Issue: Group III Written Notice with Termination (client abuse); Hearing Date: April 22, 2002; Decision Date: April 23, 2002; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esquire; Case Number: 5423; **Administrative Review: Hearing Officer Reconsideration Request received 05/03/02; Reconsideration Decision Date: 05/06/02; Outcome: No basis to change decision**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5423

Hearing Date: April 22, 2002
Decision Issued: April 23, 2002

APPEARANCES

Grievant
Team Leader
Legal Assistant Advocate for Agency
Two witnesses for Agency

ISSUES

Did the grievant's actions on January 7, 2002 warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued on January 29, 2002 because he had physically abused a client.[1] The grievant was discharged from employment as part of the disciplinary action. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2]

The Department of Mental Health, Mental Retardation and Substance Abuse Services (MHMRSAS) (Hereinafter referred to as "agency") has employed the grievant as a direct service care worker for six years. He has worked for the agency for a total of 13 years.

The grievant received Mandt System® training on March 13, 1996, March 26, 1997, March 25, 1998, May 26, 1998, March 31, 1999, April 12, 2000, and April 18, 2001.[3] The Mandt System® is a systematic training program designed to help you de-escalate and co-manage yourself and others, as well as reduce the potential for verbal and physical abuse to yourself and others.[4] The program uses a combination of interpersonal communication skills and physical interaction techniques designed to reduce the potential for injury to participants in an interaction. When patients are agitated and kicking, Mandt training indicates that no attempt should be made to move patients. Grabbing a resident's ankles and dragging him is not an approved Mandt technique.

Section 201-1 of MHMRSAS Departmental Instruction 201 on Reporting and Investigation Abuse and Neglect of Clients states, in pertinent part: "The Department has zero tolerance for acts of abuse or neglect." The grievant received this policy.[5] Section 201-3 defines client abuse, in pertinent part:

> Abuse means any act or failure by an employee or other person responsible for the care of an individual that was performed or was failed to be performed knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person receiving care or treatment for mental illness, mental retardation or substance abuse. Examples of abuse include, but are not limited to, acts such as:
> - Use of excessive force when placing a person in physical or mechanical restraint
> - Use of physical or mechanical restraints on a person that is not in compliance with federal and state laws, regulations, and policies, professionally accepted standards of practice or the

[1] Exhibit 10. Written Notice, issued January 29, 2002.
[2] Exhibit 11. Grievance Form A, filed October 24, 2001.
[3] Exhibit 2. Grievant's Training File.
[4] Exhibit 2. Excerpts from the Mandt System® Training Manual.
[5] Exhibit 1. Signature Form, signed by grievant April 18, 2000.

person's individualized services plan.[6]

The agency has also promulgated a written instruction that addresses the forms of physical restraint that may and may not be used when dealing with clients. The following section is also repeated in facility Instruction Number 2240 and states, in pertinent part:

> Under no circumstances may staff lie on or apply pressure, excluding pressure inherent in approved Mandt holds, to a resident's chest/trunk while the resident is in a prone or supine position.[7]

Each cottage houses 10 residents and employs four staff to supervise and care for the residents. In each cottage, there is a "deceleration binder" that contains detailed treatment programs for each resident. Psychologists and other health care professionals formulate the treatment programs to address the behavioral problems of each resident. The written plan contains, among other things, a description of the resident's behavioral problem, training methods, history, and detailed treatment procedures specific to that resident. Staff members are expected to be familiar with the treatment programs for each of the residents in their cottage and to interact with residents according to the program. Grievant knew that each cottage has a deceleration binder and that programs contained therein are guides for the best way to interact with each resident.

Resident W is a nonverbal, ambulatory 22-year-old male with severe mental retardation, right spastic hemiparesis, idiopathic ataxia with falls, and impulse control disorder. In February 1999, he developed an infected bursa of the right elbow, secondary to a fall three months earlier. He underwent three surgical procedures on the elbow and, despite continual care, the wound failed to heal for a prolonged period of time. The wound eventually healed but the integrity of the wound site continues to be a concern and the patient wears a bivalve splint on the right arm for protection. Resident W also wears a helmet for head protection in the event of falls.[8] He is about 5'7" tall and weighs about 140 pounds. Grievant is significantly taller and heavier than resident W.

Resident W's training program emphasizes that he will respond, often in undesirable ways, to <u>any</u> attention from staff. His deceleration program for physical aggression states: "Therefore, it is CRUCIAL that attention be given for desirable behavior and minimized when unwanted behavior occurs. … [Resident] will be placed on verbal extinction for about 10-20 seconds after he is in a position where he cannot hit someone. … Once he has done ONLY appropriate behavior (for about 10 seconds), staff will give him attention."[9] Resident W has

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[6] Exhibit 1. Departmental Instruction 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, revised April 17, 2000.
[7] Exhibit 3. Section 104-5, Departmental Instruction 104(TX)99, July 1, 1999.
[8] Exhibit 4. Deceleration Programs for patient W.
[9] Exhibit 4. Deceleration of Physical Aggression, updated December 18, 2000.

previously lain on the floor and become agitated. When staff ignore him, he gets up when he realizes his behavior is not eliciting the type of attention he craves.

During mid-afternoon of January 7, 2002, resident W twice attempted to hit grievant and grievant responded each time by hitting the resident with an open hand on the side of his head.[10] The staff person who witnessed this incident did not report it because grievant was her supervisor and she wasn't sure whether the hitting constituted abuse.

At 8:15 p.m. on January 7, 2002, a psychologist was making rounds as the shift supervisor. While in resident W's cottage, the psychologist observed resident W lie on the dining room floor in a supine position. Grievant kneeled next to resident W with his left knee on the floor and his right knee over resident W's stomach or hip area. He restrained the resident by holding his hands together in front of him. The psychologist was coming down the hall towards grievant's back so he was unaware of her presence. Grievant then stood up and grabbed the resident's ankles and dragged the resident two or three steps toward the hallway. When grievant became aware of the psychologist's presence, he let go of the resident. The psychologist told grievant to ignore the resident's behavior (pursuant to his treatment program) and left the cottage. She then notified the facility director about the incident.

Grievant normally worked in a cottage adjacent to resident's W's cottage. But, because the residents in both cottages have especially challenging behaviors, the team leaders often interchanged staff to fill in for absentees or for cross-training purposes. Thus, grievant had worked in resident W's cottage at various times on a sporadic basis. He had also often interacted with resident W when the residents of both cottages were together in the yard outside the cottages. Grievant testified that he had seen resident W behave in the same manner (lying supine on the floor and kicking) on other occasions. Grievant transferred to resident W's cottage on January 3, 2002.

Two other staff members witnessed the incident on January 7, 2002. The female staff member was discharged from employment because she failed to report the abuse. A male staff member was suspended during the investigation and would probably have been reinstated but for his failure to comply with a mandatory drug screening requirement.

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

[10] Exhibit 7. Witness statements of female staff member, January 8, 2002 & January 10, 2002.

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 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[11]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training[12] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. 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 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. Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. The agency's policy on patient abuse provides that an employee found to have abused a client would normally be discharged.[13]

If grievant had placed his knee on the resident's trunk, this would constitute prima facie evidence of abuse. However, the evidence on this point is inconclusive. Grievant denies doing so while the psychologist believes grievant did rest his knee on the resident's stomach or hip region. The psychologist was approaching grievant from his rear and from her perspective, it may have

[11] § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*
[12] Now known as the Department of Human Resource Management (DHRM).
[13] Exhibit 1. Section 201-8, DI 201(RTS)00, *Ibid.*

appeared that his knee was on the resident's trunk. However, it is possible that his knee could have been above the resident's stomach without actually resting on it. Viewing the evidence in the light most favorable to grievant, it is concluded that he did not put his knee on the resident's trunk.

However, a preponderance of the evidence establishes that grievant's actions on January 7, 2002 constituted abuse, as defined in agency policy. First, the undisputed evidence establishes that grievant twice hit the resident in the head during the afternoon. While the witness to this occurrence did not testify in person, grievant did not rebut her two handwritten witness statements.

Second, grievant has acknowledged that he did restrain resident W, first by his hands, then by his ankles, and subsequently dragged him across the floor. This form of restraint violated the resident's treatment program, and by definition constitutes abuse. Grievant denied to the investigator that he restrained resident W's hands. However, during the hearing, grievant acknowledged that he was holding the resident's hands because the resident was falling backwards to the floor. The inconsistency in grievant's two statements taints his credibility.

Third, grievant disingenuously contends that he restrained resident W because he believed that the resident might injure himself or others in the area. However, the testimony of witnesses established that other residents in the area were not close enough to resident W to be a target of his kicking. The preponderance of evidence indicates that, although resident W was agitated and kicking his legs, there was no apparent likelihood that he would injure himself or anyone else if he were left alone.

Grievant points out that he had been assigned to resident W's cottage on a permanent basis only since January 3, 2002 and, therefore, had not yet read the treatment programs for resident W. This argument is not persuasive for three reasons. First, grievant knew the plan was in the deceleration binder and that he was responsible for knowing its contents. He has not shown that he did not have sufficient time to review the plans for this resident in the preceding three days. Second, even without reading the plan, he had previously interacted with this resident on several occasions, had observed him engage in the same behavior and knew how he should be treated. Third, grievant knew from his extensive and repeated Mandt training that restraining the hands and ankles of a resident are not approved methods for dealing with this situation.

Grievant contends that his actions were not abuse because he did not "knowingly, recklessly or intentionally" do anything that might cause harm to the resident. Hitting a person in the head, and dragging a person along the floor can both cause physical harm to the patient.[14] Moreover, the examples of abuse in

[14] The investigative report (Exhibit 7, pp. 2-3) indicates that resident W may have sustained a rug burn while being dragged.

the definition specifically include physical restraint that is not in compliance with the resident's individualized service plan (treatment program).

Grievant also attempts to shift responsibility to the psychologist because she did not examine the resident to ascertain whether he sustained any injury. The psychologist credibly testified that she did not observe any injury and that the resident did not complain of injury. Therefore, she promptly reported the matter to the facility director, which ended her obligation. Even if the psychologist were found to have some responsibility to examine the patient, that would not alter grievant's actions or absolve him of his responsibility for precipitating the incident. Therefore, this issue is simply a red herring.

Grievant argues that he was under the impression that resident W's treatment program included a room restriction component when he misbehaved. Several years earlier, the resident's treatment plan had included such a component. However, following his 1998 elbow injury and the prolonged difficulty in achieving healing of the wound, this component was removed because resident W would sometimes reinjure his elbow when confined to his room on restriction. Moreover, even if grievant reasonably believed that resident W should have been restricted to his room, dragging him by the ankles is a totally inappropriate method of taking him to his room.

Finally, grievant contends that all employees have to use some degree of discretion when performing their jobs. While this is a true statement, discretion is permitted only within the parameters of the treatment plans specified for each resident and within the bounds of Mandt training. In this case, grievant clearly violated the treatment plan and ignored the Mandt training he had received.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice issued to the grievant on January 29, 2002 and his discharge from employment are AFFIRMED. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **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 cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision.** (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 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 HRM, 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.

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David J. Latham, Esq.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5423

Hearing Date:	April 22, 2002
Decision Issued:	April 23, 2002
Reconsideration Received:	May 3, 2002
Reconsideration Response:	May 6, 2002

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 10 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.[15]

OPINION

Grievant's request for reconsideration raises several issues; this reconsideration addresses those issues in the same order as presented in grievant's request.

[15] § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

Witness statement

Grievant contends that it is unfair to give evidentiary weight to a written witness statement because that witness did not testify during the hearing. Grievant's contention fails for three reasons. First, there is no requirement that a witness who writes a statement in connection with an investigation must testify during the hearing. A party may elect to submit a written witness statement in lieu of personal appearance for various reasons, usually because the witness is unavailable to testify in person. The witness' written statement is admissible evidence but, of course, is assigned less evidentiary weight than sworn testimony. Second, the grievant raised no objection to the introduction of the witness statement; the statement was properly marked and entered into the record as part of the documentary evidence. Third, when one party presents evidence (either oral or written), the burden of disproving that evidence shifts to the opposing party. Here, the agency proffered a witness statement but the grievant failed to dispute that statement during the hearing. When the grievant fails to rebut evidence presented by the opposing party, it is presumed that the evidence is undisputed and admitted as fact.

Grievant correctly observes that the Written Notice did not specifically include a description of the grievant striking the patient in the head. However, this evidence is corroborative because it establishes a pattern of behavior consistent with grievant having pulled the patient by his ankles across the floor, both types of behavior being abusive in nature.

Dragging of resident

Grievant argues that he did not "drag" the resident. However, grievant admitted, and the uncontradicted evidence establishes, that he held the resident's ankles while the resident was lying supine on the floor and then walked backward three steps. There can be no doubt that this activity constitutes dragging the resident. Each person who testified had a slightly different estimate of the distance. Whether the distance was two steps or three steps, or five feet or ten feet, is insignificant. The fact remains that grievant dragged the resident for a distance across the floor. Moreover, it was his apparent intent to drag the resident to his room; he stopped only when he realized that the psychologist was watching him.

Grievant's failure to read treatment plan

Grievant suggests that his failure to read the resident's treatment plan should exonerate him from liability for his actions. This argument is not persuasive for four reasons. First, grievant has not demonstrated that he did not have time to read the plan. Second, while the supervisor had offered to review the plan with grievant, grievant could easily have read the plan on his own – as he claims he had already done for the other residents. Third, the plan does not

state, “Do not drag residents by their ankles along the floor.” However, even without reading the plan, grievant knew, or reasonably should have known, that this constitutes abusive behavior. Fourth, and most significantly, grievant had known and worked with this resident on previous occasions. He knew full well that the resident was required to wear a helmet to protect his head. On this occasion, grievant admitted that the resident had taken his helmet off and was throwing it around. It should have been obvious to grievant that dragging the resident without his helmet on could have resulted in a head injury. Grievant’s disregard for the resident was abusive.

Grievant also suggests that his supervisor should have been disciplined because she had not yet reviewed the resident’s treatment plan with grievant. Grievant’s attempt to shift responsibility for his own actions is inappropriate. If grievant truly believed that his knowledge about the resident’s treatment plan was deficient, he should not have attempted to control the resident during the behavioral malfunction. Grievant could have requested advice or help from other staff or from his supervisor.

Other staff

Grievant believed that the resident’s treatment plan still included room restriction as a method of dealing with inappropriate behavior. In fact, grievant acknowledged that it was his intent to take the resident to his room when he started to drag him. Grievant maintains that other staff should have told him that room restriction was no longer part of the treatment plan. However, it is not clear that other staff were aware that grievant intended to take the resident to his room. If other staff was unaware of grievant’s intention, they would have had no reason to tell him about removal of the room restriction from the resident’s treatment plan.

Parenthetically, grievant’s admission of intent to take the resident to his room strongly infers that grievant intended to drag the resident the entire distance to his room, but for the fortuitous arrival of the psychologist on the scene.

Injury to resident

Grievant renews his argument that the resident was not injured and that the psychologist did not physically examine the resident. The evidence established that there was no reason to believe that the resident had been injured and therefore, an examination was unnecessary. Grievant misses the point at issue, i.e., that his actions could potentially have caused injury. When one engages in actions that might cause injury, such actions constitute abuse as defined in the agency policy.

New evidence

Grievant raises the issue of potential disparate treatment by proffering evidence not raised during the hearing. The general rule is that new evidence is deemed admissible only if the party making the proffer could not have discovered such evidence through the exercise of due diligence. Here, the grievant has not demonstrated that the evidence he now seeks to present could not have been presented during the hearing. The evidence proffered is insufficient to conclude either that the hearing should be reopened or that a different decision would have resulted from the evidence.

Mitigation

The hearing officer is mindful that grievant has worked for the agency, apparently without prior discipline, for several years. However, in carefully weighing all the evidence, one cannot ignore the seriousness of grievant's actions and the potential for injury to the resident. Moreover, and contrary to grievant's assertion, grievant knew what he was doing and thus his actions were willful. Finally, the resident was not being aggressive toward anyone else – he was lying on his back on the floor kicking his legs and flailing his arms. Therefore, the resident was not aggressive toward anyone and there was no need for grievant to take immediate action.

DECISION

The hearing officer has carefully reconsidered grievant's arguments and concludes that there is no basis to change the Decision issued on April 23, 2002.

APPEAL RIGHTS

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3. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, 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.

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David J. Latham, Esq.
Hearing Officer