

Issue: Group III Written Notice with Termination (patient abuse/neglect); Hearing Date: 09/05/14;  
Decision Issued: 09/10/14; Agency: DHBDS; AHO: John V. Robinson, Esq.; Case No. 10435;  
Outcome: No Relief - Agency Upheld; Administrative Review: EDR Ruling Request received 09/23/14;  
EDR Ruling No. 2015-4005 issued 10/06/14; Outcome: AHO's decision affirmed.

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 10435

Hearing Officer Appointment: August 6, 2014

Hearing Date: September 5, 2014

Decision Issued: September 10, 2014

PROCEDURAL HISTORY, ISSUES  
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge the termination of her employment pursuant to a Group III Written Notice by management of the Department of Behavioral Health and Developmental Services (the "Department" or "Agency"), as described in the Grievance Form A dated July 24, 2014.

The parties duly participated in a pre-hearing conference call scheduled by the hearing officer on August 14, 2014 at 10:00 a.m. The Grievant's attorney, the Agency's advocate and the hearing officer participated in the call. The Grievant, by counsel, confirmed she is seeking reinstatement and attorney's fees.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on August 14, 2014 (the "Scheduling Order"), which is incorporated herein by this reference. The parties, by counsel/advocate, requested and the hearing officer entered a form of Protective Order concerning this proceeding. The Protective Order is attached hereto and incorporated herein by this reference.

At the hearing, the Grievant was represented by her attorney 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>.

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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 exhibit 1 are designated GE.

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

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 forensic mental health technician ("FMHT") by the Agency at a facility (the "Facility") which serves patients with severe intellectual disabilities. AE 6. The patient at issue in this proceeding (Patient 1) was assigned to the care of Grievant on or about June 21, 2014 some time around 7:30 p.m. - 8:00 p.m.<sup>2</sup>
2. Patient 1 was diagnosed with schizophrenia and has a history of auditory hallucinations and paranoia. Patient 1 was committed to the Facility for restoration of competency to stand trial for charges including failure to register as a sexual offender, a probation violation and a show cause on a prior conviction for possession of cocaine. AE 2 at 1.
3. Patient 1 is irascible, very difficult to deal with, seeks to pit staff against each other and targets the Grievant to cause trouble and difficulty for her. Nevertheless, the Grievant is expected and required, as part of her job duties, to treat Patient 1 with dignity and respect even when his behavior is extremely bad, calling her a "bitch", etc. AE 6 at 1.
4. At approximately 7:30 p.m. - 8:00 p.m. on or about June 21, 2014, FMHT S returned from break and was assigned to the bathroom post to monitor showers. AE 2 at 9.
5. The Grievant and Patient 1 were arguing over the shower with Patient 1 insisting that he was next in line to take a shower. Patient 1 was waiting for his shower in the dayroom.

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<sup>2</sup> Individuals are referred to generically to preserve privacy.

6. Several other patients standing around confirmed that Patient 1 was next in line. AE 1 at 9.
  7. When FMHT S confirmed that all of the names on the shower list before Patient 1 had been crossed off the shower list, FMHT S told Patient 1 that Patient 1 could shower. The Grievant became upset that FMHT S permitted Patient 1 to shower at his appointed time and began yelling at FMHT S and Patient 1. The Grievant's continued yelling upset the other patients.
  8. The Grievant threatened Patient 1 that the Grievant could make sure that Patient 1 did not go home on time. FMHT S unequivocally and convincingly confirmed this threat in her written statement and testimony.
  9. FMHT S went to the Supervisor, who confirmed that FMHT S was correct to allow Patient 1 to shower and the Grievant left the ward for a while to cool off before returning to her post.
  10. The Grievant admitted during cross-examination at the hearing that it might have been Patient 1's turn when the Grievant wanted to skip him.
  11. The Grievant had been employed with the Agency approximately 2 years and 3 months when she was terminated.
  12. The Grievant has received human rights training concerning her job duties and the appropriate methodologies for implementing her direct care services to the adult psychiatric patients. AE 5 and 6.
  13. The Facility conducted a thorough investigation and the assigned experienced Investigator, after assessing the credibility of the witnesses, reasonably found the allegation of abuse substantiated. AE 2.
  14. The Facility issued a Group III Written Notice on July 22, 2014:

