Issue: Administrative Review/grievant claims hearing officer upheld discipline despite agency's failure to produce evidence; Ruling Date: December 7, 2005; Ruling #2006-1140; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: hearing officer directed to reconsider decision in light of this ruling and issue a reconsidered opinion.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINSTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Mental Health, Mental Retardation and Substance Abuse Services
Ruling No. 2006-1140
December 7, 2005

The grievant, through her representative, has requested that this Department administratively review the hearing officer's decision in Case Number 8155. The grievant contends that the hearing officer erred by upholding the discipline issued by the agency. Specifically, the grievant asserts that the hearing officer upheld the agency imposed discipline despite the agency's failure to produce evidence that she committed patient abuse on May 13, 2005.

FACTS

The grievant was a direct service associate at the time of her removal from employment. On May 13, 2005, a male resident with mental retardation had been behaving badly and was placed in "time-out." After being in restraints for 45 minutes, the resident was released but continued his negative behavior and kicked a hole in a wall. He was placed in restraints a second time. When he was again released, the patient requested to call his aunt. The team leader heard part of the conversation and then spoke with the resident's aunt. The aunt said that the resident claimed that the grievant hit him because he was bad. However, the aunt said she did not believe that the grievant would hit the resident. The team leader reported the conversation to the Center Director.[1] Because there was no evidence other than the resident's allegation, and because the resident's aunt did not believe that the grievant would hit the resident, the Director concluded that there was insufficient information to warrant an investigation.

On May 24, 2005, a contract employee reported that he had seen the grievant strike the resident on May 13th. Upon learning of this report, the Center Director assigned an investigator to the case. The investigator interviewed the resident, the grievant, and six other employees who worked in the resident's

[1] Agency Exhibit 3. Team Leader's witness statement, May 25, 2005. *See also* Agency Exhibit 4, e-mail from team leader to Center Director, May 17, 2005.

building. The investigator concluded that the grievant had physically and verbally abused the resident. Central Office directed that the grievant be removed from employment, which occurred on June 9, 2005. The agency's Written Notice to the grievant stated the "Date of Offense" as "5/13/05" and described the "Nature of Offense and evidence" as "In accordance with DI 201, *Reporting and Investigating Abuse and Neglect of Clients*. Allegation of abuse of residents was substantiated."

The grievant challenged her removal through the grievance procedure and, on September 7, 2005, her grievance advanced to hearing. In a September 8, 2005 hearing decision, the hearing officer found that "[c]onsidering the totality of the available evidence, the agency has not demonstrated, by a preponderance of evidence, that grievant struck the resident." However, the hearing officer upheld the discipline and termination, based on the grievant's alleged verbal abuse of residents. The hearing decision did not contain a finding of when the alleged verbal abuse occurred.

DISCUSSION

Due Process

The grievant asserts that the hearing officer erred by upholding the discipline because the Written Notice lists May 13, 2005 as the date of the alleged offense and the agency did not prove nor did the hearing officer find that client abuse occurred on that date. This objection, while not couched in terms of due process, squarely raises the issue. Due process is a legal concept appropriately raised with the circuit court. Nevertheless, because due process is inextricably intertwined with the grievance procedure, this Department will address this issue of due process.

Prior to receiving discipline, the United States Constitution and state and agency policy generally entitle a non-probationary, non-exempt employee of the Commonwealth to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[2] A more comprehensive post-disciplinary hearing follows once the discipline has been issued. Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the

[2] Board of Education v. Loudermill, 470 U.S. 532, 545-46 (1985). State policy requires:

> Prior to any (1) disciplinary suspension, demotion, and/or transfer with disciplinary salary action, or (2) disciplinary removal action, employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

Department of Human Resource Management (DHRM) Policy 1.60 VII (E)(2). In addition, the Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."

discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[3]

On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[4] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[5] Based on these principles of notice and due process, where an employee is challenging a disciplinary action, "only the misconduct cited on the Written Notice and attachments are subject to adjudication."[6]

In this case, the grievant asserts that the hearing decision is upholding her discipline and termination for conduct that was not cited in the Written Notice. As stated above, the Written Notice states that the date of the offense was May 13, 2005, and that the alleged misconduct was "abuse of residents." There was no explanation of the evidence supporting the charge and there were no other documents attached to the Written Notice.

