

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 09/02/14; Decision Issued: 09/22/14; Agency: DBHDS; AHO: Teron Galloway Lee, Esq.; Case No. 10432; Outcome: No Relief – Agency Upheld.

## **DECISION OF HEARING OFFICER**

**In the matter of**

**Case Numbers: 10432**

**Hearing Date: September 2, 2014**

**Decision Issued: September 22, 2014**

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### **SUMMARY OF DECISION**

The Agency had found Grievant violated Departmental Instruction (DI) DI 201 and Agency Policy # 050-57, and it then issued Grievant a Group III Written Notice with removal. The Hearing Officer found Grievant engaged in the behavior alleged and it was misconduct. Next, finding the Agency's discipline was consistent with policy and reasonable, the Hearing Officer upheld the discipline.

### **HISTORY**

On July 8, 2014, the Agency issued Grievant a Group III Written Notice with removal. Specifically, the notice alleged that Grievant violated DI 201 and Agency Policy # 050-57 "Reporting and Investigating Abuse and Neglect of Clients." According to the Agency the violation substantiated a finding of physical and psychological abuse of a patient. On or about July 14, 2014, Grievant timely filed her grievance challenging the Agency's discipline. The Office of Employment Dispute Resolution (EDR) assigned the undersigned as the hearing officer to this grievance on July 31, 2014.

The Hearing Officer held a telephonic prehearing conference (PHC) on August 12, 2014.<sup>1</sup> Based on discussions during the PHC, the Hearing Officer found the first available date for the hearing was September 2, 2014. Accordingly, by agreement of the parties, the hearing was set for that date. On August 18, 2014, the Hearing Office issued a scheduling order addressing those matters discussed and ruled on during the PHC.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. None were presented. During the hearing the Hearing Officer admitted Agency Exhibits 1 through 13 to which Grievant did not object.<sup>2</sup> Grievant was provided an opportunity to present exhibits, but declined to do so.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During the proceeding, the Agency was represented by its advocate. Grievant

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<sup>1</sup> This was the parties' first date available for the PHC.

<sup>2</sup> Before admitting the Agency's Exhibits, Grievant stated she had not viewed exhibit 12, a video of Grievant's conduct, which is the subject of this grievance. The Hearing Officer then recessed the hearing to allow Grievant time to view the video with the Agency's Advocate. When the hearing resumed, Grievant stated she had an opportunity to view the video. Further, she acknowledged having no objection to its admission.

represented herself.

### **APPEARANCES**

Advocate for Agency  
Witnesses for the Agency (2 witnesses)  
Grievant  
Witnesses for Grievant (1, Grievant)

### **ISSUE**

Was the written notice warranted and appropriate under the circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8(2). A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

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

1. The Agency is a facility of the Department. Specifically, it is a mental health hospital. Grievant had worked for the Agency as a certified nurse assistant for over 10 years. Several members of the staff attest to Grievant’s good work ethics. (A Exh. 2, p. 2-4; A Exhs. 7 and 8).
2. Patient was receiving inpatient care at the hospital on June 14, 2014. Grievant entered Patient’s room to supply him with towels and washcloths so he could bathe. Patient opened his bathroom door and threw a cup of urine on Grievant. The urine landed on Grievant’s arms, the front of her blouse, and down the front of her pants and shoes. Grievant asked Patient “if he would like the same to happen to him.” Grievant became angry and walked out of the room. She returned minutes later with a cup of water and threw it on Patient. Patient then closed his door. Patient has Hepatitis C and this was known to Grievant when Patient threw his urine on her. (A Exh. 2 and 9, A Exh. p. 3; A Exh. 9, pp. 2 and c.1.7; A Exh. 12; Testimonies of Nurse and of Grievant).
3. Patient also carries a diagnosis of mild mental retardation and has an extensive history of being institutionalized. Patient has a history of sabotaging his behavioral progress when he becomes uncertain about whether he will remain at the Agency. After the incident involving Grievant on June 14, 2014, the nursing staff took steps to assure that cups were removed from Patient’s room to avoid his filling them and throwing substances at others. (A Exh. 9, p. c.1.8).

4. Two days after the June 14, 2014, incident described above, Patient reported being scared of Grievant and afraid that she might do something to him. He also asked to be transferred somewhere he believes he will receive better treatment. (A Exh. 9, pp. 2-3).

