

Issue: Group III Written Notice with Suspension (patient abuse); Hearing Date: 02/04/11; Decision Issued: 02/10/11; Agency: DBHDS; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 9492; Outcome: Full Relief.

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 9492

Hearing Date: February 4, 2011
Decision Issued: February 10, 2011

APPEARANCES:

Grievant
Agency Representative
3 Witnesses for Grievant
3 Witnesses for Agency

ISSUE

“Was the Group II Written Notice with mitigation recommended properly issued?”

FINDINGS OF FACTS

1. Grievant was issued a Group III Written Notice on November 18, 2010, for violation of Departmental Instruction No. 201 and [facility] Instruction 10, for allegedly grabbing a resident by the neck, throwing him against a wall and verbally abusing him.
2. Mitigation was recommended by the agency in Grievant’s case because of his “good work record”.
3. The allegations of physical abuse and verbal abuse of a resident were ruled “unsubstantiated”, after the on site investigation found no corroborating witnesses.
4. The resident’s family, through the facility’s patient advocate, requested further investigation of the allegations.
5. The matter was referred to the Investigations Manager at Central Office in Richmond.
6. The facility investigation was properly done.
7. The Investigation Manager had approximately 100 files on the accuser, in which the accuser had charged infractions and retracted his allegations. The accuser did not retract his allegations in this matter.

8. Without a retraction of allegations by the resident, the Investigations Manager ruled the allegations founded in spite of no physical evidence or witness evidence.

9. The resident, a mentally challenged individual, "was obsessive about getting his point card checked which got him rewards such as a canned drink as positive reinforcement. The card was not immediately signed or stamped.

10. The resident was positive about the time of the alleged incident.

11. At the time of the alleged incident a shift change was in progress and two (2) shifts of agency employees were in the area where the alleged incident occurred.

12. None of the agency employees who were in the location of the incident either heard or saw it happen.

13. The Investigations Manager made the ruling from Richmond without investigation at the scene.

14. The Grievant was reassigned to move him away from the complaining resident.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to the 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 the workplace." Murray v. Stokes, 237 Va. 653, 656 (1989).

Code Section 2.2-3000 et seq. sets forth the Commonwealth's grievance procedure and provides, in 2.2-3000A:

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 Section 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.

Departmental Instruction 201 (RTS) 03 requires the facility director to be notified in case of suspected abuse.

Facility Instruction 10 calls for “immediate” reporting of any incident that could constitute abuse.

DECISION

While Departmental Instruction 201 requires termination for a substantiated finding of abuse, unless there are circumstances that would warrant mitigation. Ordinarily, this hearing officer would agree with the agency recommendation for mitigation to a 10 day suspension. However, the case substantiating the finding of abuse leaves considerable reasonable doubt as to whether the alleged abuse actually occurred. The facility investigation was well within policy and guidelines and ruled the allegations unsubstantiated. The alleged victim has a large record (100 cases) of unsubstantiated charges. The substantiation of the allegations was made because the resident did not retract his allegations. There was no physical evidence – no evidence of a battery from witnesses who were present at the alleged time. Two shifts of employees were present at the alleged time and saw or heard nothing. There was no finding of post traumatic stress disorder. The resident did change his behavior. The Grievant was reassigned to move him away from the resident.

For the above reasons, I find the allegations of abuse unfounded. Therefore, the Group III Written Notice is unfounded and improper and is hereby DISMISSED. The Group III Written Notice is ORDERED removed from Grievant’s file and any loss of pay and benefits from his suspension must be reinstated.

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, Suite 301, Richmond, Virginia, 23219 or faxes to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and **received** by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first 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.

Thomas J. McCarthy, Jr., Esquire
Hearing Officer