

Issue: Group III Written Notice with Termination (patient abuse); Hearing Date: 06/09/11; Decision Issued: 07/01/11; Agency: DBHDS; AHO: John R. Hooe, Jr., Esq.; Case No. 9611; 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. 9611

Hearing Date: June 9, 2011
Decision Issued: July 1, 2011

PRELIMINARY MATTERS

During a telephone pre-hearing conference conducted on May 24, 2011, it was agreed by the Grievant and the Agency's representative that the hearing in this matter would be conducted on June 9, 2011 commencing at 9:30 a.m. on the grounds of [the 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, June 6, 2011 at 5:00 p.m.

APPEARANCES

Grievant
Representative for Agency
Four Witnesses for Agency

ISSUES

1. Did the Grievant commit the offense set out in the written notice, namely: violate existing Departmental Instruction 201 by abusing a person receiving services in department facilities?
2. If so, should mitigating factors result in discipline less severe than termination?

EXHIBITS

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

- Tab 1 - Group III Written Notice issued February 3, 2011
- Tab 2 - Employee Grievance Form A dated February 28, 2011
- Tab 3 - Investigator summary dated January 26, 2011
- Tab 4- Witness statement dated January 25, 2011
- Tab 5- Written statement dated January 25, 2011
- Tab 6- Written statement dated January 25, 2011
- Tab 7- Email dated January 25, 2011
- Tab 8- Email dated January 25, 2011
- Tab 9- Witness statement dated January 25, 2011
- Tab 10- Hospital instruction No. 5100
- Tab 11- Letter dated February 4, 2011
- Tab 12- Follow-up investigation dated March 29m 2011
- Tab 13- Departmental instruction 201 (RTS) 03 Reporting and Investigating Abuse and Neglect
- Tab 14- DBHDS employee handbook, Chapter 14 “Standards of Conduct and Client abuse”
- Tab 15- Commonwealth of Virginia Standards of Conduct, effective April 16, 2008
- Tab 16- Notice of discipline dated February 1, 2011
- Tab 17- Written notice issued April 24, 2009

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 the morning of January 24, 2011, the grievant was working on a floor of the facility where individuals were receiving services. Grievant’s co-worker testified that she observed the Grievant approach a patient for the purpose of taking the patient’s vital signs. She heard the patient become loud and refuse to cooperate with the Grievant. She heard the Grievant continue to ask the patient to take his vital signs as the patient grew louder in refusing. She saw the patient get up from a chair and rush towards the Grievant. She observed the Grievant lay the patient on the floor with force and heard the

Grievant say to the patient “your mother is a slut” in response to the patient’s repeated racial slurs directed at the Grievant.

The Grievant’s statement as set out at Exhibit 4 (and as testified to at hearing) maintained that the reason he continued to ask the patient to take his vital signs was because the patient had been sick the day before. The Grievant stated that the patient made numerous offensive remarks to him before slamming his playing cards on the table where he was sitting and charging at the Grievant. The Grievant stated that the patient threw a punch at him and in doing so lost his balance, fell on the floor and then got back up. The Grievant stated that he asked the patient if he was alright and the patient returned to his table.

The director of the facility testified that based on the Grievant’s co-workers observations and the conclusions reached by the investigator, the director believed that the Grievant was guilty of battery and verbal abuse, both violations of the Standards of Conduct and client abuse. The director further testified that when the Grievant was given an earlier Group II written notice on April 24, 2009 for a positive finding under Departmental Instruction 201, the offense was actually a Group III offense but was mitigated to a Group II offense due to the Grievant’s good work history. The director also testified that even if the current written notice would have been mitigated to a Group II offense, the result would still have been termination due to it being a second Group II written notice.

The evidence further indicated that the Grievant and the co-worker had been on good terms prior to January 24, 2011 and the Grievant could think of no reason that the co-worker would not tell the truth about what occurred on January 24, 2011.

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 evidence 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 verbal and physical action were abuse. The Agency further demonstrated that the Group III written notice issued regarding the events which occurred on January 24, 2011 was issued while a Group II Written Notice was active, the earlier notice having been issued on April 24, 2009, to become inactive April 24, 2012.

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