

Issue: Group III Written Notice with Termination (patient abuse); Hearing Date: 12/20/10; Decision Issued: 12/21/10; Agency: DBHDS; AHO: William S. Davidson, Esq.; Case No. 9468; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 9468

Hearing Date: December 20, 2010  
Decision Issued: December 21, 2010

**PROCEDURAL HISTORY**

The Grievant was issued a Group III Written Notice on October 21, 2010 for:

Physical abuse of an individual in a residence as determined by investigation  
#707-2010-032.<sup>1</sup>

Pursuant to the Group III Written Notice, the Grievant was terminated on October 21, 2010.<sup>2</sup> On October 24, 2010, the Grievant timely filed a grievance to challenge the Agency's actions.<sup>3</sup> On November 22, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On December 20, 2010, a hearing was held at the Agency's location.

**APPEARANCES**

Advocate for Agency  
Grievant  
Attorney for Grievant  
Witnesses

**ISSUE**

1. Did the Grievant physically abuse an individual in a residence as determined by Investigation # 707-2010-032?

**AUTHORITY OF HEARING OFFICER**

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in Tatum v. VA Dept

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<sup>1</sup> Agency Exhibit 1, Tab 1, Page 1

<sup>2</sup> Agency Exhibit 1, Tab 1, Page 1

<sup>3</sup> Agency Exhibit 1, Tab 2, Page 1

of Agriculture & Consumer Servs., 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a “super personnel officer” and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency’s decision.

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) §5.8. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.<sup>4</sup> However, proof must go beyond conjecture.

<sup>5</sup> In other words, there must be more than a possibility or a mere speculation.<sup>6</sup>

### **FINDINGS OF FACT**

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

The Agency provided the Hearing Officer with a notebook containing thirteen (13) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1. During the course of the hearing, four (4) pictures numbered 1 through 4 were introduced as additional Agency exhibits without objection.

The Grievant provided the Hearing Officer with a notebook containing three (3) tabbed sections which were numbered 14, 15 and 16 and that notebook was accepted in its entirety as Grievant Exhibit 1.

The Grievant’s job title was a Direct Care Professional.

A fellow employee (Nurse A) testified that on the morning of Sunday, September 19, 2010, at approximately 8:45 a.m., she observed the Grievant slap one (1) of the residents of this

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<sup>4</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>5</sup> *Southall, Adm’r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>6</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

Agency. Nurse A testified that as she entered what the Hearing Officer will call the “day area,” she observed the Grievant slap this resident and address him in a loud voice. Nurse A testified that she stated, in a somewhat raised voice, “I know you did not just do that.” Nurse A testified that she immediately approached the Grievant and took the Grievant to the nurse’s office. The nurse on duty at that time stated that this incident should be reported to the acting Director and it was. That report led to an investigation and subsequent issuance of the Written Notice before this Hearing Officer. Pursuant to this investigation, this witness prepared a written statement on September 19, 2010.<sup>7</sup> This witness testified that she was approximately 35 feet away from the Grievant when she observed her slapping the resident. She testified that there were at least three (3) other Agency employees closer to the Grievant and that there was a television that was on in the day area. In her written statement, this witness stated that, on a scale of 1 to 10, she would rate the slap as a 6.<sup>8</sup> In her written statement and in her oral testimony, this witness stated that the Grievant admitted that she touched the resident. This witness was a new employee of the Agency as of July 10, 2010. She testified that the Grievant was a wonderful person and was one of her favorite people to work with and that she could not say enough good things about the Grievant.

Upon cross-examination, Nurse A testified that this particular resident will often strike himself. Nurse A, at the time she reported the alleged incident, was serving in a one-to-one capacity with another resident. In theory, at least the majority of her attention was supposed to be on that resident.

The next witness for the Agency was the Investigator. The Investigator’s Report is found at Agency Exhibit 1, Tab 2. The Investigator estimated that Nurse A may have been as much as 40 to 45 feet from where this incident took place. This Investigator interviewed the resident in the presence of at least three (3) other people. In his investigation, the Investigator stated in part as follows:

When [the resident] was questioned by the investigator he did not have any recall of [the Grievant] striking him in the back of the head.<sup>9</sup>

During his testimony before the Hearing Officer, the Investigator stated that the resident said that he was not struck by the Grievant. The Investigator stated that in his opinion, while acknowledging that he was not a professional in this area, the resident was capable of knowing if he had been hit or not.

The next Agency witness was the Registered Nurse to whom Nurse A took the Grievant after this alleged incident in order to make her first report of the incident. This witness has known the resident for approximately ten (10) years. Her testimony was that Nurse A told her that morning that she had seen the Grievant slap the resident and that the Grievant stated that she just tapped the resident just to get his attention. She testified that the Grievant explained to her

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<sup>7</sup> Agency Exhibit 1, Tab 4, Pages 1 and 2

<sup>8</sup> Agency Exhibit 1, Tab 4, Page 2

<sup>9</sup> Agency Exhibit 1, Tab 3, Page 4

that she tapped this resident to get his attention because he had pushed another resident. All of this is consistent with the nurse's written report dated September 19, 2010.<sup>10</sup>

This nurse was present when the Investigator questioned the resident and she testified that the resident stated that the Grievant had not struck him and that the resident further stated that the Grievant is a good person. This witness for the Agency testified that the resident would tell if he thought he had been hit or if he perceived that he had been hit. She further testified that the resident would not "cover up" for someone. Indeed, she testified that this resident would fixate on this and would continuously state that he had been hit. This nurse further testified that she immediately checked the resident to see if he had any bruising or redness and she found none. This witness testified that the Grievant was a mild-mannered person and she had never heard her raise her voice and that the Grievant always approached others in a quiet and supportive manner.

The next Agency witness was another Direct Care Professional. This witness was sitting at a table with two (2) other Agency employees in the day area at the time of this alleged incident. He heard Nurse A scream, "I know you did not just hit him." He immediately looked up, saw Nurse A and then saw the Grievant and her resident. He testified that the television was running and was at a volume level that was loud but no so loud as to be irritating. This witness did not see the Grievant hit anyone, nor did he hear anyone get hit. He testified that he did not hear the Grievant raise her voice to her resident. All of this is in agreement with his written statement, which was submitted to the Investigator on September 19, 2010.<sup>11</sup> This witness testified that he would have heard a loud slap and that he and the others sitting at this table were much closer to the Grievant and the resident than Nurse A. He further testified that he asked the resident if the Grievant had hit him and the resident definitively answered, "No." This question was posed to the resident within minutes of the incident.

The next Agency employee who was seated at the table at the time of the alleged incident did not testify but her testimony was stipulated to. The stipulation was that her testimony would be similar to the prior employee who testified.

The Grievant testified and stated that she had worked for the Agency for approximately eight (8) years. She specifically denied slapping the resident, hitting the resident and raising her voice to the resident. She did state that the resident was upset because another resident had been in his room and he was very possessive of his possessions. The Grievant stated that her resident spoke rudely to this other resident who had allegedly been in his room and pushed him. She testified that she tapped her resident on the back of the shoulder in order to get his attention and to have him apologize for using a raised voice and for pushing the other resident.

In summary, the evidence that the Agency presented before the Hearing Officer is that a new employee of the Agency alleged that she saw and heard the Grievant slap a resident. The evidence is that Nurse A was somewhere between 30 and 50 feet away from the incident. The evidence is that there was a television between Nurse A and where the alleged incident took place and that television was at a loud volume. There were three (3) other Agency employees who were closer to the Grievant than Nurse A. Nurse A alleges that she heard a "loud slap," and that on a scale of 1 to 10, it would register as a 6. An Agency witness looked at the resident

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<sup>10</sup> Agency Exhibit 1, Tab 6, Pages 1 and 2

<sup>11</sup> Agency Exhibit 1, Tab 9, Pages 1 and 2

immediately after this incident and found no bruising and no redness. Agency witnesses asked the resident immediately after this alleged incident if the Grievant had slapped him and the resident stated that she had not. The Investigator in this matter spoke to the resident within hours of this alleged incident and asked him if the Grievant had struck him and in his oral testimony the Investigator testified that the resident's answer to that question was that the Grievant had not struck him. Another Agency witness who was present during the Investigator's questioning of the resident confirmed that the resident stated that he had not been struck.

Several Agency witnesses testified that the resident would not cover or lie for someone and that he was very prone to verbalizing if he had been harmed. Indeed, their testimony was that he would fixate on that harm and would repeat his story over and over. At no time did the resident indicate in any way that the Grievant had slapped him.

The Grievant admits that she tapped the resident to get his attention after he had a confrontation with another resident. The matter before this Hearing Officer is what is the more credible evidence: That the Grievant slapped the resident or that the Grievant tapped the resident? Recognizing that Nurse A had an instant to notice what she alleged was a slap, the Hearing Officer is cognizant of the fallibility of such eyewitness testimony. While the Hearing Officer was not offered what the sound or appearance of a "6" on a scale of 1 to 10 would be, the Hearing Officer presumes that it would be more likely to be a hard slap than a tap. It is compelling to the Hearing Officer that Nurse A was at least 30 and perhaps 50 feet away from this incident and that the television was set to a loud volume, though not a volume such as to be irritating. There were three (3) other Agency employees who were closer to this alleged incident and they heard and saw nothing. The resident was looked at immediately after the event and not only did he have no bruising, he had no redness on his skin either. Further, the resident stated on at least two (2) occasions, that the Grievant did not hit or slap him. The consensus of the opinion of the Agency's witnesses was that the resident was capable of knowing if he had been slapped and that he would have readily told anyone that he had been hit and he would not fail to make this known in an attempt to protect someone.

Slap, when it is used in its verb form, is sometimes defined to mean to strike sharply with or as if with an open hand or to cause to strike with a motion or sound like that of a blow with an open hand. The Hearing Officer finds that the Agency has not borne its burden of proof in this matter regarding the allegation that the Grievant slapped the resident. The Hearing Officer is fully cognizant that this Agency has a zero-tolerance policy regarding abuse in any form of its residents. However, all of the Agency employees when asked the question of whether or not they could touch a resident, stated that they absolutely could touch a resident. Indeed, touching of residents was essentially a necessary day-to-day activity in dealing with the residents. In large measure, the difference between a touch and a slap is going to be defined by the strength of the touch and the intent of the touch. The Agency was of the mind that the mere touching of a resident, for whatever purpose, results in a battery and therefore is abuse of the resident and justifies termination. The Hearing Officer finds that the Agency's own rules and witnesses in this matter establish that is an improper interpretation of its rules and regulations.

## **MITIGATION**

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the Agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution...”<sup>12</sup> Under the Rules for Conducting Grievance Hearings, “a Hearing Officer must give deference to the Agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus a Hearing Officer may mitigate the Agency’s discipline only if, under the record evidence, the Agency’s discipline exceeds the limits of reasonableness. If the Hearing Officer mitigates the Agency’s discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

### **DECISION**

For reasons stated herein, the Hearing Officer finds that the Agency has not borne its burden of proof regarding this matter. The Hearing Officer orders that the disciplinary action be rescinded; that the Grievant be reinstated to her former position or, if occupied, to an objectively similar position; that the Grievant be paid full back pay from the date of her termination to the date of her reinstatement; and that all of the Grievant’s benefits and seniority be restored.

### **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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that 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

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<sup>12</sup>Va. Code § 2.2-3005

of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director  
Department of Employment Dispute Resolution  
600 East Main Street, Suite 301  
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 and to the EDR Director. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>13</sup> You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>14</sup>

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

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William S. Davidson  
Hearing Officer

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<sup>13</sup> 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).

<sup>14</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.