

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 05/10/17; Decision Issued: 05/12/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10997; Outcome: Full Relief; **Administrative Review: Ruling Request received 05/30/17; EDR Ruling No. 2017-4561 issued 06/12/17; Outcome: Remanded to AHO; Remand Decision issued 06/20/17; Outcome: No change to original decision.**



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10997**

Hearing Date: May 10, 2017

Decision Issued: May 12, 2017

#### **PROCEDURAL HISTORY**

On December 30, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for client abuse.

On January 11, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 4, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 10, 2017, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

#### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. 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)?
4. 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?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. 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 the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Behavioral Health and Developmental Services employed Grievant as a Safety and Security Technician at one of its facilities. The purpose of his position was:

To maintain security, custody, and control over a patient population ranging from ages 18 to 64 in the Forensic Unit. Responsible to maintain controlled access both inside and outside the Forensic Unit.<sup>1</sup>

He had been employed by the Agency for approximately three years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received training in Therapeutic Options of Virginia (TOVA) regarding how to respond to physical assaults by patients. He was taught to block a Patient who was attacking him. The Agency's witness conceded that not every confrontation with a patient can be resolved using TOVA techniques.

The Patient was admitted to the Facility based on a Temporary Detention Charge after being charged with false report to a law enforcement officer, strangulation of another, and unlawful bodily injury. His primary diagnosis is post-traumatic stress disorder.

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<sup>1</sup> Agency Exhibit 5.

The Patient is a young man who is significantly shorter and lighter than Grievant. Grievant is taller and heavier than the average male and all of the other employees involved in the conflict.

On December 13, 2016, the Patient was in a two-to-one relationship meaning that two Forensic Mental Health Technicians were to be within arm's length of the Patient at all times.

The Patient became agitated when a nurse asked him why he removed the dressing from his left arm. He began pacing around the room and went down the hallway to his room. He scraped dry paint from the wall and stuck it into his right arm trying to create a cut. He put the paint chip in his pocket. A nurse asked him to give her the paint chip. He removed it from his pocket and dug it into his arm. The Patient looked into the nursing station and saw a nurse drawing a syringe. He believed staff intended to give him a sedative against his will. He said, "come on with it; whoever touch me will get knocked the f—k out."

An emergency response that included Grievant was called to provide assistance to the FMHTs working with the Patient. When Grievant arrived he observed the Patient cutting himself with a piece of dry paint he obtained from his room. The Patient's forearm was wrapped with a white material. Grievant heard the Patient say, "I'm gonna f-k me up somebody tonight yo I swear." The Patient ripped the water fountain off the wall of the room. He flipped a table upside down.

The Patient began pacing back and forth down the sides of the room. The two FHMTs followed the Patient attempting to verbally de-escalate the Patient. A Nurse announced that they had a "hands on" order from the doctor.

The Patient picked up a chair and began walking around with it. He stood next to the flipped table. Grievant told the Patient to put down the chair. The Patient threw the chair at Grievant who was on the other side of the flipped table. Grievant deflected the chair and slapped the chair down to the floor. The Patient moved slightly toward Grievant as he spoke to Grievant. Grievant stepped towards the Patient. A FHMT tried to move the Patient backwards. The Patient moved backwards several feet and three employees faced the Patient and were between the Patient and Grievant as Grievant walked closer to the Patient yet remaining several feet away. Once the Patient was in the corner and surrounded by employees, he brushed passed the FHMTs and faced Grievant. He began striking at Grievant as Grievant moved to his left to avoid the contact. The Patient punched Grievant in the face and then moved back and away from the corner. The punches dazed Grievant.

The Patient quickly moved to the other side of the flipped table. Another Male Employee approached the Patient to the Patient's right. Grievant walked around the table to the Patient's left side. The Patient turned towards to his right to face Grievant and positioned himself to fight Grievant. Grievant was not advancing towards the Patient as much as he was moving from Grievant's left to his right. Grievant's body was

facing in the direction he was moving as his head was turned to his left to view the Patient. The Patient crouched and positioned himself to fight. As Grievant continued his path from left to right and past the Patient, the Patient lunged forward towards Grievant with the objective of hitting Grievant in the face. Because of Grievant's height, the Patient leapt or hopped towards Grievant. Grievant attempted to stop moving from his left to his right to position himself squarely facing the Patient to enable him to block the Patient's advance. He balanced himself on his right leg and his left leg moved upward and off the ground as Grievant tilted slightly backwards. Grievant stuck his arms out to block the Patient as the Patient attempted to hit Grievant. Because the Patient's upper body stopped moving forward while his lower body continued to move forward as he moved upward, his feet moved upwards quickly as his head moved backwards. He fell backwards with his right side landing on the floor and near the flipped table.

The Patient got up from the floor and moved to his right and away from Grievant. Several FMHTs grabbed the Patient by his arms and Grievant moved towards the Patient in an attempt to restrain the Patient. The Patient was able to break free and moved back towards the flipped table. The Lieutenant grabbed Grievant's shoulder and told him to go to the nursing station. He went to the nursing station door. Once the door opened, he went inside and remained there until the Lieutenant told him to leave the nursing stations so that the Patient would not see him.

## **CONCLUSIONS OF POLICY**

The Commonwealth of Virginia is obligated to provide State employees with a safe workplace. The Agency is obligated to provide its patients with a safe environment free from harm caused by State employees. The Agency takes seriously its obligation to its patients and severely punishes patient abuse.

The Agency investigated the allegation of abuse against Grievant and carefully considered the video evidence, the statements of witnesses, and Grievant's work history. The Agency's opinion that Grievant engaged in client abuse is sincere. The evidence, however, is not sufficient to support the issuance of a Group III Written Notice with removal for several reasons.

First, the video of the incident does not capture all of the movement of the Patient and Grievant. The video is a series of still pictures with no picture between the stills to view movement that occurred between the still pictures. This tends to exaggerate the movement and leave out key images of the conflict. For example, a punch appears faster and more vigorous than it would otherwise be if all of the movement could be observed. At first impression, the Patient appears to be knocked onto his back by the Grievant. A closer review shows that the Patient was moving upwards in order to punch a much taller person. The Patient's feet are slightly off the ground at the moment of contact with Grievant and the Patient's lower body moves forward while his upper body stops with the impact. Grievant did not need to punch the Patient to cause this result. If

Grievant were standing with his arm out to block the Patient, the Patient would have fallen backwards as depicted in the video. In other words, the video does not clearly show that Grievant shoved the Patient with sufficient force to cause the Patient to fall backwards.

Second, the video has a wide angle view of the room and does not reveal clear images of significant points of contact. The video is taken from two camera angles with the cameras positioned at corners of the room designed to view the entire room. The Hearing Officer reviewed the video numerous times from both angles at both regular speed and frame-by-frame. The Hearing Officer viewed the video numerous times with various levels of zoom. When the zoom function of the video image is utilized, the images appear closer, but more blurred. The image may show an extended arm but it is difficult to determine whose arm is extended.

The Agency contends that Grievant shoved the Patient and knocked him off of his feet. The video images show Grievant's arms coming outward away from his body quickly. The video does not show whether Grievant's fists were balled. The image between the moment Grievant's arms were near his body and the moment his arms were extended touching the Patient is missing. It is equally likely that Grievant extended one or both of his arms in the manner consistent with a "stiff arm" (blocking) as it is that he extended his arms in order to push the Patient backwards. The Patient fell on the right side of his back because he leapt to reach Grievant's face and his feet were off the ground at the time of impact with Grievant's arms.

Third, despite being punched twice in the face, Grievant did not display demeanor suggesting he wanted to fight the Patient. He did not begin slugging the Patient. When he moved towards the Patient it was consistent with the movement of the FMHTs who were also attempting to address the Patient's behavior. Grievant's actions were consistent with an employee attempting to provide assistance and security to his co-workers.