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[3] Loudermill, 470 U.S. at 546.

[4] Reeves v. Thigpen, 879 F. Supp. 1153, 1174 (Mid. Dist. Ala. 1995). *See also* Garraghty v. Commonwealth of Virginia, 52 F.3d 1274 (4th Cir. 1995) (holding that "'[t]he severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" Garraghty, 52 F.3d at 1284. *See also* Detweiler v. Commonwealth of Virginia, 705 F.2d 557, 560-561 (4th Cir. 1983)(Due process requirement met where: (A) the disciplined employee has the right to (i) appear before a neutral adjudicator, (ii) present witnesses on employee's behalf and, (ii) with the assistance of counsel, to examine and cross-examine all witnesses, *and* (B) the adjudicator is required to (i) adhere to provisions of law and written personnel policies, and (ii) explain in writing the reasons for the hearing decision.)

[5] *See* Va. Code § 2.2-3004(F) which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing, and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005 and 3006. *See also Grievance Procedure Manual* §§ 5.7 and 5.8, which discuss the authority of the hearing officer and the rules for the hearing, respectively.

[6] *See* Hearing Case No. 551, page 6, issued March 12, 2004. In this hearing decision, the hearing officer cites to O'Keefe v. United States Postal Service, 318 F.3d 1310 (U.S. Ct. App.), which states that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply." O'Keefe, 318 F.3d at 1315. Moreover, under the rules of the grievance procedure, "[a]ny issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing." *Rules for Conducting Grievance Hearings*, I. In this case, the Written Notice that was qualified for hearing was expressly issued for alleged conduct occurring on May 13, 2005.

The grievant is correct that, based on the Written Notice she received, the agency limited the offense for which she was disciplined to conduct occurring on May 13th. The agency certainly could have expanded the scope of the Written Notice by citing to a range of dates and by explaining in a description of the charges and supporting evidence that it was charging her with acts that occurred on dates other than May 13th.[7] However, the agency limited (intentionally or not) the Written Notice to cover only conduct which occurred on May 13th. Thus, only conduct that occurred on that day could be used to sustain the Written Notice.

While the hearing decision contains a finding that the grievant engaged in verbal abuse of patients, the hearing decision does not contain a finding that any verbal abuse occurred on May 13.[8] Furthermore, this Department's review of the record evidence did not reveal any evidence that appeared to establish that the grievant committed verbal abuse on May 13, 2005. However, the hearing officer is fact-finder, and thus he is ordered to review the record evidence to determine whether the agency bore its burden of proving, by a preponderance of the evidence, that the grievant committed patient abuse on that date. As with any hearing decision, the hearing officer shall cite grounds in the record evidence that support his findings.

Whether Grievant's Conduct on May 13th Constituted Patient Abuse

The grievant objected to the hearing decision on the basis that the hearing officer did not follow the framework for determining whether discipline was warranted and that the agency did not prove that any client abuse occurred on May 13th. The framework to which the grievant refers is found in the *Rules for Conducting Grievance Hearings (Rules)* and requires the hearing officer to determine (i) whether the employee engaged in the behavior described in the

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[7] *See* Hearing Case No. 551 in which the hearing officer found that the date of the written notice was a single day March 27, 2003, but in the description of the charges elaborated to explain that offense occurred over a period of several days, March 27th through April 3rd.