*Violation of Departmental Instruction #201, Reporting and Investigating Abuse and Neglect of Clients: A preponderance of evidence exists to corroborate that the allegation of verbal/psychological abuse is substantiated.*
- AE 1, at 1.
15. The Grievant received considerable training concerning her direct care duties.
  16. The testimony of FMHT S was credible. The demeanor of FMHT S 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 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 abuse 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 threatening to obstruct Patient 1's ability to go home on time constituted abuse and a Group III Offense.

Departmental Instruction 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 for mental illness, mental retardation or substance abuse. . . .

AE 7 at 16.

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 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:

DHRM's *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).

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.

The Grievant, by counsel, has specifically raised mitigation as an issue. 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 two (2) years and 3 months and the Grievant's service to the Agency;
2. the often difficult and stressful circumstances of the Grievant's work environment;
3. the bad behavior of Patient 1;
4. the fact that the Grievant received an overall rating of "Contributor" for each of her 2 performance evaluations (AE 6); and
5. the fact that the Grievant has no prior formal discipline.

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 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. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

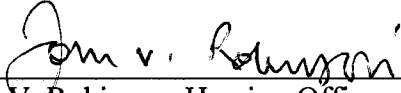
A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the 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: 9 / 10 / 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)).

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

**Re: Grievance of Juanece Banks (Case No. 10435)**

**PROTECTIVE ORDER**

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**Grievant:**  
Juanece Banks

**Agency Representative:**  
Ms. Tracy Salisbury

**Administrative Hearing Officer:**  
John V. Robinson, Esquire  
7102 Three Chopt Road  
Richmond, Virginia 23226  
(804) 282-2987  
(804) 282-2989 (facsimile)  
e-mail: [jvr@jvrlawpc.com](mailto:jvr@jvrlawpc.com)

**Advocate for Agency:**  
Ms. Ann Bailey

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Upon motion of the parties and agreement of counsel/advocates, and deeming it just and proper so to do, it is hereby ORDERED that:

1. This Order governs the handling of all documents, testimony and information produced, given or filed herein by the parties and designated as "CONFIDENTIAL".
2. A party may designate as "CONFIDENTIAL" any document produced or used in this proceeding, that contains any confidential, proprietary, copyrighted, personal, business or financial information by writing, typing or stamping on the face of such document, answer or transcript the word "CONFIDENTIAL" or by otherwise notifying counsel/advocates of the parties in writing, and, in the case of transcripts and exhibits, also the court reporter. Should a party object to the

designation of a document, or transcript as "CONFIDENTIAL", he may apply to the hearing officer for a ruling that the document, answer or transcript, or information contained therein, shall not be so treated after giving prior written notice of such application to counsel/advocates for all parties. Until the hearing officer enters an Order, if any, changing the designation of the documents, answers or transcripts, it shall be given the "CONFIDENTIAL" treatment initially assigned as provided for in this Order.

3. Except upon further Order of the hearing officer, documents, answers or transcripts, or portions thereof, designated as "CONFIDENTIAL" pursuant to this Order, and information contained in any such documents, answers or transcripts, shall be disclosed only to the hearing officer, counsel/advocates of record (including their staff) for the parties or independent experts retained by the parties. No person receiving such "CONFIDENTIAL" documents, answers, transcripts or information shall disclose them or their contents to any person other than the hearing officer or counsel/advocates of record.

4. All documents, answers or transcripts and information disclosed, given or produced by the parties herein shall be used solely for the preparation for and use at the hearing of this proceeding and shall not be used or disclosed by any receiving person for any other purposes, including any commercial or business purpose.

