

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 07/24/17;  
Decision Issued: 08/17/17; Agency: DBHDS; AHO: Lorin A. Costanzo, Esq.; Case No.  
11030; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA**  
**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**  
**DEPARTMENT OF HUMAN RESOURCE MANAGEMENT**  
**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of: Grievance Case No. 11030

Hearing Date: July 24, 2017  
Decision Issued: August 17, 2017

**PROCEDURAL HISTORY**

On May 8, 2017 Grievant was issued a Group III Written Notice with termination.<sup>1</sup> Grievant filed his *Grievance Form A* to challenge the Agency's action on May 9, 2017. Undersigned was appointed hearing officer in this matter effective June 1, 2017.

The parties waived the 35 day period for a hearing to be held and on July 24, 2017 the grievance hearing was held at Facility. Grievant requested to submit a written closing statement at the conclusion of the hearing. By agreement, written closing statements of each parties were scheduled to be submitted by 5:00 p.m. on August 1, 2017.

Agency submitted its written closing statement on July 31, 2017 and Grievant submitted his written closing statement on August 1, 2017 prior to 5:00 p.m.

**APPEARANCES and EXHIBITS**

- A. The following appeared at hearing:
  - Agency's Advocate at Hearing
  - Grievant (who was also a witness)
  - Grievant's attorney
  - Witnesses
  
- B. Exhibits were admitted, by agreement of the parties, *en masse* and consists of one binder of Agency's exhibits tabbed A through K.
  
- C. Agency's Exhibits are referenced herein as "A. Tab. \_\_\_\_" with the tab designation inserted at the "\_\_\_\_".

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<sup>1</sup> A. Tab A.

## ISSUES

Whether the issuance of a Group III Written Notice with termination was warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.<sup>2</sup>

The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.<sup>3</sup>

## FINDINGS OF FACT

After reviewing all the evidence admitted and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

01. Agency Facility is a residential mental health institute providing mental health and other services to male and female individuals in its care.<sup>4</sup>

02. Grievant has over 27 years employment with Agency and, at times relevant to this proceeding, was employed as Direct Service Associate at Facility.<sup>5</sup> Grievant had no prior disciplinary actions or Notice of Improvement Needed.<sup>6</sup>

03. Individual is an adult male approximately 19 years of age. Individual resides at Facility where he receives care and services, including care and treatment for mental illness.<sup>7</sup>

04. On April 22, 2017, while at Facility, Individual suffered a "comminuted fracture of the olecranon, with distraction by 2 cm".<sup>8</sup> Individual later underwent surgery to address his injury.<sup>9</sup>

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<sup>2</sup> Dept. of Employment Dispute Resolution, *Grievance Procedure Manual*, Sections 5.8 and 9.

<sup>3</sup> Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

<sup>4</sup> Testimony.

<sup>5</sup> A. Tab A. and Testimony.

<sup>6</sup> Testimony, A. Tab A.

<sup>7</sup> Testimony, A. Tab C.

<sup>8</sup> A. Tab C.

<sup>9</sup> Testimony, A. Tab C.

05. Matters related to allegations of abuse occurring on 4/22/17 were brought to the attention of Agency and Agency initiated an investigation into matters involving Grievant and Individual. At the conclusion of the investigation, Investigator recommended, in her "Investigator's Summary" dated April 28, 2017 a finding be substantiated for physical abuse.<sup>10</sup>

06. On April 24, 2017 Grievant was provided notice, in writing, of an allegation of abuse being made against him and that an investigation was being conducted into the incident.<sup>11</sup>

07. On May 1, 2017 Acting Facility Director gave Grievant a letter in which he was notified of the investigation results and notified of concerns he behaved in a manner not consistent with Therapeutic Options of Virginia ("TOVA") thus causing physical harm to Individual. The letter informed Grievant his actions were in violation of DI 201 (RTS) and may result in a Group III Written Notice with termination of employment. Grievant was afforded 24 hours from receipt of the letter to respond in writing to the proposed action.<sup>12</sup>

08. Employees at Facility, including Grievant, are required to use Therapeutic Options of Virginia ("TOVA") standards in aggressive behavior management. Grievant was provided TOVA training and was aware of, or should have been aware of, TOVA standards.<sup>13</sup>

09. Facility surveillance cameras, on April 22, 2017, made video recordings of matters occurring between Grievant and Individual, including physical contacts, and matters occurring while Grievant was in the seclusion room.<sup>14</sup>

10. Agency has adopted a Zero Tolerance policy for abuse and neglect of individuals receiving services.<sup>15</sup>

11. Grievant grieved the issuance, on May 8, 2017, of a Group III Written Notice with termination (effective 5/8/17) for Patient/inmate/client abuse (Written Notice Offense Code "81") . The Offense Date was 4/22/17 and the Nature of Offense and evidence indicated:

A recent DI201 investigation [**case no.**] regarding client abuse/neglect has given us cause to believe that you behaved in a manner not consistent with TOVA (Therapeutic Options of Virginia) and thus caused physical harm to a client. This has resulted in a substantiated finding of physical abuse, which is in violation of Departmental Instruction 201 (RTS) "Reporting and investigating Abuse and Neglect of Individuals Receiving Services in Departmental Facilities".<sup>16</sup>

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<sup>10</sup> A. Tab C.

<sup>11</sup> A. Tab C.

<sup>12</sup> A. Tab B.

<sup>13</sup> Testimony, A. Tab G., A. Tab H.

<sup>14</sup> A. Tab J.

<sup>15</sup> A. Tab D.

<sup>16</sup> A. Tab A.

## CONCLUSIONS

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 of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in 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 employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001.

### 1.60<sup>17</sup>

To establish procedures on Standards of Conduct and Performance for employees pursuant to §2.2-1201 of the Code of Virginia, the Department of Human Resource Management (“DHRM”) promulgated the *Standards of Conduct, Policy No. 1.60, effective April 16, 2008*. The *Standards of Conduct* provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The *Standards of Conduct* 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.

DHRM Policy 1.60 - *Standards of Conduct* organizes offenses into three groups according to the severity of the behavior. Group I Offenses include acts of minor misconduct that require formal disciplinary action. Group II Offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. Group III Offenses include acts of misconduct of such a severe nature that a first occurrence normally would warrant termination.

The *Standards of Conduct* provides abuse or neglect of clients is an example of a Group III offense. Additionally, the *Standards of Conduct* provides that the normal disciplinary action for a Group III offense is Written Notice and discharge. In lieu of discharge, the agency may: (1) suspend without pay for up to 30 workdays, and/or (2) demote or transfer with disciplinary salary action.

### DI-201<sup>18</sup>

Departmental Instruction-201(RTS)03 (“DI-201”) provides each individual receiving services in a state facility has the right to be protected from harm, has the right to report any potential abuse or neglect, and has a right to have the allegations investigated in a timely manner. Additionally, DI-201

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<sup>17</sup> A. Tab E.

<sup>18</sup> A. Tab D.

provides the standard for substantiating abuse and neglect is based on a preponderance of the evidence gathered during the investigation process.

Departmental Instruction 201(RTS)03 sets forth Agency's philosophy of a zero tolerance for abuse and neglect and provides, in pertinent part:

The Department of Behavioral Health and Developmental Services ("Department") has a duty to provide a safe and secure environment to individuals receiving services and has a philosophy of zero tolerance for abuse and neglect. The Department will, in all instances, investigate and act upon allegations of abuse or neglect. ...

"Abuse" is defined in DI-201 which provides:

This means 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. ...

Grievant received Human Rights/DI-201 training on May 18, 2016.<sup>19</sup>

**Surveillance cameras:**

Facility has promulgated Institutional Instruction II 616 (EM) 01-2015 providing for the use of surveillance cameras in certain areas of Facility to assure the safety and security of clients, staff, visitors and guests.<sup>20</sup> Among other areas at Facility, common areas within client areas of the Facility are monitored and recorded.

A number of surveillance cameras captured video of Individual's and Grievant's interactions on April 22, 2017 in the commons area and hall. Additionally, video was recorded of Individual while he was in the seclusion room. Video and still images taken from video recordings were admitted and reviewed in this cause and given strong consideration. Surveillance cameras/equipment did not record audio but provided a date and time stamp on video recordings made.

**4/22/17:**

Nursing staff had ongoing concerns with Individual calling 911 from pay phones in the common area. Grievant was attempting to have Individual leave the common area and proceed down the hall to his room when matters occurred which ultimately led to issuance of the Group III Written Notice with termination.

Individual and Grievant are both male. Individual is of smaller stature than Grievant. Grievant was trying to get Individual to leave the common area. Both were facing each other when Individual kicked one of his shoe off at Grievant and stepped out of his other shoe. Grievant picked up Individual's shoes. Holding the shoes in his right hand, both Individual and Grievant then begin walking, in close proximity, down the hall with Individual walking backward down the hall and Grievant, facing Individual, walking in a forward direction. While walking backward Individual had his fists up in front of his face.

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<sup>19</sup> A. Tab G.

<sup>20</sup> A. Tab F.

Proceeding down the hall, Individual stopped and faced the wall briefly and then began to turn. Grievant placed his hand on Individual's arm and holding on to Individual's arm pushed Individual. Individual then began to pull away. Grievant brought up the shoes held in one hand and Grievant swatted the shoes in a flickering type gesture at Individual, not hitting Individual. Individual flinched/moved at this. Grievant took Individual by arm and Individual pulled away.

Individual kicked Grievant between the legs. Grievant swings the shoes, again without contact to Individual. Grievant and Individual are then physically in contact.. Grievant takes Individual down to the floor with Individual's back hitting the floor and Grievant over him but not resting his body on of him. Individual is on the floor on his back. Grievant flipped Individual onto his stomach and held Individual's neck on the floor. Additional Staff then came to the scene and Individual is lifted off the floor by his arms and escorted to the seclusion room.

Facility surveillance cameras videos provided time-stamped video of matters in the common room, hall, and seclusion room.. The video recordings are summarized below with the approximate time, as indicated by the video recording time-stamp.

**Approx.**

**Time (P.M.)    General description of recording:**

1:27:15	Individual and Grievant in common area appearing to converse.
1:27:40	Individual and Grievant walking towards hall from common area.
1:27:46	Individual curves towards payphone in common area raising his hand towards phone.
1:27:48	Individual turns to face Grievant.
1:27:50	Individual and Grievant appear to be talking.
1:27:55	Grievant points and Individual turns and walks in front of Grievant towards the hall.
1:28.02	Individual in hall turns and faces Grievant who is in common area.
1:28.09	Individual kicks right shoe at Grievant and steps out of left shoe.
1:28.12	Grievant picks up shoes and places both in his right hand.
1:28.13	Individual walking backwards with both fists raised and Grievant, facing him, walking down hall.
1:28.28	Individual's fists lowered while still walking backward with Grievant facing him.
1:28.29	Individual swings open hand at Grievant, no contact.
1:28.34	Individual turns from walking backwards facing Grievant to facing wall and stops.
1:28.36	Grievant grabs hold of Individual and pushes, while holding on to his right upper arm area.
1:28.37	Grievant flicks shoes held in right hand towards Individual, Individual not hit
1:28.39	Individual kicks Grievant between legs with his right leg. Grievant swings shoes held in right hand across his body.
1:28.42	Individual pushed against wall.
1:28.43	Individual taken down to floor by Grievant. Individual's back hits floor.
1:28.44	Grievant rolls Individual over his right arm onto a face down position.
1:28.45	Grievant's right hand on Individual's neck/head holding Individual to the floor.
1:28.48	Individual's neck/head held on floor by Grievant.
1:29:13	Grievant releases neck/head hold. Individual lifted up by Grievant on right arm and other staff on left arm to his knee then Individual gets on his feet under him, rises, and begins walking while held by two staff to seclusion room.
1:30:28	Individual, having been escorted by staff, enters a seclusion room. Individual remains in the seclusion room for approximately 4 hours (which was video recorded). <sup>21</sup>

In the seclusion room, on April 22, 2017, staff noted swelling on Individual's right elbow/arm and it was subsequently determined Individual suffered a "comminuted fracture of the olecranon, with

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<sup>21</sup> Testimony.

distraction by 2 cm".<sup>22</sup> Individual went to the emergency room and, at a later date, underwent surgery to address his injury.

**Individual:**

Individual is an adult male receiving care and treatment, including treatment for mental illness, at Facility with a diagnosis of "Asperger's Syndrome" and who Nurse described as having high function autism mixed with psychotic spectrum.<sup>23</sup> Individual can be impulsive at times and is described a very provocative. He has unexpectedly hit people.<sup>24</sup>

Individual told staff that he hit Grievant and Grievant slammed him. Individual told investigator, "I fell down you know somebody did this" and the investigator indicated he was motioning with his body the act of being picked up and thrown down. Individual also told investigator he had not been hit with the shoes. Additionally, Individual also said the side of his head hurt due to the incident.<sup>25</sup>

**Investigation:**

Investigator conducted an investigation of an allegation of physical abuse of Individual by Grievant. As a part of the investigation, Investigator reviewed video of surveillance camera recordings of matters occurring on 4/22/17 and conducted interviews.

At the conclusion of the investigation, an "Investigator's Summary" dated April 28, 2017 was filed recommending that a finding be substantiated for physical abuse.<sup>26</sup> The investigation summary with its recommended finding of substantiation for physical abuse was presented to Acting Director who signed indicating she agreed with the Investigator and was presented to the Human Rights Advocate who indicated she review it with no comments being made.<sup>27</sup>

Investigator, at hearing, expressed concerns of Grievant using his lower body to pick up Individual and throw him to the floor with what she described as a lot of force. After Grievant was taken to the floor Investigator expressed concern Grievant was shown lifting individual by his right arm which was twisted with elbow up. Investigator expressed concern the following matters shown on the video could be considered abuse:

1. Pushing Individual in the hall.
2. Swatting shoes towards Individual.
3. Swinging the shoes at Individual.
4. Taking Individual to the ground.
5. Hold to ground by neck/head area.

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<sup>22</sup> A. Tab C.

<sup>23</sup> A. Tab C, Testimony.

<sup>24</sup> Testimony.

<sup>25</sup> A. Tab C.

<sup>26</sup> A. Tab C.

<sup>27</sup> A. Tab C.



Investigator additionally addressed matters relating to injury to Individual's right elbow/arm in her testimony and in the Investigator's Summary.

***Injury:***

On April 22, 2017, at Facility, Individual suffered what was determined to be a "comminuted fracture of the olecranon, with distraction by 2 cm".<sup>28</sup> While in seclusion, Staff noted swelling in Individual's right elbow and he later was taken to an emergency room. At a later date, Individual underwent surgery to address the injury to his right elbow.<sup>29</sup>

Grievant raises that this injury did not occur when he had physical contact with Individual but was self inflicted by Individual in the seclusion room. The Investigation Summary noted "Facility Event Report described event as possible self-inflicted injury".

Investigator's Summary of 4/28/17 indicated Individual told Investigator, "I fell down you know somebody did this" and he motioned with his body the act of being picked up and thrown down. Other persons receiving care at Facility witnessed and/or heard events occurring on 4/22/17 and gave statements to Investigator. One person stated Grievant threw Individual to the ground, Individual went down hard, and could have been taken down much easier by Grievant. A second stated to Investigator that Individual's head hit the floor hard and it was so loud it scared her. A third stated she heard a loud "boom" sound and thought Grievant could have been easier on Individual.

Individual was raised off the hall floor and taken to a seclusion room by Grievant and another employee. Grievant held Individual's right arm with another employee holding his left arm when they raised Individual who was on his stomach laying on the hall floor. Individual was then walked to a seclusion room where he remained for approximately 4 hours. Grievant's time in seclusion was video recorded. Investigator reviewed video of the approximately 4 hours that Individual was in the seclusion room and did not determine there was injury to Individual's arm in the seclusion room. Investigator noted concern Individual had his shirt pushed above his elbow and she indicated it appeared the arm had swollen so tightly he couldn't get the shirt below his elbow. She noted she couldn't see swelling but could see Individual had trouble getting his sleeve down over the elbow. Investigator also noted she could see Individual favoring that arm.

Nurse saw Individual when he initially went into seclusion and about 30-45 minutes later when she checked on him again. On the first contact there was no mention of pain and he did not say he was injured. However, on the second contact with Individual in the seclusion room Nurse noted swelling of Individual's elbow and Individual said his arm did not hurt. Nurse had him move his arm. Nurse inquired of him in the seclusion room how he hurt his elbow and he said, "I guess I hit it on the floor".

Nurse also testified, upon going into seclusion, a person is normally offered medications. She indicated Individual should have been given medication. However, no evidence was admitted of what

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<sup>28</sup> A. Tab C.

<sup>29</sup> Testimony, A. Tab C.

medication may have been given or whether Individual actually was or was not given a PRN or medication.

The video of Individual's time in the seclusion room, hall, and common room was admitted into evidence, reviewed, and taken into consideration by the Hearing Officer. Upon review of the evidence admitted in this cause, there is insufficient evidence to find the injury to Individual's arm was due to matters occurring in the seclusion room. The evidence indicates, by a preponderance, Individual's right elbow/arm injury was the result of Grievant's actions in the hall.

**Abuse:**

While the evidence indicates Individual was physically injured on April 22, 2017 as a result of matters occurring in the hall with Grievant, actual physical injury or harm is not a requirement to find "abuse" pursuant to DI-201. DI-201's definition of "abuse" includes an act or failure to act that caused or might have caused physical or psychological harm.

If the Hearing Officer were to have found Individual's right elbow/arm had not been injured due to Grievant's actions in the hall, the evidence would still indicate Grievant pushed Individual, flicked shoes at Individual, swung shoes at Individual, physically took Individual to the floor, and held Individual on the floor by holding Individual's neck/head. These actions, in and of themselves, would be sufficient to find "abuse" as defined in DI-201.

**Grievant:**

Grievant testified he was hit in the head when Individual kicked off his shoe. He testified he pushed on Individual to get him to go down the hall and he was not trying to hit Individual with the shoes but protect himself from getting spit upon, as Individual was cursing him and said he was going to spit on him. He also stated he did not slam Individual to the floor but just fell. Grievant indicated he had his hand on Individual's neck to hold him and was not aware of any injury until he came to work the next day.

Grievant contends he fell and landed on top of Individual after a struggle, he did not physically take/throw Individual to the floor, and did not use a lot of force. However, the evidence admitted, including the video recording, does not appear consistent with Grievant's contention he fell and landed on top of Individual. Video evidence does not indicate Grievant and Individual fell to the floor. The video evidence is consistent with and indicates Grievant, by action, physically took Individual to the floor. Other persons who were being treated at Facility saw and heard matters. They provided statements to Investigator. One stated Grievant threw Individual to the ground, Individual went down hard, and could have been taken down much easier by Grievant. A second stated to Investigator that Individual's head hit the floor hard and it was so loud it scared her. A third stated she heard a loud "boom" sound and thought Grievant could have been easier on Individual.

**TOVA:**

Facility employees, including Grievant, are required to use Therapeutic Options of Virginia ("TOVA") standards in aggressive behavior management. TOVA training is provided to all employees annually. Nurse Instructor provided TOVA Training to Grievant on multiple years.

On 5/17/16 Grievant completed TOVA Recertification/Seclusion and restraint training.<sup>30</sup> Grievant's EWP (signed by Grievant on 10/20/15) indicated a core Responsibility (25%) of "Continuously work to promote safety, behaviorally and environmentally". Grievant's EWP further provided one measure of this core responsibility is, "Participate in the aggressive behavior management process appropriately and as directed with the use of TOVA."<sup>31</sup> Grievant was aware, or should have been aware TOVA was required to be utilized by Facility employees.<sup>32</sup>

TOVA involves utilization of both verbal and physical techniques and requires treating Individuals with dignity and respect and the use of the least amount of external management possible to manage a situation. Pushing Individual, flicking shoes at Individual, and swinging shoes at Individual are not proper TOVA techniques. Taking Individual physically to the floor and holding him on the floor by his neck/head are not proper TOVA techniques.

Grievant stated to Investigator, when she asked him if he had used TOVA moves, TOVA moves do not work with these young guys. That TOVA can be used on individuals if they sneak up on them or if they are older.<sup>33</sup>

Grievant raises that he lost his radio due to physical contact with Individual. This occurred just before Individual was taken to the floor. The evidence evidence indicates Grievant had opportunity to but did not seek staff assistance. He also didn't attempt to back away, walk away, or call a "Code Green".

***Mitigation, Unfair, Unequal or misapplication of policy:***

Va. Code § 2.2-3005.1 authorizes a hearing officer to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." The hearing officer must receive and consider evidence in mitigation or aggravation of any offense charged by an agency.<sup>34</sup> Furthermore, mitigation must be "in accordance with the rules established by the Department of Human Resources Management ...".<sup>35</sup>

The *Rules for Conducting Grievance Hearings* provide a hearing officer is not a "super-personnel officer" and, therefore, in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy. Furthermore, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the Agency's discipline, the hearing officer is charged with stating in the hearing decision the basis for mitigation.

Grievant has the burden to raise and establish mitigating circumstances that justify altering the disciplinary action consistent with the "exceeds the limits of reasonableness" standard. The Agency has the burden to demonstrate any aggravating circumstances that might negate any mitigating circumstances.<sup>36</sup>

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<sup>30</sup> A. Tab G.

<sup>31</sup> A. Tab H.

