

> Consultation transcription is to be provided to the ordering Licensed Independent Practitioner by Unit 4 Secretary within three working days of the Clinic date.

Grievant was the Unit 4 Secretary on August 26, 2010. She knew of her obligation to transcribe the Doctor's recommendation and deliver that recommendation to the Licensed Independent Practitioner within three working days. Grievant failed to comply with that provision with respect to seven patients. She acted contrary to the Facility's policy thereby justifying the issuance of a Group II Written Notice of disciplinary action. Upon the issuance of a Group II Written Notice, an employee may be suspended for up to 10 workdays. Accordingly, Grievant should receive a Group II Written Notice of disciplinary action with a 10 work day suspension.

Grievant argued that she lost the tapes when the Agency moved her office from one floor to another. Although this might explain why Grievant was late in transcribing the Doctor's recommendations, it does not excuse her tardiness. Grievant was responsible for ensuring she retained the tapes during the office move.

Grievant argued that the Doctor's recommendation was not effective until the Doctor signed the recommendation. Whether the Doctor signed his recommendation was irrelevant. Grievant's obligation was to transcribe the Doctor's dictated recommendation within three working days of the clinic. Her obligation to transcribe did not depend on the doctor's signature.

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…."[7] 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, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

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[6] See, Attachment A, DHRM Policy 1.60 and the Agency's Standards of Conduct.

[7] Va. Code § 2.2-3005.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because she is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group II with a 10 work day suspension. The Agency is ordered to **reinstate** Grievant to Grievant's former position, or if occupied, to an objectively similar position. After accounting for a 10 workday suspension, the Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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 St., 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 St. STE 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 all of your appeals 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 review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. 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.[8]

[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].

_____
Carl Wilson Schmidt, Esq.
Hearing Officer

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9477-R

Reconsideration Decision Issued: February 7, 2011

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

The Agency contends that Grievant should receive a Group III Written Notice based upon the language in the Standards and Conduct stating:

> Examples of offenses, by group, are presented in Attachment A. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense **not specifically enumerated**, that in the judgment of agency heads or their designees undermines the effectiveness of agencies'

> activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.
>
> **Note**: Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms. Refer to Attachment A for specific guidance.

This reconsideration request must be resolved based upon what notice Grievant had of the allegations against her prior to the grievance hearing. The Written Notice alleged that Grievance violated Departmental Instruction 201. The evidence showed that Grievant did not violate Departmental Instruction 201 because she was not a person responsible for the care of patients at the Facility. The Hearing Officer reduced the discipline to a Group II Written Notice because the Agency clearly informed Grievant prior to the hearing that it believed she had acted contrary to Facility policy governing timeliness of her work. Grievant was presented with a copy of the Facility policy indicating the time frame for which she had to complete typing the Doctor's dictation. Grievant had the opportunity to present her defenses to show that she complied with the Facility timeliness policy.

The Agency did not allege prior to the hearing that Grievant engaged in an offense not specifically enumerated but that in the judgment of the Agency, Grievant's behavior undermined the effectiveness of the Agency's activities. Grievant did not have the opportunity to present evidence and argument to show that the Agency's allegations were already enumerated as an offense less than a Group III offense. Grievant did not have the opportunity to present evidence and argument to show that her behavior did not undermine the effectiveness of the agency's activities.

The Agency did not allege prior to the hearing that at Grievant's behavior was a offense typically associated with one offense category that could be elevated to a higher level offense based on the unique impact that a particular offense had on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms. Grievant did not have the opportunity to present evidence and argument that her offense was not one that should be elevated to a higher level offense. Grievant did not have the opportunity to present evidence and argument that the consequences of any poor performance or misconduct did not exceed agency norms.