The Agency contends Grievant admitted to the abuse by saying he "inadvertently pushed him back ...". His statement, however, is not sufficient to show client abuse.<sup>2</sup> To the extent Grievant pushed the Patient, it was while Grievant was off balance standing on one leg while attempting to prevent the Patient from striking him. Every employee has a right of self-defense<sup>3</sup> and may exercise that right within limits. Grievant's reaction to the Patient's attack was reasonable under the circumstances. He

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<sup>2</sup> Client abuse requires an action performed "knowingly, recklessly, or intentionally." It includes "use of excessive force." Grievant was not reckless and did not intend to harm the Patient. His force was not excessive because it was intended to prevent his injury.

<sup>3</sup> Agencies are obligated to create a safe workplace for employees. If an agency is unable to do so, an employee is entitled to take action to secure his or her safety. Grievant took measured action to ensure that the Patient did not strike him again.

did not intend to harm the Patient. His objective was to protect himself.<sup>4</sup> After Grievant stopped the Patient from hitting him, Grievant did not assume a fighting stance or attempt to pursue the Patient to fight him. Grievant's actions were consistent with someone trying to protect his coworkers and himself from an "out of control" and dangerous Patient.

Grievant was permitted to block the blows from the Patient. Although Grievant's block was not a perfect execution of the TOVA method, TOVA does not fit every type of contact. In this case, the contact involved the Patient leaping towards Grievant as Grievant moved from his left to his right while Grievant was balancing on his right leg. Extending his arms to stop the Patient's advance appeared to be a reasonable method of preventing further injury to Grievant.

The Agency argued that the Patient was "targeting" Grievant and, thus, Grievant should have removed himself sooner from the room. Although it may be clear in hindsight watching a video of the incident that at some point the Patient began "targeting" or focusing on Grievant, the idea that that Grievant should have somehow instinctively recognized this is not logical. Grievant's duty was to provide assistance and security to FMHTs in the room. He was focused on carrying out his duties to provide security. He was not focused on whether he was being targeted by the Patient. Towards the end of the conflict, the Lieutenant notified Grievant that he should leave the room. If Grievant was expected to recognize sooner that he was being targeted, surely the Lieutenant (who had a better opportunity to view the conflict) should have recognized this and asked Grievant to leave sooner.

Grievant testified he did not wish to be reinstated. Accordingly, the Hearing Officer will not order Grievant's reinstatement or back pay and benefits.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **rescinded**.

## 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

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<sup>4</sup> Grievant testified the risk to him was not only from being punched but also from coming into contact with the Patient's blood. The Patient had opened wounds on both forearms but only one was partially wrapped. The Patient was bleeding from the other forearm.

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  
Department of Human Resource Management  
101 North 14<sup>th</sup> 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 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 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>5</sup>

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

*\s\ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>5</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.





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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 10997-R**

Reconsideration Decision Issued: June 20, 2017

**RECONSIDERATION DECISION**

EDR issued Ruling 2017-4561 remanding this matter to the Hearing Officer.

In its request for administrative review, the agency has pointed to other record evidence, not addressed by the hearing officer in the decision, potentially supporting the agency's position that the grievant engaged in abuse by pushing the client. This evidence includes 1) testimony from a security Lieutenant, who was an eyewitness and, it appears, the principal source of testimony for the investigator that led to the finding of abuse; 2) admissions during the grievant's own testimony; and 3) an admission from the grievant in his witness statement. It may be that the hearing officer assessed this evidence and found it not credible or persuasive. However, where, as here, the hearing officer's decision appears to be based on the lack of clarity in the video, this potentially explanatory and contradictory (to the hearing officer's findings) eyewitness testimony (including the grievant's admissions) must be considered and addressed in the decision as to the question of whether the grievant's action was a "block," as it appears the hearing officer found, or a "push," which the agency determined was excessive force and abuse. As such, EDR must remand this matter to the hearing officer on this basis for further consideration of the record evidence. (Footnotes omitted). \*\*\*

Based upon EDR's review of the record and the hearing decision, we are unable to determine the supporting facts, policy, or law for the hearing officer's determinations. Agencies do have a general duty to provide a safe workplace, but it is unclear what duty the hearing officer is referring to here and how it relates to the facts of the case. Employees do have a right to self-defense with limitations, but it is not clear what record

evidence or authority the hearing officer is considering in making his determinations in this case. Furthermore, it is unclear what record evidence the hearing officer is relying on to find that “to the extent” the grievant pushed the client he was justified to do so in self-defense. In short, the hearing decision is not clear on these points and must be remanded for further explanation and/or citation to supporting authority and/or record evidence. The hearing officer must reconsider and further explain his determinations with regard to self-defense, the agency’s duty to provide a safe workplace, and related analysis.

