

Issue: Group III Written Notice with Termination (patient abuse); Hearing Date: 10/21/11; Decision Issued: 10/24/11; Agency: DBHDS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9681; Outcome: Full Relief.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

HEARING OFFICER'S DECISION

In the matter of: Case No. 9681

Hearing Date: October 21, 2011
Decision Issued: October 24, 2011

PROCEDURAL HISTORY

Grievant was a residential services associate for the Department of Behavioral Health and Development Services (“the Agency”), with 2 years of service in this position as of the offense date. On May 26, 2011, the Grievant was charged with a Group III Written Notice for patient abuse. The discipline was job termination. The Grievant was under a performance improvement plan signed April 11, 2011.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action, and outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On September 12, 2011, the Department of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer. Following a pre-hearing conference, the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, October 21, 2011, on which date the grievance hearing was held, at the Agency’s facility. Accordingly, for good cause shown, the time for completing the grievance has been extended.

The Agency submitted documents for exhibits that were accepted into the grievance record, subject to objection from the Grievant to the extent that the documents, particularly Agency Exh. H, included references to polygraph examination results, and they will be referred to as Agency’s Exhibits. References to polygraph results, as noted below, are not admissible. The Grievant submitted documents that were, without objection from the Agency, accepted into the grievance record, and they will be referred to as Grievant’s Exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel for Grievant
Advocate for Agency
Witnesses

The Grievant requests rescission of the Group III Written Notice, back pay, and attorney's fees.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

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 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.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group III Offenses to include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws.

The Agency's Employee Handbook, Rules of Conduct Governing Relationships with Residents, defines sexual misconduct:

Any behavior of a sexual nature between employees and residents is prohibited and will be treated as an impropriety. Behavior of a sexual nature includes, but is not limited to, sexual abuse, sexual assault, sexual harassment, physical conduct of a sexual nature, sexual obscenity, and conversations or correspondence of an emotional, romantic, or intimate nature.

The policy continues with Improperities:

Improperities, the appearance of impropriety, fraternization, or other non-professional association between employees and residents or their families shall be discouraged. Associations between employees and these individuals which may compromise security or undermine an employee's effectiveness to carry out his duty may be treated as a Group III offense under the Standards of Conduct.

Agency Exh. C.

Va. Code § 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 § 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 determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), 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."

Va. Code §§ 8.01-418.2 and 40.1-51.4:4 prohibit a grievance hearing officer from considering polygraph test results. Specifically, Va. Code § 40.1-51.4:4(D)

The analysis of any polygraph test charts produced during any polygraph examination administered to a party or witness shall not be submitted, referenced, referred to, offered or presented in any manner in any [grievance] proceeding ... except as to disciplinary or other actions taken against a polygrapher.

See also Rules for Conducting Grievance Hearings § IV(D) (citing statute and noting same).

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a residential services associate, with 2 years of service in the position. The Grievant was under a performance improvement plan, signed April 11, 2011, that responded to management concerns that the Grievant was allowing Resident X too much time with her.

An internal investigation of alleged misconduct occurred, resulting in the Agency's conclusion that the Grievant had an inappropriate relationship with Resident X. The Written Notice, issued May 26, 2011, charged:

On 16 May 2011 a 201 Abuse and Neglect investigation was opened to look into your involvement with Resident [X] after he made statements during a pre-polygraph interview that he kissed you, touched you above your clothes, and that you put your hand in his pants and stroked his penis. You were asked by the Facility Investigator if you would take a polygraph examination to answer questions about your relationship with Resident [X]. You agreed to take the polygraph and were asked by the examiner if you kissed Resident [X], allowed him to touch you, or if you touched his penis. You responded "No" to all of the questions. The polygraph examiner noted that your answers scored as extremely deceptive.

Participating in an inappropriate sexual relationship with a civilly committed Sexually Violent Predator negatively affects their treatment, compromises the safety of the facility, and is considered abuse. The statement from Resident [X], your inability to answer questions about the incidents without showing deception, and your past incidents involving Resident [X] have resulted in my recommendation that you be terminated for patient abuse effective immediately.

The Written Notice indicated the termination was effective May 31, 2011. The Written Notice also included the Agency's description of a pattern of the Grievant's problems with Resident X, including

You were placed on a performance improvement plan to help you improve and comply with [Agency] policy and procedures; however the results of two polygraph tests coupled with the observed pattern of behavior with this resident warrant separation. Sexual touch with a Resident is considered patient abuse. Your history of boundary issues with Resident [X] leaves me unable to mitigate this disciplinary action and strengthens my decision to recommend termination for patient abuse.

Resident X did not testify at the grievance hearing. Nor did the facility investigator. The Agency witnesses testified that the Grievant was otherwise a very good employee. The Agency

witnesses established that Resident X was a convicted felon and sexually violent predator, civilly committed for treatment following his criminal sentence. The witnesses also characterized Resident X as a manipulative person.