[8] The discussion in the hearing decision regarding alleged verbal abuse is set forth below:

> Grievant denies speaking to residents in an abusive manner, and denies that the team leader ever counseled her. One coworker (H) said that some staff use a harsh tone when speaking to residents. The contract employee stated that grievant spoke abusively to residents and used vulgar language when doing so. The team leader had spoken to grievant several times during the year about speaking loudly and harshly at residents. Another coworker (M) corroborated that the team leader had counseled grievant and two others for talking harshly to residents. She testified that she had heard grievant use curse words when speaking to residents.
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> While the credibility of the contract employee is in question, grievant did not challenge the credibility of the team leader and other coworkers. On cross-examination, grievant did not question the team leader and coworker about the accuracy of their written statements regarding the verbal abuse. Given the totality of the evidence, it is concluded that the agency has borne the burden of proof to show that grievant verbally abused residents.

Hearing Decision, page 5.

Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense) and, finally, (iv) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.[9]

Applying the *Rules* framework to the facts of this case, the hearing officer was first required to determine what behavior occurred *on May 13, 2005*, and next consider whether such behavior constituted misconduct. The hearing officer appears to have concluded that the grievant, on some indeterminate date(s), used harsh language when speaking with residents and had cursed when addressing them. Certainly, such behavior would seem to constitute misconduct and could support some level of disciplinary action, *if it occurred on May 13th*.

The hearing officer was next required to determine whether the discipline was consistent with law and policy. Here, that analysis would address whether the discipline for any misconduct found to have occurred on May 13th was appropriately characterized as a Group I, II, or III. In this case, there remains a question as to whether the misconduct identified in the hearing decision, even if found to have occurred on May 13th, was properly characterized as a Group III offense. Under the agency's Standards of Conduct, the use of obscene or abusive language is a Group I offense. Likewise, inadequate or unsatisfactory job performance is also a Group I offense. On the other hand, patient abuse, physical or verbal, is a Group III offense.[10] Here, distinctions regarding the behavior supporting a Group I offense for poor job performance or use of obscene language, and a Group III offense for verbal abuse, are not expressly addressed in the hearing decision. Because such distinctions essentially determine whether a particular act of misconduct constitutes a Group I or III, under the *Rules* framework, the decision should have discussed the differences between these

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[9] *Rules for Conducting Grievance Hearings*, VI (B), ("Framework for Determining Whether Discipline was Warranted and Appropriate").

[10] According to agency policy, patient "abuse" means any act or failure to act by an employee or other person responsible for the care of an individual in a facility or program operated, licensed, or funded by the Department, excluding those operated by the Department of Corrections, 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. Examples of abuse include, but are not limited to, acts such as: (1) rape, sexual assault, or other criminal sexual behavior; (2) assault or battery; (3) use of language that demeans, threatens, intimidates or humiliates the person; (4) misuse or misappropriation of the person's assets, goods, or property; (5) use of excessive force when placing a person in physical or mechanical restraint; (6) use of physical or mechanical restraints on a person that is not in compliance with federal and state laws, regulations, and policies, professionally accepted standards of practice or the person's individualized services plan; and (7) use of more restrictive or intensive services or denial of services to punish the person or that is not consistent with his individualized services plan.

offenses and how the hearing officer concluded that the grievant's acts rose to the level of a Group III instead of a lesser offense.[11]

The decision appears to rest, in part, on a statement by the Team Leader. The decision finds that the Team Leader had spoken to grievant several times during the year about speaking loudly and harshly at residents. Depending on the facts, such verbal communication could certainly rise to the level of verbal patient abuse, a Group III offense normally warranting termination. However, given the Team Leader's testimony that she had never considered the grievant's communication to constitute verbal abuse, it is not evident how the team leader's statement (or testimony) supports a conclusion that the grievant's apparently inappropriate communications rose to the level of verbal abuse.[12]

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[11] The hearing decision shall state the grounds in the record for findings. *Rules for Conducting Grievance Hearings*, II.

[12] The hearing officer appears to rely on the grievant's failure to cross examine the team leader to support his finding that verbal abuse occurred on an indeterminate date. (*See* note 8 above). However, given the sworn testimony of the team leader, that she did not consider the grievant's communications to be verbal abuse, there appeared to be little reason for the grievant to cross-examine the Team Leader. The agency called the team leader as a witness and asked her "Did you ever hear her [the grievant] speak in abusive language at residents or around residents?" The team leader responded by stating "Not abusive-sternly." Hearing tape 1, side A, counter #1280-1285. Later, the hearing officer appropriately attempted to clarify the distinction drawn by the team leader. The exchange between the hearing officer and team leader is set forth below and is found on hearing Tape 1, side B, counter #255-306.

Hearing Officer: Now, you said that you had heard Ms. Hill speaking to residents sternly. Correct?
Reply from Team Leader: Uh-uh.
HO: Is that yes or no ma'am?
Reply: Yes. I'm sorry.
HO: But, you didn't consider it abusive?
Reply: No. It was not on a frequent basis.
HO: But yet you did speak to her about it.?
Reply: I did speak to her, and, I believe I put it in her evaluation last year: monitor voice tone.
HO: But yet you didn't consider it abusive?
Reply: No.
HO: Did you ever consider her being abusive verbally to patients?
Reply: No. There was never a threat. It was: "he shouldn't have that." It was just more stern towards me. I think [the grievant] felt that certain residents were getting favoritism or special privileges such as Mr. [B] who could verbalize: "I don't want this."
HO: So your experience with [the grievant] is that she has never spoken abusively to a client? Is that correct?
Reply: Never spoken abusively, just stern; tone.
HO: So as far as you're concerned she should not be disciplined for abusive language or abusive speaking to a patient, as far as you have witnessed.
Reply: Abusive language? I'm sorry. . .
HO: Any kind of abuse to a patient.
Reply: Yes. Anyone should be disciplined for . . .
HO: No. Should she be disciplined for verbal abuse toward this resident, based on what you know and you had witnessed?
Reply: Are we speaking of the sternness?
HO: I'm talking about verbal abuse. You're familiar with the abuse policy are you not?

The hearing officer's decision also relies upon the statement of co-worker (H) to support his finding of verbal patient abuse. The hearing decision states that co-worker (H) "said that some staff use a harsh tone when speaking to residents." Co-worker (H) never testified at hearing but the hearing record contains a written statement by co-worker H which states that "some staff [no names mentioned] do use a tone of voice that seems harsh to me . . . ."[13] A report drafted by the agency investigator following her investigation of the charge of patient abuse also attributes to co-worker H an allegation of inappropriate, harsh language by several employees, including the grievant. However, neither the investigative report nor statement appeared to link any such behavior to May 13th.

The only other record evidence that the hearing officer apparently relied upon to uphold the verbal abuse charge against the grievant is testimony and a statement by co-worker (M). According to the hearing decision, co-worker (M) confirmed that the Team Leader "had counseled the grievant and two others for talking harshly to resident." However, as stated above, the record reflects that the Team Leader testified that she had observed the grievant speaking sternly to patients but never abusively. The hearing decision also states that co-worker (M) "testified that she had heard grievant use curse words when speaking to residents." The hearing tapes reveal that the agency representative's question posed to co-worker (M) regarding the alleged use of abusive language (or "curse words")[14] was partially inaudible and thus the review could neither confirm nor refute the testimony attributed to co-worker (M).[15] However, even if co-worker (M) is presumed to have testified as described in the hearing decision, her response was not date specific and she could not recall any words purportedly used by the grievant. Equally important, co-worker (M) provided no testimony as to the context in which the unidentified curse words were used.[16]

Reply: Yes.
HO: Okay. Do you think she has violated the abuse policy?
Reply: Verbally, no.

[13] Agency Exhibit 3.

[14] The agency representative uses "curse words" interchangeably with "verbal abuse." *See* hearing tape 1, Side B, counter 550-557. *See also* hearing tape 2, side A, counter 1040-1050.

