

Issues: Group II Written Notice (failure to follow policy) and Termination (due to accumulation); Hearing Date: 11/12/13; Decision Issued: 11/15/13; Agency: Department of Behavioral Health and Developmental Services; AHO: William S. Davidson, Esq.; Case No. 10198; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 10198

Hearing Date: November 12, 2013  
Decision Issued: November 15, 2013

**PROCEDURAL HISTORY**

A Group II Written Notice was issued to the Grievant on September 25, 2013, for:

Failure to follow written policy/practices. Specifically, on 9/3/13, you failed to follow the Food and Nutrition policy and practices taught in TOVA training when assisting an individual (GW) with his meal. Your inappropriate interactions at mealtime with the individual (GW) led to an unsafe environment for that individual. 24-Hour letter issued on 9/19/13. <sup>1</sup>

Pursuant to this Group II Written Notice, the Grievant was terminated on September 25, 2013. <sup>2</sup> On May 3, 2013, the Grievant timely filed a grievance to challenge the Agency's actions. <sup>3</sup> On October 15, 2013, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On November 12, 2013, a hearing was held at the Agency's location.

**APPEARANCES**

Agency Representative  
Grievant  
Witnesses

**ISSUE**

Did the Grievant fail to follow written policy/practices regarding the Food and Nutrition policy and the TOVA training for this Agency?

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<sup>1</sup> Agency Exhibit 1, Tab 1, Page 1

<sup>2</sup> Agency Exhibit 1, Tab 1, Page 1

<sup>3</sup> Agency Exhibit 1, Tab 2, Page 1

## **AUTHORITY OF HEARING OFFICER**

Code Section 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 Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>4</sup> Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) 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. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

## **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") §5.8. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.<sup>5</sup> However, proof must go beyond conjecture.<sup>6</sup> In other words, there must be more than a possibility or a mere speculation.<sup>7</sup>

## **FINDINGS OF FACT**

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

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<sup>4</sup> See Va. Code § 2.2-3004(B)

<sup>5</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>6</sup> *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>7</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

The Agency provided the Hearing Officer with a notebook containing sixteen (16) tabs. That notebook was accepted in its entirety as Agency Exhibit 1, with the exception of Page 14, of Tab 16, which were excluded.

The Grievant provided the Hearing Officer with a notebook containing three (3) tabs. That notebook was accepted in its entirety as Grievant Exhibit 1.

This matter commenced at approximately 4:15 p.m., on September 4, 2013, when an incident was reported by an employee of this Agency.<sup>8</sup> Pursuant to the report of this incident, an investigation was conducted and an Investigator's Summary was produced by the Agency's Investigator.<sup>9</sup> The Investigator's Summary was completed on September 11, 2013. The Grievant, in this matter, was not the primary concern of the investigation. The incident is best summarized by the Investigator's Summary of the employee (CD) who filed the original report. The Investigator's Summary is as follows:

...On Sept. 3, 2013 I took [GW] to the bathroom after removing his soiled clothing. He was having a hard time dressing. I tried to help him get his pants on but he resisted. [AB] came into the bathroom and held a cup of water over his head and told him to get dressed, knowing that [GW] doesn't like water on his face. He got dressed quickly and left the bathroom. I asked her why she would do that and she said "institutionalized." At dinner [GW] didn't want to eat quickly, the other staff in the dining room wanted him to. [AB] got a bottled water out [of] the fridge, poured it in a cup, and told him to eat his dinner. He yelled out and held up his left arm as if he was covering his head to protect himself from the water. I put my hand up and said "don't do that, he doesn't like that." [Grievant] told me she would help me. She sat down and tried to get [GW] to eat. He still refused. [Grievant] then put both hands on his shirt, one on each shoulder and pulled him out of his chair, telling him forcefully to "get out, I don't have time for your games tonight." [GW] quickly walked out of the dining room and fell on his face. He was sent to the clinic where he received 7 stitches.<sup>10</sup>

While AB was the primary focus of the investigation, the Grievant became a secondary focus based on CD's statement regarding how she spoke to GW and how she grabbed his shirt and pulled him out of his chair.

In his Investigator's Summary, regarding his questioning of AB, the Investigator states that CD told him the following:

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<sup>8</sup> Agency Exhibit 1, Tab 3, Page 1

<sup>9</sup> Agency Exhibit 1, Tab 3, Pages 1-15

<sup>10</sup> Agency Exhibit 1, Tab 3, Page 5

[Grievant] did not grab [GW], she put her stern voice on and to(ld) [sic] [GW] to get up and he did.<sup>11</sup>

When the Investigator summarized the Grievant's statements, he wrote as follows:

I was assisting individual with his meal while [CD] was assisting [GW] with his meal. [GW] was making loud vocalizations and refusing to eat. After I was finished assisting my individual I volunteered to help [CD] with [GW's] mealtime. [GW] still refused his meal so I stated to [GW] that he could not continue to yell and disrupt the dining room and he could come back in a few minutes. [GW] stood up and walked out...<sup>12</sup>

The investigator spoke to the Shift Supervisor and summarized his statement as follows:

On Tuesday September 3<sup>rd</sup> around 5:50 pm while on 19B living area; I heard something hit the floor. When I looked around the corner I saw staff member [CD] bending down asking [GW] on the floor to get up. When I asked her what had happen(ed) [sic] she stated that he had dropped to the floor where he hit his head causing a laceration to his upper right eyebrow. **At that time there was no mention of anything that may or may not have happen(ed) [sic] while they were in the dinner area. It is my understanding that [CD] told [the other 2<sup>nd</sup> Shift Supervisor] a different story a few hours later concerning the incident.**<sup>13</sup> (Emphasis added)

The Investigator spoke with a psychology associate. She stated in part as follows:

I have no personal experience with [GW] as I have just assumed the 19B caseload. I reviewed past psychological testing and interviewed staff that worked with him for a number of years to get an idea of his level of functioning and comprehension...Based on the information I obtained from a review of his records and staff interviews, I believe [GW] would have the understanding that a cup of water held over his head could result in water being poured over his head. **I cannot state with any certainty, though, that he would feel frightened or threatened by staff holding a cup of water over his head or that this type of action would have any negative impact on him.**<sup>14</sup> (Emphasis added)

Finally, the Investigator spoke with AB's instructor and the instructor stated as follows:

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<sup>11</sup> Agency Exhibit 1, Tab 3, Page 5

<sup>12</sup> Agency Exhibit 1, Tab 3, Page 5

<sup>13</sup> Agency Exhibit 1, Tab 3, Page 6

<sup>14</sup> Agency Exhibit 1, Tab 3, Page 7

...She found her to be honest and had potential in her opinion.<sup>15</sup>

Based on the above, the Investigator reached the following conclusions regarding the Grievant:

**...The investigator found it unlikely that [Grievant] would have been able to pull [GW] out of his chair in the dining room by holding on to his shirt as stated in [CD's] testimony;** (however, this type of physical intervention is probably not specified in his BSP, not taught as an approved technique in TOVA, and is therefore not allowed). **The investigator could not verify the [Grievant] lifted [GW] out of the chair in the dining room by his shirt.**

There were performance issues on the part of [Grievant], for failing to provide a safe environment for [GW] by forcefully stating “get out, I don't have time for your games tonight.” This was only seconds before [GW] exited the dining room and fell to the floor in the hallway striking his head and causing 7 sutures above his right eye area.<sup>16</sup> (Emphasis added)

In his conclusions, the Investigator stated that CD had only been working for the Agency as of June of 2013.

Of all the people that the Investigator spoke to, the only person who appeared before the Hearing Officer was the Grievant. All of the Investigator's testimony was, by definition, hearsay. The Agency did not ask the Hearing Officer to compel any one of these potential witnesses, nor did it attempt to elicit telephonic testimony. Accordingly, there is no way for the Hearing Officer to test the credibility of any of these hearsay statements.

The Grievant testified before the Hearing Officer and denied placing her hands on GW and lifting him out of his chair. The Hearing Officer finds that the Grievant was credible in her testimony. The Hearing Officer also notes that even the Investigator found little credibility in CD's statement regarding the Grievant lifting GW out of his chair. When he testified, the Investigator stated this was highly unlikely because of GW's size. Further, the Investigator explicitly stated that he did not believe he had sufficient grounds to accuse the Grievant of abuse and neglect in this matter. If he did not have sufficient grounds to even make an allegation of abuse and neglect, then clearly that matter is not before the Hearing Officer.

Regarding TOVA training, the Agency directed the Hearing Officer to Tab 8, Pages 13, 14 and 19 of Agency Exhibit 1. Based on the Agency's own testimony and the denial of any improper touching by the Grievant, the Hearing Officer finds that there is no TOVA violation. The Agency directed the Hearing Officer to the Behavior Support Plan for GW.<sup>17</sup> Under Interventions, this document states in part as follows:

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<sup>15</sup> Agency Exhibit 1, Tab 3, Page 7

<sup>16</sup> Agency Exhibit 1, Tab 3, Page 9

<sup>17</sup> Agency Exhibit 1, Tab 5, Pages 1-6

1. If [GW] is displaying signs of agitated behavior...staff will attempt to determine what is bothering him and...**If he continues to display agitated behavior, staff will redirect his attention to an alternate activity or allow him to go to a quieter area (such as his bedroom) away from the situation that he finds distressing.**

2. If [GW] chooses to go to his room during periods of agitation, staff will give him his personal space and discreetly monitor him for potential escalation. **Once [GW] is calm, staff will ask him to return to his ongoing activity...**<sup>18</sup> (Emphasis added)

An Agency witness testified that a proper intervention, regarding GW and his failing to eat his meal would be to let him go to his room until he was calm enough to return and eat his meal. The testimony of the Investigator and the Grievant is that the Grievant directed GW to go to his room because he was agitated and was not eating his meal. The Grievant was a volunteer in this scenario. GW had a one-on-one staffing during this incident. His one-on-one was CD. CD had no one to assist other than GW. When GW left the dining area, CD was responsible for him and him only. Because CD was not there to testify, the Hearing Officer has no idea as to where she was in relationship to fulfilling her one-on-one responsibility to GW.

In it's oral presentation, the Agency spent significant time regarding the Grievant's attendance record. On February 28, 2012; May 8, 2012; July 30, 2013; and again on July 30, 2013, the Grievant received Group I Written Notices for unsatisfactory attendance.<sup>19</sup> Clearly, from the testimony presented before the Hearing Officer, the Agency was extraordinarily upset by this Grievant's attendance problems and the resulting issues that created with the proper function of this Agency.

Standards of Conduct, Policy 1.60(B)(2)(a), regarding Group I offenses, states in part as follows:

...Accumulation of four active Group I Offenses normally should result in termination unless there are mitigating circumstances...<sup>20</sup>

The Agency's policy regarding this issue is as follows:

...Upon receipt of the fourth active Group I Written Notice, the employee may be suspended for 5 to 10 days in lieu of termination. Upon receipt of the fifth active Group I Written Notice, the employee will normally be terminated...<sup>21</sup>

No evidence was presented to the Hearing Officer as to why this Grievant was not terminated pursuant to Policy 1.60, upon receipt of her fourth active Group I Written Notice.

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<sup>18</sup> Agency Exhibit 1, Tab 5, Page 4

<sup>19</sup> Agency Exhibit 1, Tab 16, Pages 1, 5, 9 and 11

<sup>20</sup> Agency Exhibit 1, Tab 11, Page 8

<sup>21</sup> Agency Exhibit 1, Tab 14, Page 1

In this matter, the Agency is looking at the Grievant as a secondary matter to an investigation regarding another employee. The Agency relies entirely upon the testimony of a new employee who is no longer employed by this Agency and whom the Agency did not request the Hearing Officer to compel or attempt to establish telephonic testimony. The Investigator who talked to this employee doubts the credibility of the abuse and neglect allegation regarding the Grievant. The entirety of this matter comes down to whether or not the Grievant spoke to GW in a manner that violated some rule of this Agency. The Grievant denies the allegation; another employee whom the Investigator cited in his report also denies the allegation; and one employee affirmed the allegation. The Hearing Officer finds that the Agency has not even met its minimal burden of proof in this matter that the Grievant violated any written policy or practice of this Agency. While the Hearing Officer is sympathetic to the Agency regarding this Grievant's inability to come to work on a timely basis, the Agency may not use this matter, before the Hearing Officer, to attempt to accomplish what could have been accomplished with the issuance of the fourth Group I Written Notice.

### **MITIGATION**

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..."<sup>22</sup> Under the Rules for Conducting Grievance Hearings, "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. If the Hearing Officer mitigates the Agency's discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

### **DECISION**

For reasons stated herein, the Hearing Officer finds that the Agency has not borne its burden of proof in this matter. The Hearing Officer orders that the Agency reinstate the Grievant to the same position or an equivalent position. The Hearing Officer orders that the Agency award full back pay, from which interim earnings must be deducted, to the Grievant and that she have a restoration of full benefits and seniority.

### **APPEAL RIGHTS**

You may file an administrative review request if any of the following apply:

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<sup>22</sup> *Va. Code § 2.2-3005*



1. If you believe the hearing decision is inconsistent with state policy or Agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

2. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date of the original hearing decision. A copy of all requests for administrative review must be provided to the other party, EDR and the hearing officer. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>23</sup> You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>24</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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William S. Davidson  
Hearing Officer

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<sup>23</sup>An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>24</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.