The Grievant unequivocally denied the Agency's allegations of an inappropriate relationship of any kind with Resident X. The Grievant testified that she did report to management, as expected, a rumor that Resident X had an inappropriate relationship with a unit manager.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

It is reasonable for the Agency to discipline an employee based on the conclusions of an internal investigation, and the facility manager here acted accordingly and issued discipline in the face of the findings his agency presented to him. However, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency's reliance on polygraph results, however, presents the Agency with the burden of proving the misconduct at the grievance hearing without relying on the polygraph evidence. The polygraph test results are prohibited within the grievance hearing procedure. The Written Notice itself specifies the polygraph results as the basis for the discipline. Because the discipline was directed to the polygraph results, without relying on the polygraph evidence the Agency is left with the hearsay evidence from Resident X to prove the prohibited relationship.

I find the Grievant's testimony to be at least as credible as the contrary information and conclusions charged by the internal investigation.

Based on the manner, tone, and demeanor of the witnesses, I find that the Grievant credible. The hearing officer cannot, on the face of interview summaries from non-testifying persons, weigh the credibility of these witnesses' unsworn accounts; they cannot be cross-examined, nor their recollections probed. It is established that Resident X is a convicted felon and sexually violent predator. As such, the information from Resident X, even if it had been sworn testimony, is subject to evidentiary scrutiny. Under Va. Code Ann. § 19.2-269, a convicted felon is not incompetent to testify, "but the fact of the conviction may be shown in evidence to affect his credit." Although the statute is found in the criminal procedure section of the Code of Virginia, it is applicable to civil cases. *Payne v. Carroll*, 250 Va. 336, 461 S.E.2d 837 (1995).

None of the witnesses saw the Grievant engage in the acts alleged. The Agency has the burden to show convincing information beyond equipoise. Here, the only corroborating evidence is hearsay from Resident X, a convicted felon, who was not sworn or subject to confrontation and cross-examination. Further, Resident X's own statements are conflicting and grossly inconsistent. At one point, Resident X flatly denied to the investigator any relationship with the Grievant. Most recently, according to the facility investigator, who did not testify, Resident X told a completely different story of physical, sexual contact with the Grievant. The therapeutic counselor for Resident X testified that she ultimately believed Resident X's story of the intimate touching described in the Written Notice.

Resident X definitely lied; the challenge is to determine which story is the truth. There is no corroborating evidence to support the serious charge of a sexual relationship. When there are conflicting, credible accounts regarding a situation or issue, the charging party needs to show a reliable basis on which to conclude one way or the other. Here, the hearsay from Resident X is blatantly suspect and lacks credibility. Resident X had at least one motive to harm the Grievant—the Grievant's report of the rumor that Resident X had an inappropriate relationship with another staff member. By all accounts, Resident X was upset with the Grievant over her reporting of that information.

The Grievant herself was the only witness testifying at the grievance hearing with first-hand knowledge, under oath, and subject to cross-examination or a determination of credibility. The internal investigator's report presented summaries of information he gathered from third parties. While the hearsay facts included in the investigation report and the internal investigator's testimony are admissible under the grievance procedure, such statements are not subject to cross-examination and subject to weighing. Determining the truth from Resident X's inconsistent accounts is impossible without the opportunity for cross-examination and observation of credibility. Thus, I find the weight of the investigation report and the hearsay statements contained therein are not sufficient to bear the burden of proving misconduct or that the discipline was warranted and appropriate.

The actual Written Notice relied on the polygraph test conclusions, but such evidence must not be considered under applicable statutes referenced above. The evidence presented at the grievance hearing did not show by a preponderance of the evidence that the Grievant committed the wrongful acts constituting patient abuse. The thread of consistency this hearing

officer finds in the evidence presented is that Resident X is unreliable and manipulative. Accordingly, since Resident X's unsworn hearsay is the only positive evidence of the misconduct, the Agency has not proved the misconduct for the Written Notice and the discipline must be rescinded.

The Agency presents a position in advance of its role as guardian of the residents in its charge and institutional integrity of preventing resident abuse and neglect. The hearing officer accepts, recognizes, and upholds the Agency's important role in safeguarding all parties from improper and inappropriate staff/resident relationships. However, the Agency bears the burden of proving such misconduct without relying mostly on inadmissible polygraph tests.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with termination is **reversed**. Thus, the Agency is ordered to reinstate Grievant to her former position, or if occupied, to an objectively similar position.¹ The Grievant is awarded full **back pay** from which any interim earnings must be deducted (which includes unemployment compensation and other income earned or received to replace the loss of state employment). The Grievant is restored to full benefits and seniority. Grievant is further entitled to seek a reasonable **attorney's fee**, which cost shall be borne by the agency.

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.

¹ The Grievant did not request reinstatement, but that is the consistent result when the Group III Written Notice is reversed. The hearing officer is not limited to the specific relief requested, as long as the relief granted is consistent with law and policy. *Rules for Conducting Grievance Hearings*, § VI.A.

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 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 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer