

Issue: Group III Written Notice with Termination (patient neglect/abuse); Hearing Date: 12/14/12; Decision Issued: 12/18/12; Agency: DBHDS; AHO: John V. Robinson, Esq.; Case No. 9989; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9989

Hearing Officer Appointment: November 26, 2012

Hearing Date: December 14, 2012

Decision Issued: December 18, 2012

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge termination of his employment effective November 6, 2012, pursuant to a written notice, dated and effective November 6, 2012 by management of the Department of Behavioral Health and Developmental Services (the "Department" or "Agency"), as described in the Grievance Form A dated November 7, 2012.

The parties duly participated in a pre-hearing conference call scheduled by the hearing officer on December 4, 2012 at 10:00 a.m. The Grievant, the Agency's advocate and the hearing officer participated in the call. The Grievant confirmed he is seeking the relief requested in his Grievance Form A, namely, reinstatement and confirmed during the call that he is also seeking back-pay and restoration of all benefits.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on December 4, 2012 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the Grievant represented himself and the Agency was represented by its advocate. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing¹.

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

¹ References to the agency's exhibits will be designated AE followed by the exhibit number. The Grievant did not offer any exhibits.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

APPEARANCES

Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant was formerly employed as a Direct Support Professional II by the Agency at a facility (the "Facility") which serves patients with severe intellectual disabilities. AE 1. The patient at issue in this proceeding needed to go from the Facility to a local hospital for a procedure. The Grievant was assigned as the patient's sitter. As the patient sitter, the Grievant was required by policy to act as the patient's advocate at the hospital, at a minimum informing hospital staff immediately whenever the patient needed care related to his health, hygiene, welfare, safety, etc. AE 7 and 8.
2. From 11:00 p.m. to 7:00 a.m. during the third shift on October 18-19, 2012, Grievant was responsible as a sitter for providing in the local hospital certain direct care to the patient, an elderly man with severe intellectual disabilities, who could not advocate for himself concerning when he needed assistance because he was hurt, wet, soiled, etc..
3. At approximately 4:30 a.m. on October 19, 2012, the patient received a laceration on his forehead just above the area between the eyes. The Grievant admits that it is possible that the Grievant accidentally struck the patient with the remote control in the room but the Grievant is unable to say precisely how the cut happened. AE 4 and 9.
4. The patient's authorized representative ("AR") visited the patient's room at 6:45 a.m. and discovered the patient, his mattress and bedding soaked with urine. The patient's incontinence brief was "torn to shreds" and the patient was lying in a "pool of urine." AE 9.
5. The Grievant left the Facility without attending to the subject of the AR's complaints about the patient's condition and the AR was "extremely upset." The Grievant's replacement sitter and hospital staff proceeded to bathe the patient, replace the mattress, etc.

6. During the hearing, the Grievant admitted that he misunderstood the Agency's rules and regulations concerning acting as a sitter at the local hospital. During the hearing, the Grievant admitted that he made a mistake and asked for a second chance.
7. The Grievant did not follow policy and procedure, as recited in the written notice, in acting as the sitter for the patient during the third shift on October 18-19, 2012.
8. The Grievant received considerable training concerning his direct care duties generally and as a sitter.
9. The testimony of the Agency witnesses was credible. The demeanor of such witnesses was open, frank and forthright.

ADDITIONAL FINDINGS,
APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. 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. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances 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 SOC provide a set of rules governing the professional and personal conduct and acceptable standards

for work performance of employees. The SOC 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 and to provide appropriate corrective action.

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 DHRM Policy 1.60, Standards of Conduct, management is given 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.*

Pursuant to DHRM Policy No. 1.60, the Grievant's conduct could clearly constitute a terminable offense, as asserted by the Agency.

Policy 1.60 provides in part:

c. **Group III Offense:**

Offenses in this category 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.

- See attachment A for examples of Group III Offenses.
- One Group III Offense normally should result in termination unless there are mitigating circumstances.

Attachment A specifically provides that neglect of clients constitutes a Group III offense. However, the SOC further provides:

*Examples of offenses, by group, are presented in Attachment A. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense **not specifically enumerated**, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activity, may be considered unacceptable and treated in a manner consistent with the provisions of this section.*

Note: Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms. Refer to Attachment A for specific guidance.

In this instance, the Agency appropriately determined that the Grievant's violations of policy by not notifying hospital staff of the urine-soaked state of the patient constituted a Group III Offense.

Departmental Instruction 201-3 defines neglect as follows:

. . . failure by a person, program, or facility operated, licensed, or funded by the department, responsible for providing services to do so, including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of a person receiving care or treatment for mental illness, mental retardation, or substance abuse.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's advocate that the Grievant's disciplinary infractions justified the termination by Management. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a terminable offense.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." A hearing officer must give deference to the

agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant.

While the Grievant did not specifically raise mitigation in the hearing or in her Form A and while the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein and all of those listed below in his analysis:

1. the Grievant's employment of approximately three (3) years and the Grievant's service to the Agency; and
2. the often difficult and stressful circumstances of the Grievant's work environment.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was very serious. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

The hearing officer decides for each offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and in terminating the Grievant's employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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 two types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **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 refer 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 or e-mailed.
2. **A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR'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 Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

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 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 EDR before filing a notice of appeal.

ENTER: 12 / 18 / 2012

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Rules for Conducting Grievance Hearings*, § V(C)).