Grievant did not receive adequate notice prior to the hearing of the Agency's theory of disciplinary action raised for the first time as part of this reconsideration requests. If the Hearing Officer were to grant the Agency's request to elevate the disciplinary action from a Group II Written Notice to a Group III Written Notice for the reasons expressed by the Agency in its request for reconsideration, the effect would be to deny Grievant procedure due process. The Hearing Officer will not do so. Accordingly, the Agency's request for reconsideration must be denied.

APPEAL RIGHTS

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.

S/Carl Wilson Schmidt

_____

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Behavioral Health and Developmental Services

March 9, 2011

The agency has requested that the Department of Human Resource Management conduct an administrative review of the hearing officer's decision in Case No. 9477. The grievant requested the review because she believes the hearing decision is inconsistent with agency and state policy. For the reason stated below, this Department remands the decision to the hearing officer for reconsideration. The agency head, Ms. Sara Redding Wilson, has asked that I respond to this appeal.

FACTS

The facts as set forth by the hearing officer in his **Finding of Facts**, in relevant part, are as follows: *

> The Department of Behavioral Health and Developmental Services employed Grievant as an Administrative and Office Specialist II at one of the Facilities. The purpose of her position was:
>
> > Provide clerical support to Nursing units; maintain timely, accurate record keeping and filing of HIM information; interact effectively with patients, visitors and staff directly and via phone.
>
> On October 2009, Grievant received an overall rating of "Contributor" for her annual performance evaluation. The Supervisor wrote, "[p]aying more attention to details and meeting deadlines remain areas [Grievant] needs to target for improvement."
>
> On a monthly basis, a Doctor in the community visited the Facility to conduct an orthopedic clinic for the Agency's patients. The Doctor would examine patients and then dictated his recommendation regarding how the Agency medical staff should treat the patients. Grievant was responsible for listening to the Doctor's dictated recommendation, typing the Doctor's recommendation accurately within three workdays and ensuring that each transcribed recommendation was available for review by the Agency's Licensed Independent Practitioner (LIP). The LIP relied on the transcribed recommendation in order to determine patient medical treatment. She would implement her medical orders shortly after receiving transcriptions of the Doctor's recommendations and before the Doctor reviewed and signed the transcription when he returned to the Facility in the following month.

On August 26, 2010, the Doctor conducted a clinic at the Facility. Approximately seven patients attended the clinic. The Doctor dictated his recommendations for each patient. Grievant received the Doctor's tapes but failed to timely dictate the recommendations. Grievant wrote the Date of Transcription for each patient as follows:

Patient	Date of Transcription
VB	September 3, 2010
KO	September 10, 2010
GG	September 10, 2010
JS	September 13, 2010
MC	September 14, 2010
BW	September 14, 2010
EM	September 14, 2010

As a result of Grievant's delay in transcribing the Doctor's recommendations, the LIP was not informed of the Doctor's recommendations and was unable to timely order services for those patients. For example, the Doctor recommended pain medication for patient MC. Because the LIP did not receive a transcript of the Doctor's recommendation until September 14, 2010, the LIP did not prescribe medication for patient MC as soon as patient MC needed the medication. It is likely that patient MC unnecessarily experienced pain because of Grievant's delay.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

The Agency argued that Grievant should receive a Group III Written Notice for violating the Agency's client abuse and neglect policy, Departmental Instruction 201.

Departmental Instruction ("DI") 201 defines client abuse as:

> Abuse means any act or failure to act by an employee or other person responsible for the care of an individual 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 for mental illness, mental retardation or substance abuse. Examples of abuse include, but are not limited to, acts such as:

- Rape, sexual assault, or other criminal sexual behavior
- Assault or battery
- Use of language that demeans, threatens, intimidates or humiliates the person;
- Misuse or misappropriation of the person's assets, goods or property
- Use of excessive force when placing a person in physical or mechanical restraint
- Use of physical or mechanical restraints on a person that is not in compliance with federal and state laws, regulations, and policies, professionally accepted standards of practice or the person's individual services plan; and
- Use of more restrictive or intensive services or denial of services to punish the person or that is not consistent with his individualized services plan.

