

Issue: Group III Written Notice with Termination (patient abuse); Hearing Date: 10/26/11; Decision Issued: 11/04/11; Agency: DBHDS; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 9694; Outcome: No Relief – Agency Upheld.

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 9694

Hearing Date: October 26, 2011
Decision Issued: November 4, 2011

APPEARANCES:

Grievant
Agency Representative
1 Witness for Grievant
8 Witnesses for Agency

ISSUE

“Was the Group III Written Notice with termination regarding physical abuse properly issued?”

FINDINGS OF FACTS

1. On October 26, 2011, a formal Grievance Hearing was held at 10:00 a.m. at the facility.
2. On the morning of June 20, 2011, (a Sunday), the facility van driver announced that the van would take clients to worship services. The client in question from the residential cottage supervised by the Grievant was a large mentally deficient adult. The client in question had said he would not be going but was persuaded to go.
3. Grievant is a small man.
4. On the van was another client in a wheelchair with his attendant in a one on one situation.
5. The client from Grievant’s cottage had on his sunglasses. Client had a reputation of being belligerent and aggressive when he had his sunglasses on.
6. Grievant’s client grabbed Grievant’s shirt and broke his glasses.
7. Due to the crowded confines of the van, Grievant did not have room to step back from the unruly client or get help from the other attendant.
8. Physical restraint was not authorized for the client.

9. The other attendant on the van, couldn't leave his client who was in a wheelchair at the front of the van.

10. Grievant broke the unruly client's sunglasses, and while trying to calm him, hit him in the eye.

11. Grievant admitted breaking policy by breaking client's sunglasses and hitting him in the eye.

12. Investigation by the facility staff and the Virginia State Police Investigation substantiated the charges.

13. By hitting the resident, the Grievant violated the physical abuse policy of the facility prohibiting physical abuse.

14. Mitigation was considered by the facility director and decided against.

15. Grievant wanted to question the handling of a previous matter which caused him to be moved to a different facility location. This matter was long past and not a subject before this hearing officer.

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.

Grievant admitted he struck the facility resident in violation of [facility] Instruction 10 and [facility] Instruction 106, Standard of Conduct.

DECISION

Without question the facility resident started the altercation. Grievant admitted he “lost it”. His actions were fostered by being in a confined space (a van), where Grievant struck the resident and broke his glasses. He violated policies and rules.

I sustain the Group III Written Notice with termination.

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