

Issue: Group III Written Notice with Transfer (patient abuse); Hearing Date: 01/24/13; Decision Issued: 02/14/13; Agency: DBHDS; AHO: John V. Robinson, Esq.; Case No. 9997; Outcome: No Relief – Agency Upheld; **Administrative Review**: **EDR AR Request received 03/01/13; EDR Ruling No. 2013-3551 issued 03/29/13;** **Outcome: AHO's decision affirmed; Judicial Review: Appealed to Circuit Court in Amherst County (04/29/13); Outcome: Case Dismissed (06/11/13).**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9997

Hearing Officer Appointment: December 19, 2012

Hearing Date: January 24, 2013

Decision Issued: February 14, 2013

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge a Group III Written Notice, dated and effective July 19, 2012 by management of the Department of Behavioral Health and Developmental Services (the “Department” or “Agency”), as described in the Grievance Form A dated August 10, 2012.

The parties duly participated in a pre-hearing conference call scheduled by the hearing officer on January 3, 2013 at 11:00 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 the relief requested in her Grievance Form A, including rescission of the written notice.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on January 3, 2013 (the “Scheduling Order”), which is 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 hearing¹.

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

¹ References to the agency's exhibits will be designated AE followed by the exhibit number. Any references to the Grievant's exhibits are designated GE followed by the exhibit number.

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 Direct Support Professional II by the Agency at a facility (the "Facility") which serves patients with severe intellectual disabilities. AE 3. The patient at issue in this proceeding was assigned to the care of the Grievant during the first shift from 7:00 a.m. to 3:30 p.m.
2. The subject patient is a 65 year old, long-term resident of the Facility. The patient is essentially nonverbal and suffers from various ailments and disorders, including Bipolar I Disorder.
3. The patient's cognitive skills fall within the profound range of mental retardation/intellectual disabilities. AE 10.
4. The patient enjoys his personal space and has a Behavior Support Plan which stresses the need for staff to be respectful of his personal space:

"4. When staff is making a request of [patient], be respectful of his personal space. Staff should not approach [patient] directly from the front but should remain off to his side. [Patient] does have hearing loss so staff should use caution when approaching him from behind to avoid startling him

5. When making a request of him, staff should extend a hand to [patient]. It has been noted that if he reaches for the hand, he is likely to be cooperative. If he does not accept the hand, staff should move away and try again in approximately 10-15 minutes."

AE 10 at 6-7.

5. Policy requires each Direct Support Professional II to be familiar with the Functional Behavior Assessment and Behavior Support Plan (the "Plan") for each

patient under their direct care. Services are supposed to be delivered in a way that helps the person served to be as independent as possible and in a manner that reflects the individual's personal choice and preferences to the fullest extent possible. AE 4. Accordingly, "[t]he direct care support professional should remember to 'do with' not 'for' the individual to the fullest extent possible." AE 4 at 3.

6. Staff receives ongoing training concerning their job responsibilities and the appropriate methodologies for implementing their direct care duties. AE 4, 5, 6, 7, 11, 13, 14, 15 and 16.
7. During the hearing, the Grievant admitted that she was not familiar with the patient's Plan.
8. During the early afternoon on Monday, June 25, 2012, the patient was sitting on the arm of a chair in the day hall of a particular suite and building in the Facility. The patient was sitting next to A, another DSP II and was playing with her keys. The Grievant, F (also a DSP II) and A were all on the day hall at the relevant time.
9. The Grievant walked over to the patient, grabbed his t-shirt and told him to come with her to the bathroom. The patient resisted and lowered himself to the ground.
10. The Grievant then grabbed the back of the collar of the patient's t-shirt and dragged him approximately 21 feet across the day hall to just outside the entrance into the day hall in the hallway. AE 12. At this time, the patient tried to bite the Grievant and she let go.
11. A came over to the patient, put her hands out and the patient responded by getting up, allowing the Grievant then to escort him to the bathroom.
12. Both A and F were troubled by the incident and reported the incident to their appropriate supervisors, as required by policy.
13. The Facility conducted a thorough investigation and the assigned trained Investigator, after assessing the credibility of the witnesses, reasonably found the allegation of abuse substantiated. AE 1.
14. The Facility issued a Group III Written Notice on July 19, 2012:

Violation of Departmental Instruction #201, Reporting and Investigating Abuse and Neglect of Clients, as defined in Section 201-3 for a Substantiated Allegation of Abuse. An investigation substantiated that you "dragged" an individual (GD) across the day hall by the back of his t-shirt while he

was seated on the floor. This is also a violation of the *Standards of Conduct*.

AE 3 at 5.

15. The Facility mitigated the discipline in view of the Grievant's 32 years of service and work record and the Grievant was not terminated, demoted, suspended, etc.:

Departmental Instruction 201 requires termination for a substantiated finding of abuse/neglect unless there are circumstances that would warrant mitigation. In view of your years of service and your work record, termination is being mitigated. Your response to the due process letter was also taken into consideration.

16. The Grievant was transferred to another Building within the Facility because of the incident.
17. The Grievant received considerable training concerning her direct care duties.
18. The testimony of the Agency witnesses was credible. The demeanor of such witnesses 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 (4th 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 dragging the patient across the day hall by the back of his t-shirt constituted 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 1.

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 hearing officer agrees with the Agency's advocate that the Grievant's disciplinary infractions could have justified termination by Management. Accordingly, 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:

The *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) (alteration in original).

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 and, in fact, mitigated the discipline, opting not to terminate the Grievant or even to suspend or to demote the Grievant, as it could have.

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 thirty two (32) years and the Grievant's service to the Agency;
2. the Grievant's work record; and
3. the often difficult and stressful circumstances of the Grievant's work environment.

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. 14th Street, 12th 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: 2 / 14 / 2013

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)).