### Safe Workplace

State agencies are obligated to provide a safe workplace for employees.

The Hearing Officer will not present exhaustive legal research to establish a point that is self-evident. The Hearing Officer’s point is confirmed by the EDR Ruling which states, “Agencies do have a general duty to provide a safe workplace.” The existence of OSHA laws demonstrates a legislative objective expecting employers to provide a safe workplace for employees. The mission of OSHA is to “assure safe and healthful working conditions for working men and women ....”

29 USC § 654 provides:

**(a)** Each employer— **(1)** shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees ....<sup>6</sup>

The mission of the Virginia Department of Labor and Industry is:

to make Virginia a better place in which to work, live, and conduct business. We will achieve this goal by promoting safe, healthful workplaces, \*\*\*

*Va. Code § 40.1-22* addresses the Virginia Safety Codes and Health Board and provides:

The Board, with the advice of the Commissioner, is hereby authorized to adopt, alter, amend, or repeal rules and regulations to further, protect and promote the safety and health of employees in places of employment over which it has jurisdiction and to effect compliance with the Federal Occupational Safety and Health Act of 1970 (P.L. 91-596), and as may be necessary to carry out its functions established under this title.

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<sup>6</sup> Virginia has an OSHA state approved plan.

DHRM Policy 1.80 governs Workplace Violence. This policy provides:

Each agency is expected to create and maintain a workplace designed to prevent or deter workplace violence through the development of agency policies and procedures that articulate how this policy will be implemented in their agency.

Being punched in the face by a patient constitutes workplace violence. A workplace where an employee is expected to allow a patient to punch him in the face is not a safe workplace.

### TOVA

One method of providing a safe workplace is to train employees regarding how to protect themselves from workplace harm. The Agency provides its employees including Grievant with TOVA training.

If an employee receives TOVA training and is in a position to utilize TOVA techniques to prevent an assault by a patient, that employee is obligated to utilize those TOVA techniques. TOVA techniques, however, are not always possible to utilize.

Grievant was moving from left to right while the Patient was in a fighting crouch and beginning his upward movement to punch Grievant in the face. Grievant was standing on one foot with his other leg off the ground while he was leaning backwards.

The Director of Staff Development and Training testified that employees are not taught to charge at a Patient. Grievant did not charge at the Patient. The Director of Staff Development and Training testified that if a patient is charging an employee, the employee should take a stance, stand still, and make a move to block the patient but that the employee could not swing at the patient. Grievant did not have the opportunity to stop and take a stance. If he had attempted to do so, he would have been punched in the face. Grievant did not have the opportunity to raise his forearm to block the oncoming blow as demonstrated by the witness. This is especially true given that the Patient was much shorter than Grievant and was punching upwards. Grievant did not “swing” at the Patient. Grievant did not have the opportunity to plant his feet and twist to the side to allow the Patient to go past him. While off balance, Grievant was not in a position to back away or retreat from the Patient. If Grievant had attempted to move backwards and assuming he regained his balance, the Patient would have reached him before he could have moved a safe distance away. The Hearing Officer finds fact that Grievant was not in a position to utilize any TOVA technique described by the Agency.<sup>7</sup>

Even though Grievant was not able to utilize a TOVA technique to protect himself, the Agency expected him not to stop the Patient’s advance and, thus, be

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<sup>7</sup> The Agency did not present a copy of the TOVA manual to illustrate TOVA techniques other than those discussed by Agency witnesses.

punched in the face by the Patient. The Agency's expectation was unreasonable.<sup>8</sup> The Agency's Departmental Instruction 201 does not place an employee on notice of the Agency's harsh interpretation of its policy.