<sup>32</sup> Testimony, A. Tab G., A. Tab H.

<sup>33</sup> A. Tab C.

<sup>34</sup> Va. Code § 2.2-3005 (C)(6).

<sup>35</sup> Va. Code § 2.2-3005.

<sup>36</sup> Rules for Conducting Grievance Hearings, § VI. (B.)(2.).

Grievant contends unfair, unequal or misapplication of policy in that he was treated differently than other employees. Whether the discipline is consistent with the agency's treatment of other similarly situated employees is addressed in Section VI. (B)(2) of the *Rules* as an example of "mitigating circumstances" to be considered by the hearing officer.

Testimony indicated, in generality, without specific instances or facts, there were past instances of patients being injured with there being re-training ordered instead of termination. Testimony also indicated these may have been cases with lesser injury, lesser depiction of *prima facie* behavior as evidenced by the video, uncertainty as to the facts, off camera matters, or witnesses not holding the same story. Testimony also noted this cause showed by clear video evidence the actions that were involved,

While Grievant raised, in generality, that other employees were not terminated but were re-trained there was insufficient evidence presented to determine the facts or circumstances involved and whether the same or similar circumstances were involved as in this case. Insufficient evidence or no evidence was presented as to the employees involved, what the employee(s) did or didn't do, what the circumstances surrounding the incident were, what was the nature of the abuse/injury, disciplinary action circumstances, and when the matters were alleged to have occurred.

Grievant has not presented sufficient evidence to find other employees were treated differently than Grievant in the same or similar circumstances.

In order to find misapplication or unfair/unequal application of policy it is necessary to determine whether management violated a mandatory provision of policy, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Upon consideration of all the evidence presented, no evidence was presented of a violation by management of a mandatory provision of policy or to find the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

Hearing Officer has taken into consideration the evidence admitted in this cause including Grievant's length of service (over 27 years), his good work history until this Written Notice (having no Written Notices or Needs for Improvement of Performance), and his ratings of "Contributor" and "Extraordinary Contributor". Additionally, consideration is taken of matters set forth in the 5/3/17 letter Facility HR Manager and in the 5/2/17 e-mail of Acting Facility Director requesting mitigation.<sup>37</sup> The 5/3/17 letter and 5/2/17 e-mail, as indicated by testimony, was offered or based upon matters related to length of employment and his service at work but not offered based upon of the circumstances in this incident.

However, consideration is given to the video recordings of Grievant's actions and the circumstances surrounding his actions recorded. Consideration is also given to the nature of

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<sup>37</sup> A, Tab A.

individuals receiving care and treatment at Facility, Agency's responsibility for safety and security owed persons in its care, and Agency's Zero Tolerance Policy as to abuse and neglect.

Agency, took into consideration mitigating as well as aggravating circumstances and could have issued a lesser discipline than the issuance of a Group III with termination of employment. While a Hearing Officer may arrive at a different conclusion as to discipline, a Hearing Officer may not substitute his judgment for that of the Agency when Agency's discipline falls within the limits of reasonableness. Grievant's good work record and discipline free tenure and the other matters above discussed are insufficient to overcome Agency's discipline.

Upon review of all the evidence admitted in this cause, Hearing Officer does not find Agency's discipline in issuing of a Group III Written Notice with termination exceeds the limits of reasonableness.

### **CONCLUSION**

For the reasons stated above, based upon the evidence presented at hearing, Agency has proven, by a preponderance of the evidence, that:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action.
5. Agency has proven by a preponderance of the evidence that the disciplinary action of issuing the Group III Written Notice with termination of employment was warranted and appropriate under the circumstances and it is found Agency's discipline does not exceed the limits of reasonableness.

### **DECISION**

For the reasons stated above, the Agency's issuance to Grievant of a Group III Written Notice with termination is ***upheld***.

### **APPEAL RIGHTS**

As the *Grievance Procedure Manual* (effective date: July 1, 2012) 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.

#### **A. Administrative Review:**

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means

such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

**1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of DHRM.** This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

**2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR.** This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is [edr@dhrm.virginia.gov](mailto:edr@dhrm.virginia.gov)).

**B. Final Hearing Decisions:**

A hearing officer's 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.

**C. Judicial Review of Final Hearing Decision:**

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

S/Lorin A. Costanzo

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Lorin A. Costanzo, Hearing Officer

*Copy, via e-mail to:*

Grievant's Attorney  
Agency Advocate  
EDR