

Issue: Group III Written Notice with Termination (client abuse/neglect); Hearing Date: 01/24/14; Decision Issued: 02/03/14; Agency: DBHDS; AHO: John R. Hooe, III, Esq.; Case No. 10222; Outcome: No Relief - Agency Upheld;
Administrative Review: EDR Ruling Request received 02/06/14; EDR Ruling No. 2014-3811 issued 03/10/14; Outcome: AHO's decision affirmed;
Administrative Review: DHRM Ruling Request received 02/06/14; DHRM Ruling issued 03/11/14; Outcome: AHO's decision affirmed.

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

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of : Case No. 10222

Hearing Date: January 23, 2014
Decision Issued: February 3, 2014

PRELIMINARY MATTERS

Upon being appointed as the Hearing Officer in this matter, effective November 18, 2013, I spoke with the Grievant by telephone for the purpose of scheduling a pre-hearing telephone conference. The Grievant advised the Hearing Officer that he would be represented by D.R. and provided the Hearing Officer with Mr. R.'s telephone number. The Hearing Officer telephoned Mr. R. and was advised by Mr. R. that he would not be representing the Grievant. The Hearing Officer then again called the Grievant who requested that he be allowed time to find a representative before the Hearing Officer scheduled the pre-hearing telephone conference. On December 5, 2013 the Grievant advised the Hearing Officer that his m. would serve as his representative and a telephone pre-hearing conference was scheduled for December 16, 2013.

On December 16, 2013, the Hearing Officer conducted the telephone pre-hearing conference with the Grievant's representative and the Agency representative. At that time, the grievance hearing was scheduled to be conducted on Thursday, January 23, 2014 commencing at 9:00 a.m.

In accordance with the discussion during the telephone pre-hearing conference, the Hearing Officer mailed a letter notice of hearing dated December 16, 2013 to both parties.

APPEARANCES

Grievant

Grievant's Representative
Representative for Agency

ISSUES

1. Did the Grievant abuse or neglect an Agency client? If so, was the abuse or neglect a violation of the Standards of Conduct?
2. If so, did the Grievant's conduct constitute a Group III Offense?
3. If Grievant's conduct was a Group III Offense, was termination from employment an appropriate discipline?
4. Were mitigating factors considered? If not, why were mitigating factors not considered?
5. Was the Grievant retaliated against due to an earlier workers' compensation claim?

EXHIBITS

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

1. - Notice of Hearing Officer
2. - Grievant's Form A
3. - Employee work profile
4. - Plan for providing nursing care
5. - Grievant training record
6. - Witness statements
7. - Focus of hospitalization and treatment
8. - Shift assignments
9. - Special observation flow sheet
10. - Departmental Instruction 201
11. - Employee Handbook
12. - Investigator Report
13. - Overview of skin care and faecal incontinence

The Grievant's Exhibits admitted into evidence are contained in a single notebook with the following contents:

1. - Decision Letter
2. - Alleged evidence
3. - Defense
4. - Miscellaneous documents

FINDINGS OF FACT

The Grievant filed a timely appeal from a Group III Written Notice issued on September 30, 2013 with an offense date of September 10, 2013. The Written Notice describes the offense as “Positive finding of neglect according to Departmental Instruction 201...”.

The disciplinary action taken was the issuance of a Group III Written Notice with letter of termination effective September 30, 2013.

Agency Exhibit 10. is Departmental Instruction 201 (RTS) 03 Reporting and Investigating Abuse and Neglect of Individual Receiving Services and Departmental Facilities. At Section 201-3 “Neglect” is defined as follows:

...the failure by a person...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...

Section 201-3 defines “Abuse” as follows:

...any act or failure to act by an employee or other person responsible for the care of an individual in a Department facility that was performed or was failed to be performed knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person receiving care or treatment...[including]...use of language that demeans, threatens, intimidates or humiliates the person...

Agency Exhibit 11., Employee Handbook at Page 11-7 “Client Abuse and Neglect” provides as follows:

The Department has a duty to provide a safe and secure environment to individuals receiving services and to employees. Additionally, the Department has a philosophy of “zero tolerance” for acts of abuse/neglect because the individuals receiving services represent a particularly vulnerable, fragile, often dependent portion of the population.

