Issue: Group III Written Notice with Termination (patient abuse); Hearing Date: 01/19/11; Decision Issued: 02/08/11; Agency: DBHDS; AHO: Lorin A. Costanzo, Esq.; Case No. 9497; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 9497

Hearing Date: January 19, 2011
Decision Issued: February 8, 2011

PROCEDURAL HISTORY

Grievant filed a timely appeal from a Group III Written Notice with termination issued on October 8, 2010 which indicated under *Nature of Offense and Evidence*, "Following a patient abuse/neglect investigation, the finding was substantiated for the use of physical restraint that is not in compliance."[1] Following failure to resolve the matter at the resolution steps, the grievance was qualified for hearing on December 10, 2010. The undersigned was appointed hearing officer effective January 5, 2011. Hearing was held on January 19, 2011.

APPEARANCES

Agency Presenter (who was also Agency Party Representative)
Grievant
DSA#1
Investigator
HR Regional Manager
Facility Director
RN
DSA #2

ISSUES

Whether the issuance of a Group III Written Notice with termination to Grievant was warranted and appropriate under the circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.[2]

[1] A. Tab 1, Written Notice.
[2] Dept. of Employment Dispute Resolution, *Grievance Procedure Manual*, Sections 5.8 and 9.

FINDINGS OF FACT

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

Grievant was employed as a Direct Service Associate II at Agency Facility which provides residential care for minors with emotional difficulties and/or other needs.

An Agency employee alleged that, on September 24, 2010, Grievant had utilized an inappropriate hold during a physical restraint of a minor and had not followed policy regarding the usage of seclusion/restraint with a patient. The incident was reported to Facility Director on September 28, 2010 and management reported the allegations to the Department of Social Services and to the DBHDS Office of Licensure on September 29, 2010. [3]

On September 30, 2010 Grievant was notified by written memorandum that he had been accused of noncompliance regarding the usage of seclusion/restraint with a patient at facility. He was informed that the matter had been forwarded to an investigator for review. Grievant was informed he was to refrain from contact with Unit 2 patients until notified differently by his superior and was reassigned pending the outcome of the investigation.[4]

Upon completion of an investigation into matters, the investigator filed her "Investigator's Summary", dated October 4, 2010, concerning allegations made against Grievant. As a result of her investigation, the investigator did:

> a.) Substantiate abuse, in that Grievant did attempt to get patient in her room and to escort patient utilizing unapproved holds. The investigator further determined that this constitutes noncompliance with Center Instruction 2411 *Seclusion and Restraint Policy,* federal and state laws and regulations, policies, and professionally accepted standards of practice.
>
> b. Substantiate that Grievant held the timeout room door closed to prevent patient egress, that this action constituted "seclusion", was not in response to a behavioral emergency, and was not within the scope of Center Instruction 2411 *Seclusion and Restraint Policy*, federal and state law and regulations, policies, and professionally accepted standards of practice.[5]

After Facility Director received the October 4, 2010 "Investigator's Summary" Regional Human Resources Manager met with Facility Director to discuss matters concerning Grievant. This meeting occurred between October 4 and October 7, 2010. It was determined that a Group III Written Notice with termination was warranted under the circumstances.

On October 7, 2010, at the direction of Facility Director, Regional Human Resources Manager and 3rd Shift Supervisor met with Grievant. Grievant was informed of the investigation findings.

---

[3] A. Tab 3. Investigator's Summary; A Tab 2: Memo of 9/30/10, and Testimony.
[4] A. Tab 2, Memorandum.
[5] A. Tab 3. Investigator's Summary, § IV.

He was also informed that issuance of a Group III Written Notice with termination was determined appropriate and that he was being offered an option of resigning in lieu of termination.

In the October 7, 2010 meeting, Grievant indicated that he felt he was following safety procedures in the matters that occurred on 9/24/10. Human Resources Regional Manager told Grievant he could meet with the Facility Director on October 8, 2010 to discuss matters and present information. However, at the October 7, 2010 meeting, Grievant declined the opportunity to meet with the Facility Director on October 8, 2010.

On October 8, 2010 Grievant was issued a Group III Written Notice with termination (effective date of termination: 10/09/10). The "Nature of Offense and Evidence" provided, "Following a patient abuse/neglect investigation, the finding was substantiated for the use of physical restraint that is not in compliance." The offense date was September 24, 2010.[6]

Grievant had one active Group III Written Notice which was issued on June 25, 2009 (Inactive Date: 6/25/2013). The "Nature of Offense and Evidence of the 6/25/09 Written Notice indicated, "Reported by other staff on unit and confirmed by [*Grievant*] during investigation that he pick up a client while holding one of the client arms behind their back and carry them for a few steps …".[7]

Minor, a female approximately 11 years of age, was a patient receiving treatment for a mental illness at Facility on 9/24/10. On this date Minor was asleep on the floor in her room's doorway with her legs out of the door to her room. Grievant took action to move the minor into her room. Grievant told investigator that he attempted to get the minor into her room by holding the minor's wrist and pulling her by her arm along the floor.[8] The minor was screaming and Grievant decided to place the minor into "time-out".

Grievant escorted Minor to the "time-out" room. Grievant told Investigator that he took Minor by the arm, she stood up, and as they walked through the double doors toward the" time-out" room a female staff member came along and took Minor's free arm and assisted with the escort.[9] After Minor was placed in the room Grievant held the door to the room closed from outside the room. Grievant squatted outside the room holding the door handle so as not to allow Minor to leave the room. Minor was inside the room crying and beating on the door. There was no restrictive intervention documented for the evening of September 24, 2010 in Minor's medical record.[10]

Agency has adopted Therapeutic Options of Virginia ("TOVA") and Grievant has received training on "TOVA".[11] In his New Staff Orientation Training Grievant received training on the topics of "Limiting the Use of Mechanical Restraints and Seclusions", "Standards of Conduct", and "TOVA Training".[12]

[6] A. Tab 1. Written Notice.
[7] A. Tab 12. Written Notice.
[8] A. Tab 3. Investigator's Summary.
[9] A. Tab 3. Investigator's Summary.
[10] A. Tab 3. and A. Tab 6.
[11] A. Tab 3.
[12] A. Tab 3. New Staff Orientation Training Log.

Facility has established and implemented a written "Time-Out Policy" (Center Instruction #2410)[13] and established and implemented a written "Seclusion and Restraint Policy" (Center Instruction No. 2411).[14]

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 of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in part:

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

DHRM Policy 1.60 - Standards of Conduct

To establish procedures on the Standards of Conduct and Performance for employees of the Commonwealth and pursuant to § 2.2-1203 of the Code of Virginia, the Department of Human Resources Management has promulgated Policy No. 1.60, *Standards of Conduct*. The *Standards of Conduct* provide a set of rules governing the professional and personal conduct of employees and acceptable standards for work performance of employees. The *Standards of Conduct* serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct, and to provide appropriate corrective action.

DHRM Policy 1.60 - *Standards of Conduct* organizes offenses into three groups according to the severity of the behavior. Group III Offenses include acts of misconduct of such a severe nature that a first occurrence normally would warrant termination.

The *Standards of Conduct* provides that the examples of offenses are not all-inclusive and provides:

> *Examples of offense, by group, are presented in Attachment A. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense* ***not specifically enumerated****, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.*[15]

Under the *Standards of Conduct* an agency has the ability to reduce the level of corrective action if there are mitigating circumstances. The *Standards of Conduct* indicates:

[13] A. Tab 3. Center Instruction # 2410.
[14] A. Tab 3. Center Instruction No. 2411.
[15] A. Tab 11. Standards of Conduct § B.2.