5. Counsel/advocates of record receiving such documents, answers, transcripts or portions thereof designated "CONFIDENTIAL" shall be allowed to disclose them or their contents to any other person only upon order of the hearing officer or upon receipt of written permission from opposing counsel/advocates granting such disclosure.

6. Counsel/advocates for any party may permit an expert or experts hired by any party in preparation for the hearing to review the documents subject to this Protective Order, but counsel/advocates for such party must first obtain from said experts a written statement confirming the expert's agreement to comply with every element of this Protective Order. Said experts shall agree in writing that the contents of the documents shall not be disclosed to any other person and said documents shall not be photocopied or reproduced by any other means.

7. Notwithstanding the foregoing provisions, this Order shall be without prejudice to the right of any party to challenge the propriety of discovery on any grounds including, but not limited to, relevance, privilege and materiality. To the extent that any party does not object to production of any confidential documents or to provision of confidential information, or is willing to provide such documents and/or information subject to and without waiving such objections, such party is hereby ordered to provide such documents and/or information to the other party as part of the discovery process in this proceeding and subject to the terms of this Protective Order.

8. Notwithstanding the foregoing provision, this Order shall not restrict in any manner the right of any party to offer or use as evidence at the hearing of this action any of the documents, answers, transcripts or portions thereof designated as "CONFIDENTIAL" subject to this Protective Order and nothing contained herein shall be construed as a waiver of any objection which might be raised as to the admissibility at the hearing of any evidentiary material.

9. Promptly upon the final termination of this action including any and all reviews, appeals and remands, counsel/advocates for each party shall either (i) return to opposing counsel/advocates all materials which opposing counsel/advocates has designated "CONFIDENTIAL", or (ii) destroy such materials. After taking such action, counsel/advocates for

each party shall certify to opposing counsel/advocates in writing that option (i) or (ii) was elected and has been duly satisfied. Notwithstanding the foregoing sentences of this paragraph, counsel/advocates may retain copies of briefs and other papers filed with the hearing officer which contain or constitute confidential information, but counsel/advocates must maintain such briefs and papers in accordance with the other terms of this Order.

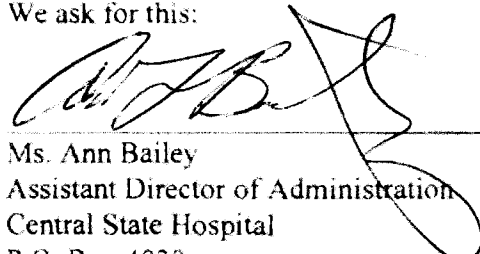
10. This Order may be modified by further order of the hearing officer or by agreement of counsel/advocates for the parties, subject to the approval of the hearing officer, provided that any such agreement be memorialized in the form of a stipulation that shall be filed with the hearing officer and made a part of the record in the proceeding.

ENTER: 8 / 06 / 2014 *nunc pro tunc*



John V. Robinson

We ask for this:



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Ms. Ann Bailey  
Assistant Director of Administration  
Central State Hospital  
P.O. Box 4030  
Petersburg, Virginia 23803-0030

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Attorney for Grievant  
Richard F. Hawkins, III, Esq.  
The Hawkins Law Firm  
2222 Monument Avenue  
Richmond, Virginia 23220

**Distribution List  
for  
Due Process Hearing  
regarding  
Juanece Banks (Case No. 10435)**

**Grievant**

Ms. Juanece Banks  
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Apt. 411 C  
Petersburg, VA 23803  
(804) 301-9227 (home)  
**[Attorney to forward to Grievant]**

**Attorney for Grievant**

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e-mail: rhawkins@thehawkinslawfirm.net

**Advocate for Department**

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Central State Hospital  
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**Agency's Representative**

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**OEDR Representative**

Ms. Brooke S. Henderson  
Office of Employment Dispute Resolution  
Dept. of Human Resource Management  
101 N. 14th Street, 12th Floor  
Richmond, VA 23219  
(804) 225-2994 (telephone)  
(804) 786-1606 (facsimile)  
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**Hearing Officer**

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