5. Nurse observed Grievant throwing the cup of water at Patient. With regret, and consistent with the Agency's policy regarding reporting suspected abuse/neglect, Nurse reported the incident as abuse. (Testimony of Nurse; A Exh. 9, p. 3).

6. The Agency then conducted a preliminary review of the incident and determined that physical abuse was suspected. Grievant was then placed on administrative leave pending the outcome of an abuse investigation. (A Exh. 4).

7. The ensuing investigation resulted in the Agency finding that Grievant had physically and psychologically abused Patient. (Testimony of Investigator; A Exh. 9, p. 7).

8. Next, the Agency issued Grievant a Group III Written Notice with removal. The group notice described the nature of the offense as follows:

On June 14, 2014 you threw water from a cup onto a client after the client had thrown urine on you. These actions were witnessed by surveillance video as well as there were witnesses that saw the incident occur. Additionally you acknowledged that you engaged in this behavior with the patient. Therefore your actions violated DI 201 and [Agency] Policy #050 -57 "Reporting and Investigating Abuse and Neglect of Clients" which resulted in a substantiated finding of physical and psychological abuse.

(A Exh. 1).

9. In pertinent part, the Department's Instruction 201 (DI 201), section 201-3 defines abuse as follow:

...[A]ny 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 for mental illness, mental retardation or substance abuse.

(A Exh. 11, p. 1).

10. DI 201, at 201-3 continues by supplying several examples of abuse. One example pertinent to this case is "assault or battery."

(A Exh. 11, p. 1).

11. *The Random House College Dictionary* defines “assault” as “an attempt or threat to do violence to another with or without battery, as by holding a stone or club in a threatening manner.” This dictionary also defines “battery” as “an unlawful attack upon another person by beating, wounding, or touching in an offensive manner.”<sup>3</sup>
12. Agency Policy #050-057 references DI 201 regarding abuse and neglect and incorporates by reference DI 201’s definition of abuse. (A Exh. 10, pp. 1-2).
13. Moreover, Agency Policy # 050-057 sets forth a like definition of abuse as noted below:

Any act or failure to act by an employee or other person responsible for the care of a patient that was performed or not performed knowingly, recklessly, or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person.
- (A Exh. 10, p. 2).
14. Agency Policy #050-057 continues by giving several examples of abuse. One example pertinent to this case is “assault or battery.” (A Exh. 10, p. 1).
15. The policies of the Department and the Agency do not tolerate abuse. (A Exhs. 10, p. 2 and 11, p. 1).
16. After Patient threw the urine on Grievant, she could have requested that her superiors remove her from the unit where Patient was housed. She also could have requested approval to press charges against Patient for his conduct. (Testimony of Nurse).
17. Grievant acknowledged she should not have responded to Patient by throwing water at him. (A Exh. 2, p. 3).

### **DETERMINATIONS 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/her 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:

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<sup>3</sup> *The Random House College Dictionary*, © 1973, pp. 81, 115.

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 resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

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 (Policy 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 and to provide appropriate corrective action.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. Further, Group III offenses are the most severe and normally a first occurrence warrants termination unless there are sufficient circumstances to mitigate the discipline. *See* Standards of Conduct Policy 1.60.

On July 8, 2014, management issued Grievant a Group III Written Notice with removal for the reason stated in the above section. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

**I. Analysis of Issue(s) before the Hearing Officer**

**Issue: Whether the discipline was warranted and appropriate under the circumstances?**

**A. Did the employee engage in the alleged conduct? Further, if so did that behavior constitute misconduct?**

Agency Policy # 050-057, similar to the Department's policy DI 201, defines abuse as follows:

Any act or failure to act by an employee or other person responsible for the care of a patient that was performed or not performed knowingly, recklessly, or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person.

Under this policy, an assault or battery on a patient is considered abuse.

Now, the Hearing Officer examines the facts to determine if Grievant violated DI

201/Agency Policy 050-057. The undisputed facts show that Grievant was upset with Patient for throwing a cup of urine on her. Grievant responded by leaving Patient's room, getting a cup of water, and throwing it on Grievant. Patient now reports he is afraid of Grievant and thinks she will act to harm him. Further, he expressed a desire to be moved to another unit where he perceives that the treatment is better.

Grievant's actions clearly show an assault and battery on the Patient by Grievant. The evidence illustrates that Grievant intentionally threw water on Patient as revenge for his throwing a cup of urine on her. Also, the evidence shows that Patient is now afraid of Grievant and believes she is out to harm him. He even requested to be removed from the unit where the assault and battery took place. Indeed, Grievant's behavior caused both physical and psychological harm to Patient. Moreover, her behavior is precisely the type of conduct precluded by the Department's and Agency's policies to prevent abuse of patients.

Having made this finding, the Hearing Officer finds it understandable that Grievant was upset because urine was thrown on her and because Patient reportedly was diagnosed with Hepatitis C. That said, Grievant's behavior is not excusable and clearly in violation of the Agency's zero tolerance of patient abuse.

To this point, first, Grievant had time to cool off. The evidence establishes that Grievant angrily left Patient's room after the urine was thrown on her. She then obtained a container and ran water in it. Then she returned and threw the container of water at Patient. In addition, the evidence shows that Grievant could have reported the incident to her superiors and requested to be moved to another unit away from Patient. Moreover, if Grievant believed Patient needed to be taught a lesson, she could have sought approval to have charges brought against Patient. Grievant took none of the actions which the evidence shows would have been sanctioned by her employer. Moreover, admittedly she responded inappropriately and sought immediate revenge, with an assault and battery. Accordingly, for all the reasons noted above, the Hearing Officer finds Grievant engaged in the alleged conduct and it constituted abuse under the referenced Department and Agency policies.

What is more, Grievant gave varying accounts of whether the water she threw actually touched Patient. Either way, misbehavior occurred. This is so because the act of throwing the water without it making contact with Patient's body was an assault. And such is precluded by Agency anti-abuse policy.

**B. Was the discipline consistent with policy and law?**

The Agency is a facility of the Department. Therefore, consistent with the Department's policies and the Agency's, the Agency has a duty to provide a safe and secure environment for its residents. Abuse of a patient is a serious offense as it can cause both physical and psychological harm to the already mentally ill or challenged. Under DI 201 and Policy # 057-050, the Agency maintains a zero tolerance for this misconduct. Accordingly, the Hearing Officer finds the Agency's issuance of a Group III Written Notice in this matter is consistent with policy and law. Moreover, under Policy 1.60, the issuance of a Group III Written Notice, even if for a first offense, normally warrants removal. The Agency terminated Grievant for her

abuse, and the Hearing Officer finds the removal is also consistent with policy.

## II. Mitigation.

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”<sup>4</sup> EDR’s *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”<sup>5</sup> More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>6</sup>

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice and that the behavior was misconduct. Further, the Hearing Officer has found, the Agency’s discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable. In her plea for mitigation Grievant presents her 10 plus years of employment with the Agency. She notes that her abuse is a first occurrence. Grievant also states she was upset because Patient’s urine made contact with her body and Patient carries a Hepatitis C diagnosis. She further asserts that she did nothing to provoke the patient to throw urine at her.

The Hearing Officer has considered all of Grievant’s arguments and all evidence whether specifically mentioned or not. After giving careful thought to the evidence, the Hearing Officer recognizes (i) the Agency’s mission to maintain a safe a secure environment, (ii) that the Agency provides services to a vulnerable group of individuals - the mentally ill and challenged, and (iii) the Agency maintains a zero tolerance for patient abuse. The Hearing Officer also notes that Grievant had an opportunity to constrain her emotions and use other avenues to handle the

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<sup>4</sup> Va. Code § 2.2-3005 and (c)(6)

<sup>5</sup> *Rules for Conducting Grievance Hearings* VI(A)

<sup>6</sup> *Rules for Conducting Grievance Hearings* VI(B)



situation. Accordingly, under the facts of this case, the Hearing Officer finds the Agency's discipline is reasonable.

### **DECISION**

Hence for the reasons stated here, the Hearing Officer upholds the Agency's discipline.

### **APPEAL RIGHTS**

You may file an **administrative review** request within **15 calendar days** from the date the decision was issued, if any of the following apply:

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. Please address your request to:

Director  
Departmental of Human Resource Management  
101 N. 14th St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371 – 7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 N. 14th St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov). or by fax to (804) 786-1606.

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 the decision was issued. You must provide a copy of all of your appeals 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 requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. 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>7</sup>

Entered this 22<sup>nd</sup> day of September, 2014.

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Ternon Galloway Lee, Hearing Officer  
cc: Agency Advocate/Agency Representative

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<sup>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.