The manual goes on to repeat the language of Departmental Instruction 201 but sets out at Page 11-9 the following:

Additionally, the Department views other acts which may be considered abuse/neglect in accordance with Virginia Code Section 37.2-100 and/or are so inappropriate or egregious to warrant disciplinary action. Such acts include but are not limited to:

- Neglect in care such as: denial of food, clothing, medications, hygiene, therapeutic activities or equipment necessary to the health, safety or welfare of a client.
- Use of words...to a client....which are either commonly understood by persons to, or the employee knows will for that particular client would humiliate, demean, disrespect... or cause emotional anguish or distress, ridicule, or threaten to harm to the client or which is likely to insight and/or precipitate maladaptive and/or regressive behavior by the client.

The Agency called as witnesses: T.H., who investigated the matter; D.T., the charge nurse at the time of the alleged incident; C.H., a PNA working at the time of the alleged incident and A.M., ward clerk at the time of the alleged incident. The Grievant called as a witness S.G., Assistant Director of Nursing at the facility.

The combination of the testimony of the witnesses at hearing, combined with the statements included in the Investigator's Summary of Evidence which begins at Exhibit 12., Page 12-3 established the following:

- D.T., the charge nurse, stated that the Grievant (who was a PNA) was pulled from Ward B1 and was assigned the male side and the 15 minute checks on patient E.
- Staff on the ward are required to change patient E.'s attends at least once during the shift due to his incontinence.
- J.T., RN and ward coordinator, stated that she required staff to place a piece of masking tape on patient E.'s attends with the date and time it was changed. She required staff to change the attends at least once per shift, soiled or not, due to her concern that if the attends was not changed it would cause patient E.'s skin to break down and may affect patient E.'s overall cleanliness.
- A.M., ward clerk and D.T., charge nurse, both told the investigator that they heard the Grievant state "D. has shit all over himself and the bathroom" while other patients were standing in line waiting for their breakfast trays. D.T., the charge nurse, stated that just before patients' breakfast, around 6:45 a.m., the Grievant entered the nursing office and told her that patient E. had defecated himself and that it was all over the bathroom and

asked what he was to do. She testified that she told him that he was to clean up patient E. using several wash cloths, change his attends and clothes and then clean the bathroom. She further testified that after she heard the Grievant make the statement that “D. Has shit all over himself and the bathroom” the Grievant entered the housekeeping closet.

- J.B., PNA, told the investigator that when he reported to work for the daylight shift, after receiving report he went to walk the ward and check it out. He stated that usually the outgoing shift walks with you to check out the ward, however, the Grievant could not be found. While checking the ward he found feces on the male bathroom floor which appeared as if someone had pushed it to one side near the wall and left it there. He further said that he saw S.B., PNA, who was doing direct observation on patient E. on the new shift and found out that patient E. had feces all over himself and all over his bed. He stated that with patient E. having so much feces on himself and on his bed, combined with the odor, he concluded that patient E. had to have defecated during the night shift. He further testified that patient E. had feces up his back, and down both legs and that patient E.’s pajama bottoms had feces on them as if patient E. had walked in the feces.

- J.H., the housekeeper, stated that when he opened his housekeeping closet the odor almost took his breath. He stated to the investigator that someone has used his cart which has the mop and mop bucket. The mop, cart and cart wheels still had feces on them. Her stated that the water in the bucket was used and there were chunks of feces in the water.

- C.H., PNA, told the investigator that she was finishing up her night shift when she was asked to clean the bathroom. She stated that she took several towels, bleach-mix and several pairs of gloves and cleaned up the pile of feces that appeared to have been moved from one stall to another. She stated that she never used the mop or the mop cart. In addition, she testified that before she went in to clean the bathroom, the Grievant, PNA, could not be located and that several times during the night shift she found him in the break room with the door shut and it appeared he was texting on his phone. She stated that the Grievant was assigned to the entire mail side.

- The investigator stated that when he interviewed the Grievant, the Grievant denied ever saying “D. has shit himself and the bathroom” by saying “I don’t recall.” The Grievant told the investigator that another patient told him that someone had shit all over the bathroom floor and that he went to the nurses office to let D.T., the charge nurse, know about it. The Grievant stated that the charge nurse told him to clean up the bathroom floor, which he did. The Grievant denied that he knew that patient E. had defecated himself.

- D.T., the charge nurse, stated that when she heard the Grievant make the statement regarding patient E. he sounded “frustrated” not loud or aggressive. She further stated

that the Grievant was not seen again on the ward after leaving her to clean the bathroom.

