

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 01/28/11; Decision Issued: 02/03/11; Agency: DBHDS; AHO: John R. Hooe, III, Esq.; Case No. 9502; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of : Case No. 9502

Hearing Date: January 28, 2011
Decision Issued: February 3, 2011

PRELIMINARY MATTERS

During a telephone pre-hearing conference conducted on January 11, 2011, it was agreed by the Grievant and the Agency's representative that the hearing in this matter would be conducted on January 28, 2011 commencing at 9:30 a.m. at agency's facility.

It was further agreed that list of witnesses and a copy of all exhibits a party intends to introduce at the hearing would be provided to the Hearing Officer and to the other party no later than Monday, January 24, 2011 at 5:00 p.m.

APPEARANCES

Grievant
Representative for Grievant
Representative for Agency
Five Witnesses for Agency

ISSUES

1. Did the Grievant commit the offense set out in the written notice, namely: violate existing Departmental Instruction 201(RTS)03 by verbally abusing a person receiving services in department facilities? If so, what was th appropriate level of disciplinary action for the conduct at issue?
2. Should mitigating factors result in less severe discipline?

EXHIBITS

The Agency Exhibits admitted into evidence were contained in a single notebook with the following contents:

- Tab 1 - Group III Written Notice
- Tab 2 - Grievant's Form A and attachments
- Tab 3 - Investigator report dated October 25, 2010, 5 pages
- Tab 4- Witness statement-Grievant
- Tab 5- Witness statement-[G]
- Tab 6- Witness statement-[B]
- Tab 7- Letter of suspension dated October 18, 2010
- Tab 8- Departmental Instruction 201(RTS)03
- Tab 9- Termination letter dated October 26, 2010
- Tab 10- Chapter 14: Standards of Conduct and Client Abuse
- Tab 11- Group II Written Notice issued May 4, 2010
- Tab 12- Notice of Improvement Needed dated May 4, 2010, 1 page

The Agency also offered under Tab 12 ten additional pages which were not admitted into evidence and were not considered by the Hearing Officer.

The Grievant reviewed the Exhibits introduced by the Agency and did not object to the admission of the Exhibits.

The Grievant did not offer any additional Exhibits.

FINDINGS OF FACT

The Grievant timely appealed the Written Notice citing the Grievant for a Group III offense and terminating the employment of the Grievant.

The evidence established that on October 14, 2010 the grievant was working on a floor of the facility where individuals were receiving services. Grievant's co-worker, [G], testified that she heard the Grievant say the phrase "oh Jesus" several times. She then witnessed a resident, [M], say to the Grievant something to the effect of "Don't use Jesus' name that way." [G] testified that she then witnessed the Grievant "loudly" singing the song "Jesus loves me." [G] also testified that she witnessed the Grievant approach [D], another resident receiving services, and asked him "Do you know any Jesus songs?" [G] testified that she believed that the Grievant sang the song "Jesus loves me" to intentionally antagonize the resident, [M], and considered the Grievant's behavior to be verbal abuse. [G] stated that she had never witnessed any problem between the Grievant and the resident prior to that day, the resident having been admitted to the facility on October 6, 2010.

Another employee, [B], testified that she also witnessed the Grievant singing the song and believed that the Grievant was mocking the resident. [B] also testified that the employees and residents had been in the room where the event occurred for at least a couple of hours prior to the occurrence and that things were more stressful than normal.

The certified abuse investigator testified that in the course of his investigation he interviewed the patient, [M], who advised that the Grievant sang the song in a “mocking” way. The resident also told the investigator that she was “humiliated” by the Grievant’s behavior. The investigator also testified that he interviewed the Grievant and that the Grievant told him that she didn’t remember if she had been singing but didn’t deny that she was singing. The investigator testified that the resident [M] told him that “All I said was to remember the Third Commandment.” The resident told him that after that the Grievant began singing out loud, “Jesus loves me” and that the Grievant was “mocking her.” The investigator also testified that he did not discover the existence of any existing animosity between the Grievant and the other employees who testified.

The director of the facility testified that when the Grievant was given a group II written notice on May 4, 2010 for verbally abusive language towards a patient, the offense was actually a group III offense but was mitigated to a group II offense due to the Grievant’s good work history and no prior written notices. The director also testified that even if the current written notice had been mitigated to a group II, the result would have still been termination due to it being a second group II written notice.

The Grievant’s supervisor, [P], testified that she had been the Grievant’s supervisor for three or four years. She admitted that she did not meet with the Grievant as required by the Notice of Improvement at Tab 12. The supervisor stated that the Notice was not given to the supervisor by the person who issued it to the Grievant.

The parties stipulated that it was generally acceptable for the Grievant to say “Jesus” as a stress management tool and that the Grievant had prior to October 14, 2010 requested that she not be required to interact with the resident, [M].

Finally the Grievant testified that the day in question was a very stressful day. She said that she made the statement “Jesus help me, Jesus help me” to help her deal with the stress. The Grievant testified that she was then confronted by the resident, [M], who had a preoccupation with the Bible. The Grievant testified that after [M] confronted her about what she was saying, the Grievant left to calm herself and then came back and began cleaning tables. The Grievant testified that “I must have sung the song ‘Jesus loves me’ because the witnesses said I did”. The Grievant further testifies that she came over to wake the resident, [D], who was sitting across from [M] but that she did not ask [D] if he knew any Jesus songs. She stated that the witness [G] lied when she testified that the Grievant asked [D] if he knew

any Jesus songs. When the Grievant was asked why the witness would lie, the Grievant stated that the staff didn't like her. The Grievant also pointed out that the abuse investigator statement that she told him that she took an Ativan is not correct. The Grievant testified that she did not take an Ativan and did not tell the investigator that she took an Ativan.

APPLICABLE LAW AND OPINION

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).

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.

To establish procedures on Standards of Conduct and Performance 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. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards 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 to provide appropriate corrective action.

The Agency Exhibit at Tab 10, Chapter 14: Standards of Conduct and Client Abuse makes clear that a violation of the Agency's policies on client abuse is a Group III offense and that a first occurrence normally should warrant suspension of up to thirty work days or a

termination. The Standards also provide that two Group II offenses normally should warrant termination.

The Agency demonstrated by a preponderance of the evidence that the Grievant's act was in fact verbal abuse and not just the Grievant's way of relieving stress (as maintained by the Grievant). The Agency further demonstrated that the Group III written notice issued regarding the events which occurred on October 14, 2010 was issued while a Group II Written Notice was active, the earlier notice having been issued on May 4, 2010, to become inactive May 4, 2013. (Agency's Exhibit Tab 11)

DECISION

The Agency's termination of the Grievant is upheld. Mitigation was considered by the Agency but not applicable.

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, Department of Employment Dispute Resolution Main Street Centre 600 East Main Street, Suite 301 Richmond, VA 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 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 5 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes **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.

John R. Hooe, III
Hearing Officer