### Self-Defense

The Agency questioned whether Grievant had a right of self-defense in this case. The Hearing Officer will not present exhaustive legal research to establish a point that is self-evident. The EDR ruling concedes that "[e]mployees do have a right to self-defense with limitations." Given that Grievant could not utilize a TOVA technique, he was entitled to exercise his right of self-defense in order to stop the Patient from harming him.

Whether Grievant's action is characterized as a block, push, shove or some other term is not as significant as whether it was intended to harm the Patient or limited to protecting the Grievant. If Grievant has acted "offensively" to harm the Patient, his actions could not be characterized as self-defense.

Grievant did not act offensively to harm the Patient. His objective was to stop the Patient from harming him. After Grievant stopped the Patient from hitting him, Grievant did not assume a fighting stance or attempt to pursue the Patient to fight him.<sup>9</sup> Grievant's actions were consistent with someone trying to protect his coworkers and himself from an "out of control" and dangerous Patient.

The Hearing Officer finds that Grievant acted defensively to protect himself from harm caused by the Patient. His right of self-defense is limited by whether he used excessive force to stop the Patient.<sup>10</sup>

The Hearing Officer finds that Grievant did not use excessive force to stop the Patient's advance. Grievant's action was not as much a thought out, intentional action as it was a reaction to an immediate threat of injury. Grievant was able to stop the Patient's advance. Although the video gives the appearance that Grievant aggressively

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<sup>8</sup> The Agency argued that certain jobs are inherently dangerous. Working with forensic mental health patients carries certain risks of harm. Those risks, however, do not include requiring an employee to be punched without taking action that could have stopped the assault.

<sup>9</sup> If Grievant wanted to fight the Patient, he had the opportunity to do so after the Patient hit him twice in the face. Instead, Grievant continued to perform his duties as best he could.

<sup>10</sup> DI 201 incorporates use of force in one of its examples. When an employee is authorized to do so and places a patient in mechanical or physical restraints, that employee has used force that caused or might have caused harm to the patient. Indeed, the psychological effect of being placed in restraint could be harmful to a patient's mental health. Only if the employee used excessive force to place the patient in restraints would the employee be subject to disciplinary action. By analogy, Grievant was authorized to use force to defend himself. Only if that force was excessive would Grievant be subject to disciplinary action.

pushed the Patient backwards, the Patient fell on his back because the top of his body stopped moving forward while the bottom of his body continued to move forward. If the Patient's feet had remained on the ground, the video would have presented a less harsh and more realistic impression of the impact. Grievant's use of force was not intended to harm the Patient any more than necessary to stop the Patient's advance. Grievant's action was appropriate under the circumstances he faced.

Because Grievant acted to protect himself, the Agency has not met its burden of proof to show that Grievant engaged in client abuse. DI 201 includes "Assault or battery" in the definition of client abuse. Grievant did not commit assault or battery of the Patient. The Hearing Officer finds that Grievant's use of force was reasonable under the circumstances he faced.

### Witness testimony

The Hearing Officer fully considered the testimony of all witnesses and gave appropriate weight to the testimony of each witness. The Investigator testified that the video was the most important evidence and, thus, the Hearing Officer focused discussion on the video. The Lieutenant's testimony was not materially different from Grievant's statements about pushing the Patient.

If the Hearing Officer assumes Grievant pushed the Patient, it does not mean he engaged in client abuse. Grievant was free to push the Patient as long as his action was intended to prevent the Patient from striking him and as long as his action was without excessive force. Grievant's and the Lieutenant's statements that Grievant pushed the Patient do not resolve the question of how hard or with how much force did Grievant push the Patient. As already discussed, the video is misleading. It suggests that Grievant pushed the Patient with sufficient force to knock him off of his feet and cause him to fall backwards to the ground. Because the video is missing key images, the amount of force Grievant used to repel the Patient's attack is not discernable.

None of the Agency's witnesses presented testimony sufficient to show that Grievant's use of force was excessive.

There is no basis to reverse the Original Hearing Decision. The Group III Written Notice must be rescinded.

## **APPEAL RIGHTS**

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 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 the Director before filing a notice of appeal.

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer