

Issues: Group II Written Notice (patient abuse) and Termination (due to accumulation);  
Hearing Date: 07/15/19; Decision Issued: 07/19/19; Agency: DBHDS; AHO: John  
R. Hooe, III, Esq.; Case No. 11380; Outcome: No Relief – Agency Upheld.

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

**DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER**

**In the matter of: Case No. 11380**

Hearing Date: July 15, 2019  
Decision Issued: July 19, 2018

**PRELIMINARY MATTERS**

Upon being appointed as the Hearing Officer in this matter, effective June 5, 2019, the Hearing Officer contacted the Grievant and the Agency Advocate. When the Grievant did not respond to the Hearing Officer's voicemail and email, the Hearing Officer advised by voicemail and email that the pre-hearing telephone conference would be conducted on June 10, 2019 at 9:30 a.m. Being unable to reach the Grievant on June 10<sup>th</sup>, the Hearing Officer scheduled the grievance hearing to be conducted on Monday July 15, 2019 beginning at 9:30 a.m. at Commonwealth Center for Children & Adolescents, 1355 Richmond Avenue, Staunton, Virginia, 24401. The Hearing Officer's letter notice dated June 11, 2019 was mailed and emailed to the Grievant and to the Agency Advocate.

In accordance with the letter notice, the Agency provided to the Hearing Officer a single notebook of exhibits and designated three possible witnesses to testify. The Grievant did not provide in advance any exhibits or otherwise contact the Hearing Officer prior to the deadline of July 8, 2019 set out in the Hearing Officer's letter.

On the morning of July 15, 2019, prior to the grievance hearing, the Hearing Officer reviewed an email which was sent by the Grievant to the Hearing Officer on July 11, 2019 (after the Hearing Officer had left his office and was out of town until the time of the hearing) asking "Is there any way I can reschedule my hearing? If possible, for Friday?". The Hearing Officer did not respond to the email prior to the hearing.

The Grievant did not appear at the hearing or otherwise prior to the hearing contact the Hearing Officer or the Agency regarding her intent not to appear at the hearing.

## **APPEARANCES**

Agency Advocate  
Investigator, Agency Witness  
Chief Nurse Executive, Agency Witness

The Grievant did not appear.

## **ISSUES**

1. Did the Grievant push a patient out of an office and slam a door behind the patient?
2. If so, were the actions by the Grievant a violation of Agency Departmental Instruction 201 Patient Abuse?
3. If so, did the Grievant's conduct warrant a Group II Written Notice?
4. If so, was termination of the Grievant's employment justified?

## **EXHIBITS**

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

1. Group II Written Notice with termination  
Termination Letter  
Due Process Letter  
Administrative Leave Notification Letter  
Abuse/Neglect Investigation
2. Grievant's Form A with attachments  
Grievant's Form B
3. Grievant's Employee Work Profile  
Departmental Instruction 201-Reporting and Investigating Abuse and Neglect  
DHRM Standards of Conduct Policy 1.60
4. Prior active Group III Written Notice
5. Grievant's Training Records

In addition, the Agency provided a DVD of the surveillance footage observed during the grievance hearing.

The Grievant did not provide any exhibits.

## **FINDINGS OF FACT**

The Agency's first witness, the Investigator, testified that Agency Exhibit 1 pages 7-14 correctly described the findings of the investigation. Page 9 of the exhibit indicates that the Investigator showed the Grievant the video of her actions which were the basis of the investigation. At page 12 of exhibit 1 the Grievant provided a written statement as follows:

On March 25, 2019 patient had been hitting staff. Patient was on the pod. I went to check on another patient in his room. When I came back to the office door patient tried to run into the office. Patient tried to bite me. I moved him back out the door.

In addition, at page 14 of exhibit 1 the Grievant added an additional statement as follows:

I...would like to make an addendum to my statement...For my safety and the safety of the patient. I used open hand Pivot and the deflect a TOVA move, that I learned (in) TOVA training. As the patient was coming at me to hit and bite me.

The Investigator also testified that the Agency has a policy of zero tolerance for patient abuse. The witness further testified that the Grievant's actions as shown on the video are not consistent with TOVA training.

The Hearing Officer viewed the video several times. The video showed the patient standing in the hallway outside the office window which is next to the office door, the Grievant arrive and open the office door, the patient quickly push by the Grievant into the office, the Grievant forcefully push the patient out of the office and the Grievant slam the door closed behind her. The Hearing Officer could not tell if the patient tried to bite the Grievant. The video did not show the patient attempting to hit the Grievant.

The Agency's only other witness was the Grievant's Supervisor who issued the Written Notice. The Supervisor's testimony was that the Group II notice was given but that termination was required because the Grievant had an active Written Notice from October 9, 2018 (which was originally a Group III Written Notice mitigated to a Group II Written Notice because of the Grievant's years of service at the Agency.).

The supervisor further testified that the Grievant participated in due process but did not offer any written or verbal statement to defend herself during the due process proceeding.

## **APPLICABLE LAW AND OPINION**

The General Assembly enacted the Virginia Personnel Act, Va. Code ' 2.2-2900 et. seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee=s ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code Section 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.

Departmental Instruction 201-5 (Agency Exhibit 3, Page 13) provides that each individual receiving services in a state facility has the right to be protected from harm including abuse, neglect and exploitation. It further provides that a finding of abuse and neglect shall be substantiated by a preponderance of the evidence gathered during the investigation process.

The Standards of Conduct, Policy: 1.60 provides that a Group II offense includes acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. The Standards of Conduct further provide that a Group II Written Notice should result in a suspension but that a second active Group II Written Notice normally should result in termination.

In considering all of the evidence, it is the Hearing Officer’s opinion that the Grievant’s conduct did constitute a violation of Departmental Instruction 201-5 and the Standards of Conduct. The Grievant’s actions did constitute a Group II offense. Agency Exhibit 4 indicated that a Group III Written Notice was issued to the Grievant on October 10, 2018 and was active at the time of the Grievant’s actions. Accordingly, termination was authorized by the Standards of Conduct.

## **DECISION**

The Hearing Officer upholds the Group II Written Notice and termination of employment.

## APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.[1]

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

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John R. Hooe, III  
Hearing Officer

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[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.