

Issue: Group III Written Notice (other issue); Hearing Date: 05/27/14; Decision Issued: 06/19/14; Agency: DBHDS; AHO: John V. Robinson, Esq.; Case No. 10340; Outcome: No Relief - Agency Upheld; Administrative Review: EDR Ruling Request received 07/07/14; EDR Ruling No. 2015-3934 issued 08/07/14; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 07/07/14; DHRM Ruling issued 08/06/14; Outcome: AHO's decision affirmed.

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 10340

Hearing Officer Appointment: April 23, 2014

Hearing Date: May 27, 2014

Decision Issued: June 19, 2014

PROCEDURAL HISTORY, ISSUES  
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge a Group III Written Notice, dated January 31, 2014 by management of the Department of Behavioral Health and Developmental Services (the "Department" or "Agency"), as described in the Grievance Form A dated February 6, 2014.

The parties, by their advocates, duly participated in a pre-hearing conference call scheduled by the hearing officer on April 29, 2014 at 10:00 a.m. The Grievant's advocate, the Agency's advocate and the hearing officer participated in the call. The Grievant, by his advocate, confirmed he is seeking the relief requested in his Grievance Form A, including rescission of the written notice.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on April 29, 2014 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the Grievant was represented by his advocate 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 hearing<sup>1</sup>.

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

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<sup>1</sup> References to the agency's exhibits will be designated AE followed by the exhibit number. Any references to the Grievant's exhibits are designated GE followed by the exhibit number.

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 is a HVAC Supervisor at a 100-year old facility (the "Facility") which provides 24/7 care for persons with intellectual disabilities. The Facility is licensed by CMS as an intermediate care facility for persons with mental retardation.
2. Pursuant to CMS Interpretative Guidelines ambient room temperatures should not drop below 68° F. AE 5. The Facility strives to maintain temperatures between 72° - 76° F. for the comfort, well-being and safety of its patients.
3. On Sunday November 24, 2013, the Director (the "Director") of Physical Plant Services ("PPS") discovered no heat in Building 8 at the Facility, patients were sitting in day halls wrapped in blankets and the temperature was 58° F. GE 12. The Facility was unable to get PPS mechanics to respond, including the Grievant. As a result, the Director met with members of PPS, including the Grievant, to get updated emergency contact information and to stress the importance of responsiveness and communication in such emergency situations to the health, welfare and safety of the disabled individuals which the Facility is charged with protecting.
4. Another such emergency circumstance was forecast for January 7, 2014 because of the extremely cold conditions expected. Temperatures were expected to drop to the single digits and as a result the Facility Director sent an e-mail to all Facility staff, including the Grievant, cautioning safety for all patients and staff and stressing, amongst other things, specifically that:

**From 5:00 p.m. today (1/6/14) through 12:00 p.m. (noon) on Wednesday 1/8/14, shift supervisors will complete rounds every hour on the building to ensure that:**

- a. a count of individuals and staff is completed from face to face observation;
- b. the building has no leaks, the mechanical devices are working, etc. and
- c. that exit doors are locked.

**This information is to be kept on a personal log.**

**Staff on the residential buildings need to notify their respective supervisor when leaving a building so that staff and individual counts are accurate.**

**All programming for Tuesday through Wednesday at noon, except Autism Day Program, will be held on the building. Alternative activities are to be completed. A decision about the Autism Day Program will be made early tomorrow morning.**

**As per current procedures, staff will promptly notify communication center for drop in temperatures and other mechanical problems on the buildings.**

AE 2.

5. The Director had previously stressed the general mandate to the Grievant that the Grievant communicate and respond to him, especially about important matters. AE 6.
6. On January 7, 2014, the temperature on Building 30 dropped to 62.4 ° F. at 7:36 a.m. AE 3.
7. Building 30 houses 2 individuals with autism on the left side as you enter it (30 B) and the autism day support program on the right hand side (30 A). AE 3.
8. The 2 individuals have severely compromised immune systems because they are colonized with a superbug (specifically CRE) and require protection from ordinary contact with the general population for their health and safety.
9. These 2 individuals need routine or structure or they will misbehave if their routine or structure is disrupted. If they need to be moved to another living area, they require a clinical support team, to provide for their medical, pharmacological, food, and other needs.
10. On January 7, 2014, the Grievant and a mechanic whom the Grievant supervises responded to a work order generated by the Facility at 8:33 a.m. that there was "NO HEAT ON BUILDING 30". AE 3.

