Issue: Group III Written Notice with termination (patient abuse); Hearing Date: 03/25/05; Decision Issued: 03/28/05; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8021; Administrative Review: HO Reconsideration Request received 04/07/05; HO Reconsideration Decision issued: 04/11/05; Outcome: HO concludes there is no basis to reopen hearing; Addendum Decision address attorney's fees issued 04/13/05

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8021

Hearing Date: March 25, 2005
Decision Issued: March 28, 2005

APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
Representative for Agency
Two witnesses for Agency

ISSUES

Did grievant's actions 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 for abusing a patient.[1] As part of the disciplinary action, grievant was removed from state employment effective January 27, 2005. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.[2] The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant as a direct service associate (DSA) for eight years. Grievant was previously employed in a similar capacity in another state for 18 years. In her 26 years of working with persons with mental disabilities, grievant has never been disciplined for any inappropriate behavior towards clients.

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."[3]

On December 1, 2004, grievant had been assigned to a two-hour period (3:00 – 5:00 p.m.) of "one-to-one" care with a profoundly retarded male client with whom she had worked for about three years.[4] For several minutes, grievant and the client had been walking together up and down a hallway in the housing unit. The aides' office is located at one end of the hall. The office has windows on three walls; from the left side of the office, one can view the entire length of the hall.[5] After grievant and the client had reached the end of the hall closest to the office, they turned and started back down the hall at about 4:00 p.m. The first door on the right is the bathroom. Because this client is often incontinent, grievant suggested to him that he go to the bathroom to urinate. The client was not immediately willing to do so and grievant bent over slightly to loudly explain why she wanted him to go into the bathroom.[6] As she straightened up, she slapped her own thigh with one hand to emphasize her direction and placed her other open hand on the client's back to guide him into the bathroom. Grievant did not hit or strike the client.

At the time of this incident, a newly-employed supervisor was standing in the aides' office doing paperwork and heard grievant's loud directions to the

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[1] Exhibit 12. Written Notice, issued January 27, 2005.

[2] Exhibit 13. *Grievance Form A*, filed January 27, 2005.

[3] Exhibit 10. Section 201-3, Departmental Instruction (DI) 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, revised April 17, 2000. The definition of abuse is: "Abuse means any act or failure to act 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."

[4] "One-to-one" care requires the staff person to remain within arm's length of the client at all times.

[5] Exhibit 2. Floor plan of housing unit. Office is 263, hallway is 200B, bathroom is 241, and the day hall is 239.

[6] The client is very short and wears a helmet to protect his head in the event of falls. Grievant had to bend down in order to make eye contact with the client.

client. She looked through the window and heard a slapping sound as grievant put her hand on the client's back. As grievant and the client entered the bathroom, grievant observed another client on a toilet who was beginning to smear his feces. Grievant stuck her head into the hallway and called the name of the DSA assigned to that client. That DSA was sitting in the aides' office doing paperwork to the supervisor's left. He looked up, saw grievant calling for his assistance, got up from his chair and went to the bathroom.

At the time of the incident, only the supervisor was looking at grievant and the client. The DSA in the office was doing paperwork and did not hear anything unusual until grievant called him.[7] No one else saw the incident. The aides' office has two doors, both of which close and lock automatically; both doors were closed at the time grievant put her hand on the client's back. Adjacent to the aides' office is a day hall. At the time of the incident there were about 11 clients and 3 staff in the room. Either a television or radio was on at the time. Some of the clients often make various noises such as grunting, slapping, or banging things. The door from the day hall to the hallway was open at the time of the incident.[8] None of the staff in the day hall heard anything unusual in the hall until grievant called for assistance from the bathroom.

The supervisor believed that grievant had struck the client in the back and, according to protocol, she called the facility director's office to report what she thought might be client abuse.[9] The client was examined by a physician within 30 minutes but there was neither any sign of injury nor any red marks or bruises on the client's back.[10] An investigator was promptly assigned to the case and he took statements from those who had been in the area at the time of the incident.

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).

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[7] Exhibit 8. DSA's witness statement, December 1, 2004.
[8] Oral statement of DSA in the day hall to the investigator, testified to by the investigator.
[9] Exhibit 1. Supervisor's witness statement, December 1, 2004.
[10] Exhibit 15. Interdisciplinary notes, December 1, 2004. Although the notes mention multiple scratches and abrasions, they were old scratches and abrasions located on knees, arms and other parts of the body. The agency stipulated that there was no injury to the client's back as a result of this incident.

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. In all other actions the grievant must present her evidence first and prove her claim by a preponderance of the evidence.[11]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. The *Standards* 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].[12] It is expected that a facility director will terminate the employment of an employee found to have abused or neglected a client.[13]

The supervisor who reported this incident graduated from college in May 2004. She was hired by the facility in October 2004 and went through a several-week training program. At the time of the incident, she had been working as a supervisor in the unit for only two weeks. When she reported the incident, she believed that what she had seen might be patient abuse. However, the evidence presented in this case does not support such a conclusion. In its essence, this case pits the observation of the supervisor against grievant's denial of any wrongdoing. Both persons testified credibly and, therefore, it is necessary to examine other evidence to determine what actually occurred.

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[11] § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.
[12] Exhibit 11. DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.
[13] Exhibit 10. Section 201-8, DI 201(RTS)00, *Ibid*.

There are five factors available to help resolve what happened. First, the undisputed evidence established that the client was not injured. A prompt physical examination revealed no injury, no bruises, and no red marks. Thus, whatever amount of pressure was applied to the client's back was so minimal as not to be injurious or even capable of producing any evidence of a slap.

Second, two other staff members in the immediate area did not hear anything unusual occur until grievant called one of them for assistance. The supervisor claims she heard loud voices causing her to look up from her paperwork. It is not disputed that in the day hall directly adjacent to the aides' office, there were up to 14 people including 11 clients who routinely make a lot of noise. Either a radio or television was playing, and clients were behaving as they routinely do – making various verbal noises and banging or slapping things. It is entirely possible that the noise that initially caught the supervisor's attention emanated from the day hall. More significantly, the grievant was in an enclosed room with the doors closed. Any sounds from outside the room would be muffled to some degree and determining the direction from which they came would be difficult. The DSA in the room with the supervisor heard nothing unusual until grievant called his name. Even though the door from the day hall to the hallway was open, a DSA in the day hall heard nothing unusual until grievant called the other DSA. Accordingly, there is no corroboration for the supervisor's assertion that grievant slapped the client so hard that she could hear it inside the closed office. If she had slapped the client that hard, it is more likely than not that it would have been heard by the other two DSAs, and that it would have left at least a red mark on his back.

Third, grievant's explanation of what occurred is not inherently implausible. It is reasonable that grievant might slap her own thigh in order to get the attention of a person with profound mental retardation. Such persons are often fixated upon their own thoughts to the exclusion of those around them; a loud noise sometimes helps to get their attention. Grievant acknowledges putting her hand on grievant's back to help guide him into the bathroom. Her account is not inconsistent with what the supervisor saw and explains why the supervisor might have perceived the noise as resulting from the placing of a hand on the back.

Fourth, the supervisor described what she heard as a slap or smack. Such a sound is consistent with hitting one's thigh. The client was wearing a sweatshirt. If one administers an open-hand slap to the back of a person wearing a sweatshirt, the resulting sound is likely to be a much lower-pitched thump. Given that the supervisor was inside a closed room, it is very unlikely that she would have heard such a thump - unless it was administered with so much force that it left a bruise or red mark. Since there was no evidence of such a forcefully administered blow, it appears more likely than not that the supervisor heard the grievant slap her own thigh as grievant put her hand on the client's

back. The supervisor assumed that the slapping sound resulted from the hand on client's back. Moreover, even if one could conclude from the evidence that grievant had mildly hit the client on his back with an open hand, that action did not constitute abuse because it did not "cause or might have caused physical or psychological harm."

Fifth, the supervisor's version of events was not consistent with all of the facts. For example, she stated that grievant and the client had come from the day hall just before the incident. However, grievant maintains that she and the client had been pacing up and down the hall several times. The staff in the day hall did not dispute grievant's account. In another example, the supervisor stated that she was working at the left side of the counter in the aides' room. However, the DSA in the room testified with certainty that he was working on the left side of the counter and that the supervisor was to his right. The DSA's version is more likely correct based on his written statement that, when grievant called his name, he looked up from his paperwork and saw her head sticking out of the bathroom door. If he had been sitting to the supervisor's right, he would not have been able to see grievant sticking her head out the bathroom door. This testimony is consistent with grievant's testimony that she saw the DSA sitting on the supervisor's left side. While neither of these differences are probative, they suggest that the supervisor's account may not have been accurate in all respects.

While prior behavior does not negate the possibility of abuse in an isolated instance, the fact that grievant has worked in this field for 26 years without a single blemish on her record suggests that it is unlikely that she would have been abusive in this instance. Conversely, the new supervisor had been on the job for only two weeks and fresh in her mind was the training that requires reporting any incident that *might* be considered abusive. The supervisor is to be commended for erring on the side of caution and reporting what she perceived to be a possible abusive incident. However, in this case, one person's perception is insufficient to constitute a preponderance of evidence.

The agency has failed to demonstrate, by a preponderance of evidence, that grievant physically abused a client.

DECISION

The disciplinary action of the agency is reversed.

The Group III Written Notice and the removal of grievant from state employment on January 27, 2005 are hereby RESCINDED. Grievant is reinstated to her former position or, if occupied, to an objectively similar position. Grievant is awarded full back pay, and her benefits and seniority are restored.

The award of back pay must be offset by any interim earnings and, by any unemployment compensation received.

She is further entitled to recover a reasonable attorney's fee, which cost shall be borne by the agency.[14] Grievant's attorney is herewith informed of his obligation to timely submit a fee petition to the Hearing Officer for review.[15]

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

> Director
> Department of Human Resource Management
> 101 N 14th St, 12th floor
> Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

> Director
> Department of Employment Dispute Resolution
> 830 E Main St, Suite 400
> Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party.

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[14] Va. Code § 2.2-3005.1.A & B.

[15] *See* Section VI.D, *Rules for Conducting Grievance Hearings*, effective August 30, 2004. Counsel for the grievant shall ensure that the hearing officer *receives*, within 15 calendar days of the issuance of the hearing decision, counsel's petition for reasonable attorneys' fees.

The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[16] You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[17]

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

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David J. Latham, Esq.
Hearing Officer

[16] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[17] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

DECISION OF HEARING OFFICER

In re:

Case No: 8021

Hearing Date:	March 25, 2005
Decision Issued:	March 28, 2005
Reconsideration Request Received:	April 7, 2005
Response to Reconsideration:	April 11, 2005

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 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. 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.[18]

OPINION

[18] § 7.2 EDR *Grievance Procedure Manual*, effective August 30, 2004.

The agency requests reconsideration for two reasons. First, the agency finds "problematic" a hypothetical and conditional comment in the decision. Although the decision specifically found that grievant did not slap the client on his back, the decision further opined that the contact that did occur between grievant's hand and the client's back does not constitute abuse, as that term is defined in the agency's own policy. The agency is particularly concerned about the use of the term "mildly hit." It is conceded that a more appropriate term would have been "mildly patted." The intent of the hypothetical comment was to emphasize that not all physical contact between an employee and a client constitutes abuse. In this case, based on the totality of the evidence, it is concluded that whatever contact there was between grievant's hand and the client's back was not abusive because it did not cause or might have caused any physical or psychological harm. To the extent that the term "hit" might result in misinterpretation by a reader, it is changed to read "patted."

Second, the agency seeks to proffer evidence not presented during the hearing. In its request for reconsideration, the agency included an excerpt from an agency "Employee Handbook." The agency has not demonstrated that it could not have offered this document as evidence at the hearing. This is a document that the agency had in its possession and could have offered. As it was not offered, grievant has not had a chance either to review the document or to interpose objections to its admittance as evidence. Therefore, because this document does not constitute *newly discovered* evidence, it cannot be used as a basis either to reopen the hearing or to support a request for reconsideration.

Nonetheless, the portion of the excerpt cited by the agency is consistent with the definition of abuse found in Exhibit 10 (Departmental Instruction 201), and, therefore, adds nothing new to the evidence in the record. The agency goes on to assert that there was evidence that the client's reaction after the event "indicated psychological distress." However, no such evidence was presented during the hearing. The client did not testify because he is essentially incapable of meaningful, detailed conversation. The agency did not offer the testimony of a psychologist or physician; thus no one with any medical qualifications testified about the client's psychological condition. In fact, no witness testified that they observed anything about the client after incident that could in any way be directly attributed to the contact between grievant's hand and the client's back.

Finally, the agency disagrees with the weight assigned by the Hearing Officer to the testimony of various witnesses. Moreover, the agency maintains that the sound described by the only eye witness is "irrelevant" in determining whether the grievant's actions constituted abuse. At the hearing, the eye witness made much of the fact that she heard a slapping sound. Since a slapping sound, heard inside a closed room, would be highly probative in determining whether the contact on the client's back was forceful enough to be considered abusive, the origin of the sound is not only relevant but crucially relevant in this case. The fact is that grievant's explanation for the slapping sound was both relevant and

credible. Most significantly, it explains why the eye witness, hearing a slapping sound at the approximate time grievant made contact with the client's back, perceived grievant's conduct to possibly be abusive.

DECISION

The agency has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered the agency's arguments and concludes that there is no basis to reopen the hearing. Further, after careful consideration of the agency's arguments, and other than changing one word as noted above, there is no basis to change the Decision issued on March 28, 2005.

APPEAL RIGHTS

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

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by 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.[19]

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David J. Latham, Esq.
Hearing Officer

[19] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 8021

Hearing Date:	March 25, 2005
Decision Issued:	March 28, 2005
Reconsideration Request Received:	April 7, 2005
Response to Reconsideration:	April 11, 2005
Addendum Issued:	April 13, 2005

APPLICABLE LAW AND PROCEDURE

The grievance statute provides that for those issues qualified for a hearing, the hearing officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the hearing officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.[20] For an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.[21]

[20] Va. Code § 2.2-3005.1.A.

[21] § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. Section VI(D) EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004.

DISCUSSION

The decision rescinded the discipline and reinstated grievant to her position. Accordingly, it is held that grievant substantially prevailed in this case. Following issuance of the hearing officer's decision ordering reinstatement of the grievant, grievant submitted a petition for attorney's fees for services rendered by her attorney from February 22, 2005 through April 11, 2005.

AWARD

The grievant is awarded attorneys' fees incurred from February 22, 2005 through April 11, 2005 in the amount of $1,140.00 (9.5 hours x $120.00 per hour).[22]

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

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David J. Latham, Esq.
Hearing Officer

[22] Section VI.D. EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004, limits attorney fee reimbursement to $120.00 per hour.