Client neglect is defined as:

> This means failure by a person, program, or facility operated, licensed, or funded by the Department responsible for providing services to do so, including 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. (Emphasis Added).

Grievant worked as a Secretary at the Facility. Her duties were clerical in nature. She did not have responsibility to treat any patients. She was not responsible for the care of any patients. Grievant was not responsible for providing services to patients. Grievant was not a medical provider with any independent duty for medical care. Grievant was responsible for providing clerical support to other employees working at the Facility. Within the context of the facts of this case, Departmental Instruction 201 does not apply to Grievant. Because Departmental Instruction 201 does not apply to Grievant in this case, it cannot form a basis for disciplinary action against her. Accordingly, the Agency's issuance of a Group III Written Notice cannot be upheld.

Failure to follow written policy is a Group II offense. Facility Policy Number 6.102 states:

> Consultation transcription is to be provided to the ordering Licensed Independent Practitioner by Unit 4 Secretary within three working days of the Clinic date.

Grievant was the Unit 4 Secretary on August 26, 2010. She knew of her obligation to transcribe the Doctor's recommendation and deliver that recommendation to the Licensed Independent Practitioner within three working days. Grievant failed to comply with that provision with respect to seven patients. She acted contrary to the Facility's policy thereby justifying the issuance of a

Group II Written Notice of disciplinary action. Upon the issuance of a Group II Written Notice, an employee may be suspended for up to 10 workdays. Accordingly, Grievant should receive a Group II Written Notice of disciplinary action with a 10 work day suspension.

Grievant argued that she lost the tapes when the Agency moved her office from one floor to another. Although this might explain why Grievant was late in transcribing the Doctor's recommendations, it does not excuse her tardiness. Grievant was responsible for ensuring she retained the tapes during the office move.

Grievant argued that the Doctor's recommendation was not effective until the Doctor signed the recommendation. Whether the Doctor signed his recommendation was irrelevant. Grievant's obligation was to transcribe the Doctor's dictated recommendation within three working days of the clinic. Her obligation to transcribe did not depend on the doctor's signature.

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…."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 nonexclusive 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, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

******

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is reduced to a Group II with a 10 work day suspension. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. After accounting for a 10 workday suspension, the Agency is directed to provide the Grievant with back pay less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

DISCUSSION

The Department of Human Resource Management offers the following in response to the Department of Behavioral Health and Developmental Services' request for an administrative review. Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is beyond the limit of reasonableness, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or by the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, purpose "…is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness. In addition, the agency has promulgated Departmental Instruction 201 whose purpose "…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." Finally, facility policy 6.102 states the following:

> Consultation transcription is to be provided to the ordering Licensed Independent Practitioner by Unit 4 Secretary within three working days of the Clinic date.

Failure to follow written policy is a Group II offense.

In his **Decision**, the hearing officer summarily offered the following as the bases for reducing the Group III Written Notice with termination to a Group II Written Notice with reinstatement:

> Grievant worked as a Secretary at the Facility. Her duties were clerical in nature. She did not have responsibility to treat any patients. She was not responsible for the care of any patients. Grievant was not responsible for providing services to patients. Grievant was not a medical provider with any independent duty for medical care. Grievant was responsible for providing clerical support to other employees working at the Facility. Within the context of the facts of this case, Departmental Instruction 201 does not apply to Grievant. Because Departmental Instruction 201 does not apply to Grievant in this case, it cannot form a basis for disciplinary action against her. Accordingly, the Agency's issuance of a Group III Written Notice cannot be upheld.

The hearing officer concluded that Departmental Instruction 201 did not apply to the grievant because her role did not require that she provide direct care to the clients. On the other hand, the grievant failed to perform the duties of her job as per the instructions in facility policy 6.102. Thus, the hearing officer, in applying the provisions of facility policy 6.102 determined that the grievant had failed to follow supervisory instructions and the disciplinary action should have been reduced to a Group II Written Notice.

The DHRM does not concur with the hearing officer's determination regarding the applicability of Departmental Instruction 201(DI 201). We note that DI 201 does not restrict coverage for client abuse and/or neglect only to employees who provide direct care. Summarily, DI 201 states that abuse means any act or failure to act by an employee or other person responsible for the care of an individual 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 for mental illness, mental retardation or substance abuse. Moreover, we note that while the DI 201 lists examples of abuse, those examples are not all-inclusive.

Concerning neglect, the DI 201 states that neglect means failure by a person, program, or facility operated, licensed, or funded by the Department responsible for providing services to do so, including 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.

In the instant case, the DHRM finds that the hearing officer's narrow interpretation that the grievant is not subject to DI 201 because "…her role did not require that she provide direct care to the clients" is inconsistent with the intent and scope of DI 201. Therefore, the DHRM remands this decision to the hearing officer in light of the interpretation by this Agency of DI 201.

_____

Ernest G. Spratley

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF ROANOKE

Plaintiff,

v. Case No. CL11-489-00

CATAWBA HOSPITAL,
VIRGINIA DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, ERNEST G. SPRATLEY and CARL WILSON SCHMIDT

Defendants.

FINAL ORDER

Grievant/Plaintiff) has filed a Notice and Petition of Appeal from the final decision in a state grievance proceeding. Defendants have moved to dismiss the appeal.

Upon consideration of the memoranda filed by the parties and after oral argument, the Court concludes that jurisdiction is lacking in the circuit court to review the matters of policy presented in this appeal. See *Commonwealth v. Needham*, 55 Va. App. 316, 328 (2009). Furthermore, with respect to the contention made by of violation of her procedural rights, the Court finds no violation, in dismissal, of constitutionally protected due process of law. See *Riccio v. County of Fairfax, Va.*, 907 F.2d 1459, 1466 (4th Cir. 1990) (distinguishing between violation of state rules and violations of due process of law).

Accordingly, the Petition for Appeal is dismissed and this matter in ended.

ENTERED: July 22nd 2011

Charles N. Dorsey, Circuit Judge

A COPY TESTE: STEVEN A. MCGRAW, CLERK
CIRCUIT COURT, ROANOKE COUNTY, VA.
BY DEPUTY CLERK

We Ask for This:

Sydney E. Kab
Sr. Assistant Attorney General
Va. Bar #15105
Counsel for Defendants DBHDS, Catawba Hospital, DHRM, Spratley
Office of the Attorney General
900 E. Main Street
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Agreed:

Elizabeth Peay, Esq.
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
(804) 786-5532
Counsel for Defendant Schmidt

Objection:

Plaintiff Objects on All Grounds Briefed and Argued in this Matter, including, but not limited to:

The Court's ruling that the Court has no jurisdiction in policy matters with the state and therefore has no authority to overrule Mr. Spratley, who overruled the hearing officer's decision twice.

Plaintiff also Objects to the Court's decision that the failure of the state to follow its own regulations in grievance matters and Section 2.2-3000, which states, in part, ..."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", is not contrary to law as defined in *Needham*.

Plaintiff also objects to the state's assertion, which the court agreed with, that the Plaintiff's due process rights were meant by being allowed to have a hearing and the failure of the state to obey its own rules, including, but not limited to, giving the Plaintiff notice as required by their grievance procedure of specifically what the agency was asking to undergo administrative review for policy. Under the grievance procedure, the Plaintiff could have, if she had been given notice of what the agency was asking be reviewed for policy, sent a rebuttal to the agency which

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included facts of the case which were presented to the hearing officer, but were not made findings of fact in his opinions.

In addition, the Plaintiff objects to the failure of the Court to recognize that *Commonwealth v. Needham*, 55 VA App. 316, 325 (2009) interpreted that contrary to law, which is the standard of appellate review in this case, includes constitutional provisions, statutes, regulations, and/or judicial decisions.

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