11. The Grievant left work at his regularly assigned time of 3:30 p.m. and completed and signed the work order under the space concerning "Work Performed" stating "Checked various boxes and heating system." AE 3.
12. However, the heating system was still deficient and this fact was not timely communicated by the Grievant to the Director so that the Director could take timely, responsive, corrective measures.
13. The 2 autistic individuals went back to 30 B at approximately 12:45 p.m. - 1:00 p.m. because of the cold and were forced to relocate to 31 B (alternate living quarters in the Facility) at 7:30 p.m. because the heating system was not working properly in Building 30.
14. It was important that the Grievant communicate the problem with the heating system on Building 30 to the Supervisor as soon as possible because there would have been more manpower readily available to address the complex issues pertaining to the two autistic individuals with compromised immune systems and because of health, safety and welfare concerns relating to such two individuals.
15. The Grievant failed to adequately communicate to the Director the persisting issues concerning heat at Building 30 before he left the Facility.
16. The Facility issued a Group III Written Notice on January 31, 2014;  
  
Failure to address an unsafe condition which had the potential to result in harm to the individuals and staff on Building 30. Specifically, on 01/07/14, at the beginning of your shift, you were notified that room temperatures in Building 30 were below levels that allowed individuals to remain safely in their homes. Attempted corrective measures were taken unsuccessfully to correct the deficiencies. At the end of your shift, you left work and did not report to administration that the heating deficiencies in Building 30 had not been corrected. This is a violation of the Standards of Conduct, Policy 1:60.  
24 Hour Letter issued 01/21/14.  
AE 1.
17. 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 (4<sup>th</sup> 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 Group III 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 shows that the misconduct at issue here constitutes a Group III offense. Additionally, 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.

AE 7.

In this instance, the Agency appropriately determined that the Grievant's violations of policy and the directions from his immediate Supervisor, by not adequately communicating to the Director the status of repair of the heating system in Building 30 constituted a Group III Offense.

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 could have justified 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 Group III 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 and, in fact, mitigated the discipline, opting not to terminate the Grievant or even to suspend or to demote the Grievant, as it could have.

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 service to the Agency;
2. the Grievant's work record;
3. the often difficult and stressful circumstances of the Grievant's work environment;
4. the age of the Facility;
5. the shortage of staff at the Facility; and



6. the difficulties in maintaining the Facility.

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.

While the Grievant argued at the hearing that the work order only required him to work on 30 A, one of the 6 heat zones concerning Building 30, the hearing officer decides that this is too narrow a reading and that the Grievant should have understood from the plain words of the work order that the work order required that heat for the whole building be addressed as the evidence showed would have been management's reasonable and customary expectation.

Similarly, the Grievant's other arguments, including concerning orders for valves and assistance from third party HVAC contractors concerning repair of Building 30's heating system, are merely red herrings which do not excuse the Grievant's failure to communicate with the Director for the benefit of the health, safety and welfare of the patients.

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 disciplining the Grievant 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. 14<sup>th</sup> Street, 12<sup>th</sup> 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. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

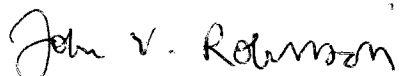
A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days of the date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date 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: 6 / 19 / 2014



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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)).

**Distribution List**  
**for**  
**Due Process Hearing**  
**regarding**  
**David Benjamin (Case No. 10340)**

**Grievant**

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(434) 947-6298 (work)  
david.benjamin@dbhds.virginia  
[Advocate to forward to Grievant]

**Advocate for Grievant**

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**Advocate for Department**

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**Agency's Representative**

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**OEDR Representative**

Ms. Brooke S. Henderson  
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