- S.G., assistant director of nursing, when asked by Grievant’s representative about retaliation against Grievant, she denied any acts of retaliation arising out of Grievant’s earlier workers’ compensation case and denied any “hidden agenda”. Grievant did not produce any evidence of retaliation.
- The Agency representative stipulated that the Grievant’s past work record was good but that mitigation was not considered due to the “zero tolerance” policy regarding patient abuse/neglect.
- The evidence established that Grievant had been trained in and was or should have been familiar with the policy and procedures of the Agency and specifically with respect to abuse/neglect of a patient.

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.

Agency Exhibit 11 Employee Handbook includes Chapter 14: Standards of Conduct and Client Abuse. Included is a list of Group III Offenses described as "...acts and behaviors of such a serious nature that of a first occurrence normally should warrant suspension of up to 30 work days or termination. Included in the list of Group III Offenses is the following:

(13) Violation of the States' or Agency's policies on Client Abuse...the chapter goes on to say under Client Abuse and Neglect the following:

The Department has a duty to provide a safe and secure environment to individuals receiving services and to employees. Additionally, Department has a philosophy of "zero tolerance" for acts of abuse/neglect because the individuals receiving services represent a particularly vulnerable, fragile, often dependent portion of the population....

DECISION

No evidence of retaliation was presented by the Grievant.

The disciplinary action of the Agency is upheld. The Hearing Officer finds that the Agency proved by a preponderance of the evidence that the Grievant was guilty of abuse/neglect of the patient. Considering the "zero tolerance" policy regarding patient abuse/neglect, the Agency action of terminating Grievant's employment is consistent with the law. The Grievant's good work record did not mitigate in Grievant's favor due to the "zero tolerance" policy for this Group III offense which supports termination.

APPEAL RIGHTS

A hearing decision must be consistent with law, policy, and the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings). A 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 administrative review by both EDR and the DHRM Director based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or email. However, as with all aspects of

the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests for administrative review must be provided to the other party, EDR and the Hearing Officer.

Important Note: Requests for administrative review must be in writing and received by the reviewer within fifteen calendar days of the date of the original hearing decision. "Received by" means delivered to, not merely post-marked or placed in the hands of a delivery service.

Requesting Administrative Review:

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 with which the hearing decision is not in compliance. The director's authority is limited to ordering the Hearing Officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-371-7401 or emailed.
2. **A challenge that the hearing decision is not in compliance with the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings)**, 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 hearing 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 must be sent to the office of Employment Dispute Resolution, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-786-0111 or emailed.

In response to any requests for administrative review, the opposing party may submit a written challenge (rebuttal) to the appropriate reviewer. If the opposing party chooses to submit a rebuttal, it must be received by the reviewer within ten calendar days of the conclusion of the original fifteen day appeal period. A copy of any such rebuttal must also be provided to the appealing party, EDR, and the Hearing Officer.

Administrative review decisions issued by the Director of DHRM and EDR are final and not appealable. If the DHRM Director or EDR orders the Hearing Officer to reconsider the hearing decision, the Hearing Officer must do so. If request for administrative review have been made to both the DHRM Director and EDR, the Hearing Officer need not reconsider his/her decision, if ordered to do so on remand, until both administrative reviews are issued or otherwise concluded unless otherwise directed by EDR in the interest of procedural efficiency. If requests for administrative review have been made to both the Director of DHRM and EDR, EDR shall generally respond first. Administrative reviews by the Director of DHRM should be issued within thirty calendar

days of the conclusion of any other administrative reviews.

Final Hearing Decision. A Hearing Officer's original decision becomes a final hearing decision, with no further possibility of 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: Once an original hearing decision becomes final, either party may seek review by the Circuit Court on the ground that the final hearing decision is contradictory to law. Neither the Hearing Officer nor the Department of Human Resources Management (or any employee thereof) shall be named as a party in such an appeal.

An employee does not need EDR's approval before filing a notice of appeal. However, an agency must request and receive approval from EDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal. The request for approval to appeal must be received by EDR within 10 calendar days, which means delivered to, not merely postmarked or placed in the hands of a delivery service. The agency may make its request by email or fax. The agency must provide a copy of its appeal request to the employee. EDR will provide a response within 10 calendar days of the agency's request.

A notice of appeal must be filed with the Clerk of the Circuit Court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision. At the time of filing, a copy of the notice of appeal must be provided to the other party and EDR. The judicial review procedure shall be as more particularly set out in the Grievance Procedure Manual.

John R. Hooe, III
Hearing Officer