[15] The agency representative's closing statement tends to call in to question the finding that co-worker (M) testified that the grievant used curse words when speaking to residents. In describing co-worker (M's) testimony, the agency representative described co-worker (M) as testifying that while "there was cursing used in the cottage, um not--she didn't say directed, [co-worker (M)] did not say directed at residents, but that it [cursing] was used." Hearing tape 2, side A, counter 1040-1050. (Emphasis added.) Also, the investigative report states in its summary of evidence that co-worker (M) "states that [the grievant] has not ever cursed at the residents, but does curse out loud." (Agency Exhibit 2, page 4, (emphasis in original)).

[16] The context in which the words were used would appear to be critical in determining whether the language was abuse (i.e., whether it could or did demean, threaten, intimidate, or humiliate). For example, co-worker M identified only two curse words that were used by staff: "hell" and "ass." Certainly in many contexts, these words could constitute abuse with the appropriate level of discipline a Group III termination. But in other contexts, depending on tone and usage, these

In sum, the hearing officer is directed to determine what behavior occurred on May 13, 2005, and whether such behavior constituted misconduct. If he finds that misconduct occurred on that date, then he must determine whether that misconduct was properly characterized as a Group III level offense rather than a lower level offense such as a Group I for unsatisfactory performance or use of obscene language. The hearing decision shall cite to the grounds in the record that support the findings on the appropriate characterization of any misconduct that occurred on May 13th.

Mitigating Circumstances

The final step in the *Rules'* framework requires the hearing officer to consider whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

One example of a potentially mitigating circumstance is inconsistent discipline of similarly situated employees.[17] In this case, the grievant queried the Center Director as to how the agency had dealt with several other employees who were also accused of using inappropriate, harsh language.[18] The Center Director responded by stating that they "certainly haven't been removed to my knowledge." [19] He went on to state that "I am sure or I feel relatively certain that they were all counseled with regard to their verbal behavior."[20] The original decision does not address the potential disparity in how these employees were treated.

The hearing officer is ordered to consider if mitigating circumstances exist (and if so, whether aggravating circumstances exist), including whether any inconsistencies exist with respect to the agency's treatment of other potentially similarly situated employees.

CONCLUSION

The hearing officer is directed to reconsider his decision in light of this ruling and issue a reconsidered opinion.

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words could fall short of abuse, even though they could be viewed as unprofessional and constituting a lesser offense.

[17] *Rules for Conducting Grievance Hearings*, VI (B) (1).

[18] It is not evident from the hearing decision or this Department's review of the hearing record whether these employees were truly similarly situated to the grievant, although co-worker (M) apparently testified that "the leader had counseled the grievant and others for talking too harshly to residents." Hearing Decision, page 5.

[19] Hearing tape 1, side B, counter 1307-1314.

[20] Hearing tape 1, side B, counter 1314-1322.

As a final note, this ruling should not be read to foreclose, at least from the perspective of compliance with the grievance procedure, an agency from attempting to correct a deficiency in a Written Notice. As to whether and how an agency can, under state policy, correct an error or omission from a Written Notice, these are questions that must be answered by the Department of Human Resource Management (DHRM) Director. However, where an agency has issued a Written Notice that is somehow deficient in terms of providing adequate notice of charges and supporting evidence, this Department does not rule out the possibility that, as a matter of compliance with the grievance process, such a deficiency could be later cured so long as it was done so in a timely[21] fashion.

APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review and any reconsidered hearing decisions following such review have been decided.[22] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[23] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[24] This Department's rulings on matters of procedural compliance are final and nonappealable.[25]

Claudia T. Farr
Director

[21] Any such attempt to cure should be in writing and must occur well in advance of the grievance hearing.
[22] *Grievance Procedure Manual,* § 7.2(d).
[23] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual,* § 7.3(a).
[24] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).
[25] Va. Code § 2.2-1001 (5).