

Issues: Group II (failure to follow instructions), Group II (failure to follow policy), Group II (client abuse), and Termination (due to accumulation); Hearing Date: 08/17/17; Decision Issued: 08/28/17; Agency: DBHDS; AHO: John R. Hooe, III, Esq.; Case No. 11045; Outcome: Partial Relief; **Administrative Review: Ruling Request received 09/12/17; EEDR Ruling No. 2018-4616 issued 09/28/17; Outcome: Remanded to AHO; Remand Decision issued 10/12/13; Outcome: No change to original decision; Attorney's Fee Addendum issued 10/25/17 awarding \$1,951.90.**

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

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of: Case No. 11045

Hearing Date: August 17, 2017
Decision Issued: August 28, 2017

PRELIMINARY MATTERS

Upon being appointed as the Hearing Officer in this matter, effective June 20, 2017, the Hearing Officer arranged a pre-hearing telephone conference which was conducted on June 28, 2017. The telephone pre-hearing conference was conducted with the Grievant's attorney and the Agency advocate. During the telephone pre-hearing conference, it was agreed that the grievance hearing was to be conducted on Thursday, August 17, 2017 beginning at 10:00 a.m. at [the agency's facility]. It was also agreed that a copy of all exhibits a party intends to introduce at the hearing and a list of witnesses to be called would be provided to the Hearing Officer and the other party no later than Thursday, August 10, 2017 by 5:00 p.m.

APPEARANCES

Grievant
Grievant's Attorney
Agency Advocate
Unit Manager, Agency Witness
Investigator 1, Agency Witness
Investigator 2, Agency Witness
Chief of Security, Agency Witness
Grievant Witness 1

ISSUES

1. Did the Grievant fail to follow a supervisor's instructions as set out in the Written

Notice issued May 11, 2017 (Agency Exhibit B)? If so, was such failure a violation of DHRM Policy 1.60 and constitute a Group II offense?

2. Did the Grievant fail to make required Observation Notes as required by FI 709 (Agency Exhibit C)?

3. Did the Grievant's behavior constitute abuse and neglect as set out in the Written Notice issued May 22, 2017 (Agency Exhibit A)? If so, does such behavior constitute a Group III offense?

4. Was the Agency's termination of the Grievant's employment consistent with the law, policy and procedure?

EXHIBITS

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

A	Written Notice of Group III issued May 22, 2017
B	Written Notice of Group II issued May 11, 2017
C	Written Notice of Group II issued May 22, 2017
D	Memo from Facility Director to the Grievant dated April 19, 2017
E	Investigator's summary with statements and attachments
F	Copy of Memo from Facility Director to the Grievant dated May 9, 2017
G	Copy of Facility Instruction 503
H	Copy of Facility Instruction 504
I	Departmental Policy Instruction 201 (RTS) 03
J	Standards of Conduct with Attachment A dated April 16, 2008
K	Training and transcripts regarding Grievant
L	Employee work profile for Grievant dated October 12, 2016
M	Grievant packet form

The Grievant's Exhibits admitted into evidence are contained in one notebook with the following contents:

1	June 5, 2017 Grievance
2	2007 EWP & Performance Evaluation
3	2008 Interim Evaluation
4	2008 Annual Evaluation
5	2009 Interim Evaluation
6	2009 EWP & 2010 Annual Evaluation
7	2010 Program Services Organizational Chart
8	2010 EWP & 2011 Annual Evaluation
9	2012 EWP & 2012 Annual Evaluation

10	2013 Annual Evaluation
11	2013 Property Officer Competency Checklist
12	9/12/13 Acknowledgement of extraordinary contributor
13	2014 EWP & 2014 Annual Evaluation (EC)
14	4/18/14 Acknowledgement of extraordinary contributor
15	10/6/15 Acknowledgement of extraordinary contributor
16	2/2/16 Acknowledgement of extraordinary contributor
17	5/2/16 Acknowledgement of extraordinary contributor
18	2016 EWP & Annual Evaluation (EC)
19	2016 Property Officer Competency Checklist
20	2/24/17 Acknowledgement of extraordinary contributor
21	4/19/17 Investigator's Summary
22	5/5/17 Director's Conclusion Summary
23	Diary notes from resident G.T.
24	Grievant's polygraph results
25	7/6/17 Grievant requests for documents from Agency

FINDINGS OF FACT

The Agency's witness, [the Unit Manager], testified that she has worked at the facility for eight and a half years and is a unit manager. She testified that with respect to The Resident , another member of the staff had reported to her that the Grievant seemed to be spending an unusual amount of time with The Resident. She testified that approximately a week later (referring to Agency Exhibit E, Page 25), that on March 25, 2017 she observed the Grievant "completely engaged" in a conversation with The Resident in the gym and considered this to be suspicious behavior. As a result, [the Unit Manager asked [the Investigator 1] to observe video footage "of the incident."

Investigator 1 testified that he has been employed by the Agency for nine years and that he is a Criminal Investigator. He testified that as a result of [the Unit Manager's] request, he observed the video footage as set out in the Investigation Statement at Agency Exhibit E, page 22. The witness noted in the Investigation Statement that he noticed that the Grievant would see [The Resident] "several times in the course of her work week for several days consecutive." The statement went on to say that [The Resident] told a friend that he had a visit on weekends that the Grievant worked overtime and that [The Resident] did not receive any visitors on the days that he told his friend he had visits. Further, the Investigation Statement says that [The Resident] described the visitor to his friend and in the opinion of the investigator the description "resembles" the Grievant.

The Investigation Statement (Agency Exhibit E) page 22, sets out that during a room search of The Resident , several letters were found, not addressed to anyone and the only name used was a reference to a "Smiley Lady B.". The Investigator further testified that when he interviewed the Grievant regarding these matters, the Grievant stated that she had known The Resident since she worked at another facility in addition to having contact with him at the

present facility, and that he “would always make flirtatious comments to her...that he had a crush on her but she didn’t think anything about it.”

Upon cross examination by Grievant’s Attorney, Investigator 1 admitted that during the search of the room of The Resident, no letters from the Grievant to The Resident were found, that no letters found in the possession of The Resident mention the Grievant by name and that although at least two other staff members names started with the letter “B”, they were not interviewed.

Agency witness, Investigator 2, testified that he has been at the facility since August 2009. He testified that as Facility Manager he supervises Unit Managers. He also testified that he conducts investigations on alleged abuse and neglect, having received one day of training at the Central Office on procedures to follow in conducting investigations. He referred to Facility Instruction No. 504 (Agency Exhibit H), page 2, which sets out under General Ethical Principles that “an employee shall avoid forming personal relationships with residents and always maintain professional and ethical boundaries.” Further, he referred to Departmental Instruction 201 (RTS) 03 (Agency Exhibit I) Reporting and Investigating Abuse and Neglect that “abuse 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....”. The Hearing Officer notes that referring to 201-3 that the examples of abuse set out do not include the Grievant’s alleged behavior but that 201-3 says “examples of abuse include, but are not limited to, acts such as :....”.

Upon cross examination by the Grievant’s Attorney, Agency witness, Investigator 2, stated that he did not inquire as to whether Social Services had done an investigation of neglect or abuse regarding The Resident . He also stated that on April 25, 2017 he first contacted the Grievant by phone and told her that he was investigating a 201 case and that the Grievant told him that she could not talk to him until she had talked to her advisor. He stated that he made a second phone call to the Grievant and that the Grievant told him again that she could not talk to him until she had talked to the advisor. When asked by the Grievant’s Attorney if it was possible that The Resident could have been talking about someone other than the Grievant, the witness admitted that it was “possible.” He further stated that it was the conclusion of Chief of Security that the description given by [The Resident] to his friend was in fact a description of the Grievant.

Agency witness , the Chief of Security, testified that he had been at the facility for ten years. He testified that the Grievant was an officer in his property department and that prior to the incident in question she was an excellent and trusted employee. The Chief of Security referred to Agency Exhibit E, Investigator’s Summary where at page 7 it states “It is alleged that (Grievant) was in a personal relationship with The Resident. It is also alleged that (Grievant) may have exchanged inappropriate written material and disclosure of personal information. (Grievant) may have also used her position in the property department to provide contraband to (The Resident).” The Summary goes on at page 10 “IV Conclusions” “...(Grievant) was coming in on her days off to assist with Residential Services. This gave her access to areas of the facility

where she could talk to ([The Resident]) that she did not have access to as a Property Officer. ([The Chief of Security]) stated he advised her on April 5, 2017 that she was not authorized to work anymore time.” The “Conclusions” section of the summary goes on to set out all the details of the investigation’s findings.

The Chief of Security, also referred to Agency Exhibit E, Page 28, Investigation Statement where he listed items found in the letters confiscated from the room of The Resident which he concluded showed that The Resident had personal information about the Grievant that he believed the Grievant would have had to share with The Resident. A copy of the letters is included with the Agency exhibits. The Chief of Security stated that the Grievant denied ever receiving any letters from The Resident and stated that she never gave any letters to him. The witness also said that the Grievant denied bringing The Resident any contraband.

The Chief of Security, further testified that he met with the Grievant in the presence of Investigator 1 on April 18, 2017 at which time the Grievant stated that she had had the conversations and interactions with The Resident as set out at page 29 of the report. The witness testified that normally a Security Officer would not have a lot of one on one contact with a resident and certainly not the extended (sometimes up to 10 minutes) contact that the Grievant had with The Resident. The witness further pointed out that The Resident’s letters references to “22 years (page 36) and to “overtime” (page 63) indicate that The Resident was writing to the Grievant.

The Chief of Security testified that employees of the Agency are required to cooperate during internal investigations and must show up for interviews when so instructed. He also pointed out that as to the allegation of “patient abuse” the Agency has zero tolerance and that there were no mitigating circumstances with respect to termination of employment.

During cross examination of the witness, the witness admitted that at the meeting with the Grievant which was conducted on April 18, 2017, he did not discuss with the Grievant what a 201 investigation is or what rights an employee has with respect to a 201 investigation. He also admitted that he did not give her copies of any applicable policies regarding such investigation. He admitted that the description of a woman given by The Resident in his letter could describe other staff at the facility. Grievant’s Attorney also referred to Agency Exhibit K, the Official Transcript of the Grievant indicating all training the Grievant had had during her employment with the facility.

At the conclusion of the Agency’s evidence, the Grievant testified.

The Grievant testified that with respect to Agency Exhibit C Written Notice Group II failing to document conversations in violation of FI709, she denied several statements attributed to her in the Written Notice. However, the Grievant did testify that The Resident said inappropriate things to her but that she did not make Observation Notes because she “handled it on my own.” She testified that it is routine for residents and staff as well to make inappropriate comments and that ignoring the comments was more effective than escalating the issue of inappropriate comments. She testified that she had never seen FI709 and had received no training

regarding FI709. She stated that she was fine at the meeting conducted on April 18, 2018 until she was accused of wrongdoing. She testified that with respect to Agency Exhibit E, page 25 regarding her interaction with The Resident in the gym, that her interaction was no different than any interaction she would have with [The Resident] or other residents at other times. She also testified that with respect to Agency Exhibit B Written Notice Group II “failure to follow a supervisor’s instruction”, that she told the Chief of Security that she could not meet prior to meeting with her advisor.

In support of her testimony, the Grievant referred to Grievant Exhibit No. 24, a Polygraph Report which concluded that “no deception indicated” when the Grievant responded “No” to the following two questions:

1. Did you deliberately share any personal or family information with Resident while at VCBR?
2. Did you knowingly violate the facilities regulations related to Staff and Resident Interactions and Boundaries?

The Polygraph was admitted as an exhibit without objection by the Agency.

The Grievant further testified that with regard to Agency Exhibit G FI503 and Agency Exhibit H FI505, both issued after the Grievant was hired by the Agency, that she had not seen either one prior to the beginning of the grievance procedure. She stated that when she was told she could no longer work overtime no one explained why. She testified that she believed that the Chief of Security was compounding her write-ups in order to terminate her. When asked why he would do that, she stated “I had been there a long time and he thought I might know about stuff he and [Investigator 1] were doing.” She stated that she was also concerned how another supervisor would have known about the investigation while it was ongoing.

The Agency Advocate in cross examining the Grievant asked how she could believe that she should not make Observation Notes when the residents are serving sentences related to being sexual predators. The Grievant gave the same explanation she had earlier given regarding her decision not to make Observation Notes.

Grievant’s witness, Grievant Witness 1, testified that she was a co-worker and friend of the Grievant serving as a Security Officer at the facility. She testified that she had never seen the Grievant do anything inappropriate as a Security Officer including when working overtime which she worked with the Grievant for two and a half years. She testified that the sort of comments in question by residents are common but that you simply redirect their behavior and it usually takes care of the situation. She testified that if a resident repeats the behavior you may make an Observation Note. Grievant Witness 1 also testified that she had never seen FI709 and that although Observation Notes were mentioned in orientation, no other training was given by the Agency with respect to policy on when to make Observation Notes.

Grievant Witness 1 also testified that another Agency employee whose last name started with the letter “B” had more contact with The Resident than the Grievant. She also stated that

she was aware of 201 but had not received training regarding 201.

At the conclusion of the evidence, the Agency Advocate made a closing statement as did the Grievant's Attorney.

APPLICABLE LAW AND OPINION

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

Code ' 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.

DHRM Policy 1.60 classifies failure to follow a supervisor's instruction as a Group II offense. The Written Notice issued May 11, 2017 did not impose any additional discipline beyond the issuance of the Written Notice. It is the opinion of the Hearing Officer that the preponderance of the evidence did establish this violation.

Departmental Instruction 201 (Agency Exhibit I) states that the purpose of the instruction is to establish policies, procedures and responsibilities for reporting, responding to, and investigating allegations of abuse and neglect of individuals receiving services in Department facilities. Section 201-3 states that it defines "abuse" as follows: "This means any act or failure to act by an employee...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...". The section defines "neglect" as "The failure by a person...responsible for providing services to do so, including nourishment, treatment, care, goods or services necessary to the health, safety or welfare of a person receiving care or treatment...".

Written Notice, Group III issued on May 22, 2017 found that the Grievant had a personal

relationship with The Resident that went beyond appropriate staff and resident interactions and may “have caused psychological harm” (abuse) to the resident. Section 4 of the Written Notice stated that “a staff person engaging in a personal relationship with a resident impacts the therapeutic environment and the safety and security of the facility to such a degree that termination is appropriate.”

The Agency failed to introduce any evidence establishing that the Grievant’s behavior may “have caused psychological harm” to the resident. While Facility Instruction 709 states that an Observation Note should be made of any “behaviors directly related to the resident’s phase goals”, the Agency did not present evidence establishing what were the resident’s phase goals.

The Agency’s evidence did raise suspicions that the Grievant was interacting with The Resident in an inappropriate manner. However, the Agency’s evidence primarily was the amount of time the Grievant was seen interacting with The Resident, the fact that the Grievant worked overtime in an area where she had contact with The Resident and copies of letters written by The Resident found in the possession of The Resident. The Agency did not present as evidence any sound recordings of interactions between the Grievant and The Resident, did not have evidence that the Grievant ever received any of the resident’s letters and did not have evidence of any written communication from the Grievant to the resident. The Grievant denied making many of the statements attributed to her by the investigators and included in the Written Notice. In support of her testimony, the Grievant provided the Polygraph Report which concluded that “no deception indicated”. The evidence was not disputed that prior to the events in question the Grievant was considered an excellent and trusted long-term employee of the Agency.

DECISION

The Hearing Officer upholds the Written Notice, Group II issued May 11, 2017 (Agency Exhibit B), the violation having been established by the preponderance of the evidence.

The Agency did not show by a preponderance of the evidence that the Grievant intentionally failed to follow Facility Instruction 709 as set out in Written Notice, Group II issued May 22, 2017 (Agency Exhibit C). The Written Notice shall be removed from the Grievant’s employee records.

The Agency failed to show by a preponderance of the evidence that the Grievant was guilty of abuse or neglect of The Resident as alleged in Written Notice, Group III issued May 22, 2017 (Agency Exhibit A). For the reasons already stated, it is the Hearing Officer’s opinion that the Agency established a suspicion but did not meet its burden of proving the violation by a preponderance of the evidence, including such proof as to whether or not the Grievant’s conduct may “have caused psychological harm” to The Resident.

The Grievant shall be reinstated to her employment with full back pay and benefits.

APPEAL RIGHTS

A hearing decision must be consistent with law, policy, and the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings). A 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 administrative review by both EDR and the DHRM Director based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or email. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests for administrative review must be provided to the other party, EDR and the Hearing Officer.

Important Note: Requests for administrative review must be in writing and received by the reviewer within fifteen calendar days of the date of the original hearing decision. A Received by@ means delivered to, not merely post-marked or placed in the hands of a delivery service.

Requesting Administrative Review:

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 with which the hearing decision is not in compliance. 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 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-371-7401 or emailed.

2. **A challenge that the hearing decision is not in compliance with the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings)**, 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 hearing 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 must be sent to the office of Employment Dispute Resolution, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-786-1606 or emailed.

In response to any requests for administrative review, the opposing party may submit a written challenge (rebuttal) to the appropriate reviewer. If the opposing party chooses to submit a rebuttal, it must be received by the reviewer within ten calendar days of the conclusion of the original fifteen day appeal period. A copy of any such rebuttal must also be provided to the appealing party, EDR, and the Hearing Officer.

Administrative review decisions issued by the Director of DHRM and EDR are final and

not appealable. If the DHRM Director or EDR orders the Hearing Officer to reconsider the hearing decision, the Hearing Officer must do so. If request for administrative review have been made to both the DHRM Director and EDR, the Hearing Officer need not reconsider his/her decision, if ordered to do so on remand, until both administrative reviews are issued or otherwise concluded unless otherwise directed by EDR in the interest of procedural efficiency. If requests for administrative review have been made to both the Director of DHRM and EDR, EDR shall generally respond first. Administrative reviews by the Director of DHRM should be issued within thirty calendar days of the conclusion of any other administrative reviews.

Final Hearing Decision. A Hearing Officer=s original decision becomes a final hearing decision, with no further possibility of 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:** 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. Neither the Hearing Officer nor the Department of Human Resources Management (or any employee thereof) shall be named as a party in such an appeal.

An employee does not need EDR=s approval before filing a notice of appeal. However, an agency must request and receive approval from EDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal. The request for approval to appeal must be received by EDR within 10 calendar days, which means delivered to, not merely postmarked or placed in the hands of a delivery service. The agency may make its request by email or fax. The agency must provide a copy of its appeal request to the employee. EDR will provide a response within 10 calendar days of the agency=s request.

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. At the time of filing, a copy of the notice of appeal must be provided to the other party and EDR. The judicial review procedure shall be as more particularly set out in the Grievance Procedure Manual.

John R. Hooe, III
Hearing Officer

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case No. 11045

Hearing Date: August 17, 2017
Decision Issued: August 28, 2017
Decision Upon Remand: October 12, 2017

DECISION UPON REMAND AND RECONSIDERATION

PRELIMINARY MATTERS

By Administrative Review Ruling No. 2018-4616 dated September 28, 2017, this matter was remanded to the Hearing Officer for reconsideration for the reasons set out in the Ruling, namely:

1. The Hearing Officer must reassess the evidence in the record, excluding Grievant's Exhibit 24 and any witness testimony or other evidence relating to the polygraph results, and issue a reconsidered decision. In this regard, the Hearing Officer would note that the Ruling states that "...Rules for Conducting Grievance Hearings...states that "the results of polygraph tests are not admissible as evidence in a grievance hearing over the objection of any party...". The Hearing Officer further notes that the Agency did not object to the admission of Grievant's Exhibit 24.
2. The Hearing Officer should also consider and address the evidence in the record relating to the existence of an additional Group II Written Notice and the effects such an additional Written Notice would have on the outcome of this case.

DISCUSSION

The Hearing Officer reassessed the evidence in the record, excluding the Grievant's Exhibit 24 and all witness testimony or other evidence relating to the polygraph results. The Hearing Officer's conclusions and decision remain the same as expressed in the Decision issued August 28, 2017.

The Hearing Officer has further considered the evidence in the record relating to the existence of the additional Group II Written Notice (proffered by the Agency with the Request for Administrative Review dated September 12, 2017) also issued May 22, 2017 finding a

violation of FI503 alleging “inappropriate interactions” with a resident. The Hearing Officer notes that the details included in the Written Notice were the subject of witnesses’ testimony at the hearing conducted August 17, 2017.

The Hearing Officer notes that Grievant’s Form A specifically grieves “the issuance of two Group II Written Notices on May 11, 2017 and May 22, 2017, and a Group III Written Notice issued May 22, 2017”. It is clear from the record that the additional Group II Written Notice issued May 22, 2017 was part of this termination procedure and was addressed by the witnesses at hearing and should be addressed by the Hearing Officer.

DECISION UPON REMAND AND CONSIDERATION

The Hearing Officer upholds the Written Notice, Group II issued May 11, 2017 (Agency Exhibit B), the violation having been established by the preponderance of the evidence.

The Agency did not show by a preponderance of the evidence that the Grievant intentionally failed to follow Facility Instruction 709 as set out in Written Notice, Group II issued May 22, 2017 (Agency Exhibit C). The Written Notice shall be removed from the Grievant’s employee records.

The Agency did not show by a preponderance of the evidence that the Grievant failed to follow Facility Instruction 503 by having “Inappropriate interactions” with a resident by discussing the Grievant’s personal information with the resident and by spending excessive amounts of time with the resident as set out in Written Notice, Group II also issued May 22, 2017. The Written Notice shall be removed from the Grievant’s employee records.

The Agency failed to show by a preponderance of the evidence that the Grievant was guilty of abuse or neglect of the resident as alleged in Written Notice, Group III issued May 22, 2017 (Agency Exhibit A). For the reasons already stated, it is the Hearing Officer’s opinion that the Agency established a suspicion but did not meet its burden of proving the violation by a preponderance of the evidence, including such proof as to whether or not the Grievant’s conduct may “have caused psychological harm” to the resident.

The Grievant shall be reinstated to her employment with full back pay and benefit

APPEAL RIGHTS

Both parties have the opportunity to request administrative review of the Hearing Officer’s reconsidered decision on any other new matter addressed in the remand decision (i.e., any matters not previously part of the original decision). Any such request must be received by the administrative reviewer within fifteen calendar days of the issuance of the remand decision.

Pursuant to Section 7.2(d) of the Grievance Procedure Manual, the Hearing Officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided. Within thirty 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. Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.

John R. Hooe, III
Hearing Officer

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case No. 11045

Hearing Date: August 17, 2017
Decision Issued: August 28, 2017
Decision Upon Remand: October 12, 2017

DECISION UPON REMAND AND RECONSIDERATION

PRELIMINARY MATTERS

By Administrative Review Ruling No. 2018-4616 dated September 28, 2017, this matter was remanded to the Hearing Officer for reconsideration for the reasons set out in the Ruling, namely:

3. The Hearing Officer must reassess the evidence in the record, excluding Grievant's Exhibit 24 and any witness testimony or other evidence relating to the polygraph results, and issue a reconsidered decision. In this regard, the Hearing Officer would note that the Ruling states that "...Rules for Conducting Grievance Hearings...states that "the results of polygraph tests are not admissible as evidence in a grievance hearing over the objection of any party...". The Hearing Officer further notes that the Agency did not object to the admission of Grievant's Exhibit 24.
4. The Hearing Officer should also consider and address the evidence in the record relating to the existence of an additional Group II Written Notice and the effects such an additional Written Notice would have on the outcome of this case.

DISCUSSION

The Hearing Officer reassessed the evidence in the record, excluding the Grievant's Exhibit 24 and all witness testimony or other evidence relating to the polygraph results. The Hearing Officer's conclusions and decision remain the same as expressed in the Decision issued August 28, 2017.

The Hearing Officer has further considered the evidence in the record relating to the existence of the additional Group II Written Notice (proffered by the Agency with the Request for Administrative Review dated September 12, 2017) also issued May 22, 2017 finding a

violation of FI503 alleging “inappropriate interactions” with a resident. The Hearing Officer notes that the details included in the Written Notice were the subject of witnesses’ testimony at the hearing conducted August 17, 2017.

The Hearing Officer notes that Grievant’s Form A specifically grieves “the issuance of two Group II Written Notices on May 11, 2017 and May 22, 2017, and a Group III Written Notice issued May 22, 2017”. It is clear from the record that the additional Group II Written Notice issued May 22, 2017 was part of this termination procedure and was addressed by the witnesses at hearing and should be addressed by the Hearing Officer.

DECISION UPON REMAND AND CONSIDERATION

The Hearing Officer upholds the Written Notice, Group II issued May 11, 2017 (Agency Exhibit B), the violation having been established by the preponderance of the evidence.

The Agency did not show by a preponderance of the evidence that the Grievant intentionally failed to follow Facility Instruction 709 as set out in Written Notice, Group II issued May 22, 2017 (Agency Exhibit C). The Written Notice shall be removed from the Grievant’s employee records.

The Agency did not show by a preponderance of the evidence that the Grievant failed to follow Facility Instruction 503 by having “Inappropriate interactions” with a resident by discussing the Grievant’s personal information with the resident and by spending excessive amounts of time with the resident as set out in Written Notice, Group II also issued May 22, 2017. The Written Notice shall be removed from the Grievant’s employee records.

The Agency failed to show by a preponderance of the evidence that the Grievant was guilty of abuse or neglect of the resident as alleged in Written Notice, Group III issued May 22, 2017 (Agency Exhibit A). For the reasons already stated, it is the Hearing Officer’s opinion that the Agency established a suspicion but did not meet its burden of proving the violation by a preponderance of the evidence, including such proof as to whether or not the Grievant’s conduct may “have caused psychological harm” to the resident.

The Grievant shall be reinstated to her employment with full back pay and benefit

APPEAL RIGHTS

Both parties have the opportunity to request administrative review of the Hearing Officer’s reconsidered decision on any other new matter addressed in the remand decision (i.e., any matters not previously part of the original decision). Any such request must be received by the administrative reviewer within fifteen calendar days of the issuance of the remand decision.

Pursuant to Section 7.2(d) of the Grievance Procedure Manual, the Hearing Officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided. Within thirty 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. Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.

John R. Hooe, III
Hearing Officer

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

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of: Case No. 11045

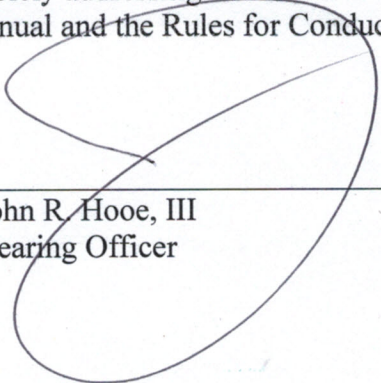
Hearing Date: August 17, 2017
Decision Issued: August 28, 2017
Decision Upon Remand Issued: October 12, 2017
Addendum Issued: October 25, 2017

ADDENDUM TO DECISION

The Hearing Officer received in a timely fashion from counsel for the Grievant a Petition For Attorney's Fees requesting reimbursement payment of \$1,951.90 to the Grievant. The Petition, included the required Affidavit itemizing services rendered, time billed for each service, and the attorney's customary hourly rate, together with a copy of the Retainer Agreement between the attorney and the Grievant.

The Hearing Officer hereby awards the fee reimbursement requested in the Petition in the amount of \$1,951.90.

Either party may petition EDR for a decision solely addressing whether this fees addendum complies with the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings.



John R. Hooe, III
Hearing Officer