> Agencies may reduce the level of a corrective action if there are mitigating circumstances, such as conditions that compel a reduction to promote the interests of fairness and objectivity, or based upon an employees' otherwise satisfactory work performance.[16]

DBHDS Employee Handbook

Agency has a duty to provide a safe and secure environment to both employees and individuals receiving services from Agency. Furthermore, Agency has established its "zero tolerance" for acts of abuse/neglect to individuals receiving services. Consistent with DHRM Policy 1.60, Agency has promulgated DBHDS Employee Handbook. Chapter 14 of the DBHDS Employee Handbook "Standards of Conduct and Client Abuse" sets forth the Agency expectation that employees will follow all DBHDS and Commonwealth policies, procedures, and practices.[17]

The *DBHDS Employee Handbook* defines "Abuse" as follows:

> "Abuse" means any act or failure to act by an employee or other person responsible for the care of an individual in a facility or program operated, licensed, or funded by the Department, excluding those operated by the Department of Corrections, 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: ….
>
> 6. 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 person's individualized service plan;
> 7. Use of more restrictive or intensive services or denial of services to punish the person or that is not consistent with his individualized service plan.

The *DBHDS Employee Handbook* further provides that:

> Upon conclusion of an abuse investigation, the facility director will notify and inform the employee of the finding. If abuse/neglect is substantiated by a preponderance of the evidence, a Group III Written Notice may be issued and normally results in termination of employment. However, there may be mitigating circumstances that warrant lesser corrective disciplinary actions, which include but are not limited to: an employee's length of service, an employees' otherwise satisfactory work performance, the circumstances surrounding the employee's actions, etc."[18]

[16] A. Tab 11. Standards of Conduct § B.3(a.)
[17] A. Tab 11. DBHDS Employee Handbook.
[18] A. Tab 11. DBHDS Employee Handbook.

The "Standards of Conduct and Client Abuse" provide that, "Violation of the State's or agency's policies on Client Abuse, …. (may be treated as a Group I, II, or III offense depending on the severity of the conduct).[19]

Departmental Instruction 201

Departmental Instruction 201 - Reporting and Investigating Abuse and Neglect of Individuals Receiving Services in Department Facilities provides:

> The Department of Behavioral Health and Developmental Sciences ("Department") has a duty to provide a safe and secure environment to individuals receiving services and has a philosophy of zero tolerance for abuse and neglect. The Department will, in all instances, investigate and act on allegations of abuse and neglect.
>
> "Abuse" This means any act or failure to act by an employee or other person responsible for the care of an individual in a Department facility that was performed or was failed to be performed knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm, or injury or death to a person receiving care or treatment for mental illness, mental retardation or substance abuse.

Center Instruction Number 2410

Center Instruction # 2410, "Time-Out Policy", promulgates the "time-out" policy and procedures utilized at Facility. This policy provides, in pertinent part:

- Children at [Facility] have the right to be treated in the least restrictive manner possible.
- **Time-out is a behavioral intervention** used only in conjunction with behaviors specified in a child's individual treatment plan (including a written justification and purpose for using time-out instead of other less restrictive interventions)
- Time-out must occur only in an **unlocked** setting and can last no longer than 15 minutes. ….
- If a seclusion room is used for time-out, the door cannot be locked or held close by any manner, and must be fully operable by the child.[20]

Center Instruction Number 2411

Center Instruction Number 2411, "Seclusion and Restraint Policy" addresses and publishes the Seclusion and Restraint polices to be utilized at Facility and provides, in pertinent part, as follows:

[19] A. Tab 11, DBHDS Employee Handbook*, Ch. 14, Standards of Conduct and Client Abuse*.
[20] A. Tab 3. Center Instruction #2410.

- **Seclusion:** Used only in extreme emergencies to protect the safety of the child and others, means the involuntary placement of a child in a locked room or area where he is physically prevented from leaving.

- **Physical restraint (also refer to as "manual hold"):**
  Used only in emergencies, means the use of approved physical interventions or the "hands on" holds to prevent a child from moving his body to engage in a behavior that places him or others at risk of physical harm. Physical restraint does not include the use of "hands on" approaches, which occur for extremely brief periods of time and never to exceed more than a few seconds duration and are use to:
  - Intervene and or redirect a potentially dangerous encounter in which the child may voluntarily move away from the situation or hands-on approach;
  - Quickly deescalate a dangerous situation that could cause harm to the child or others.

- Staff shall protect and promote the rights of each child at [Facility] including the right to be free from any restraints or involuntary seclusion imposed for discipline, coercion, retaliation, or convenience.

- Seclusion or restraint use must be ordered by a physician and must be time-limited.

- Seclusion and restraint may be used only:
  - In emergency safety situations in which there is an immediate danger of a child physically harming himself or others; and
  - In compliance with the requirements of the Center Instruction, Department of Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS)policies, the Human Rights Rules and Regulations (2001) …. "[21]

Grievant:

Grievant contends his termination is wrongful and not consistent with policies and procedures. He contends the termination is "not commensurate with either the incident or work history reflected in my performance evaluations". Additionally, Grievant raises an issue of disability discrimination noting, "Is it possible that the agency would prefer not to have a brain injured employee that a way to get rid of me, in light of documentation that my work is excellent is to make the most of such an event? [22]

[21] A. Tab 3.
[22] A. Tab 2.

Minor:

On September 24, 2010, a female approximately 11 years of age, and approximately 4 foot 7 inches tall was a patient at an Agency Facility and receiving care and treatment for a mental illness. She was known by staff to have a problem at bedtime with sleeping.

Physical Hold/Restraints:

Minor had a room to herself at Facility. Minor was asleep on the floor with her upper body well in her room and her legs protruding into the girls' area. Minor was not blocking the double doors to the day area, which were nearby, nor interfering with their operation.

When Grievant came to work on 9/24/10 he observed Minor sleeping in the doorway to her room with a blanket on. Grievant told other staff that Minor could not sleep in her doorway. A Supervisor told Grievant that the matter would be handled before the shift on duty left. Grievant indicated he was concerned that it was a fire hazard.

Grievant was subsequently observed in a squatting position pushing Minor from her doorway and Minor was heard screaming that Grievant was hurting her. Minor was face up on the floor with Grievant in a squatting position pushing up Minor's knee area to get her back into her room.

Grievant then repositioned himself to try to pull Minor into her room. Minor was in a spread eagle position and Grievant had her right arm lifted up with her shoulder off the ground and he was pulling. Minor was screaming that she was hurting.

When Minor got up Grievant then began to escort her to a "time-out" room and another staff member joined to escort Minor. The other staff member was initially in the "time-out" room with Minor but left with Grievant remaining outside the room. This room had a window on the door to the room.

Issues arose on 9/24/2010 concerning Grievant using unapproved holds on the minor while attempting to get her into her room fully and when escorting her to a room for "time-out".

Additionally, issue arose as to Grievant's holding the room door closed, with Minor in the room, preventing the minor's egress. Holding the door close with Minor in the room violated policy as to "time-out" and constituted placing the child into "seclusion" and the "seclusion" was not done in response to a behavioral emergency and was not done within the scope of Agency policy.

Agency has adopted and Grievant has received training on "TOVA" (Therapeutic Options of Virginia.[23] TOVA prescribes methods of physical interactions as to how a "hands on" is done with patients. Grievant has had a number of training sessions and certifications on "TOVA" and was aware/should have been aware of the requirements of "TOVA" and the physical holds authorized to be used. Grievant received *New Staff Orientation Training* in a number of topics including, "Limiting the Use of Mechanical Restraints and Seclusions", "TOVA", and "Abuse Investigations".[24]

[23] A. Tab 3
[24] A. Tab 3.

Grievant was aware of the importance of using approved holds and the seriousness of not using approved holds/restraint. Grievant had a prior Group III Written Notice (issued 6/25/09) addressing his not using a "TOVA" approved hold on a child at Facility. Grievant stated in his "Attachment: Issues and Facts Supporting Issues" (tendered in this present grievance but referring to his prior active Group III) that, "… I brought him back and set him down. The entire Group III offense was founded on me not using a TOVA approved hold to move the child. Later I was shown policy (by an HR employee) which stated that physical restraint/manual hold does not include the use of "hands on" approaches which occur for extremely brief periods of time, never to exceed more than a few seconds duration and are used to intervene in or redirect a potentially dangerous encounter." [25]

Witnesses to the incident of 9/24/2010 indicated that Grievant's holds on Minor were not in compliance with TOVA. Investigator asked Grievant how he attempted to get Minor fully into her room and Grievant described holding Minor's wrist and pulling her by her arm along the floor to get her from the doorway back into her room. Staff indicated Grievant was seen holding Minor by her arm and trying to drag and push her into her room. One observer of the incident stated to Investigator that she was surprised that the minor "didn't have rug burns on her thighs".[26]

Grievant demonstrated to the Agency investigator the hold he used to escort the minor to the "time-out" room. He showed the Agency investigator how he held the minor's upper right arm with his left hand just above her elbow and showed the Investigator his holding her forearm wrist area with his right hand. [27]

The evidence indicates that Grievant utilized physical restraints and holds which were not in compliance with TOVA and not in compliance with policy. Furthermore, the evidence indicates that unapproved physical restraints/holds were used both in attempting to move and drag the minor from the doorway of her room into her room and in escorting the minor to the "time-out" room.

Seclusion:

Center Instruction # 2410- Time-Out Policy ("CI #2410"), "Time-Out Policy", addresses the "time-out" policy and procedures utilized at Facility. CI #2410 sets forth in writing the policy followed at Facility and provides that children have the right to be treated in the least restrictive manner possible. CI #2410 clearly requires that "Time-Out" must occur only in an unlocked setting. Additionally, CI #2410 requires that if a seclusion room is used for time-out, the door cannot be locked or held close by any manner, and must be fully operable by the child. Grievant escorted the minor to a room, placed her in that room, and held the door closed in such a manner that she could not operate the door to get out of the room. Grievant was observed in a crouched position, on the outside of the door, squatting and holding the door with the door handle. The door was not operable by the child as required by CI 2410

Center Instruction No. 2411-Seclusion and Restraint Policy ("CI No. 2411") defines "seclusion" as the involuntary placement of a child in a locked room or an area where the child is physically prevented

[25] A. Tab 2.
[26] A. Tab 3. Investigator's Summary.
[27] A. Tab 3. Investigator's Summary.

from leaving. Grievant held the door to the room closed which physically prevented the child from being able to leave the room.

CI No. 2411 further provides that "seclusion" is only to be used in an extreme emergency to protect the safety of the child and others. Additionally, CI No 2411 provides only physicians who are board-certified psychiatrists or licensed physicians with specialized training and experience in diagnosing and treating mental disorders my give an order for restraint or seclusion per CI No. 2411.

Nurse was approached by a staff member on 9/24/10 who was upset with the situation she observed involving Grievant and Minor. The staff member was concerned as to Minor being in an inappropriate situation. Nurse went to where Grievant was and observed Grievant was squatted down holding the door shut. She observed that Minor was upset, crying, and pounding against the door. Nurse asked Grievant to step aside and switch out with another person. He didn't answer the first time she made the request. On her second request Grievant said "no" and that she was wrong. On the Nurse's third request he did switch out with a female staff.

Policy provides that seclusion is to be used only in extreme emergencies to protect the safety of the child and others, and "seclusion" means the involuntary placement of a child in a locked room or area where he is physically prevented from leaving. The evidence does not indicate that there was an extreme emergency or this action was necessary to protect the safety of the child or others. The Agency Investigation further determined that medical records and documents revealed there was no restrictive intervention documented for Minor on September 24, 2010, when the events occurred.

When the minor was placed in a room by Grievant and he then physically held the door preventing the minor from opening the door and leaving the room this was, as defined in policy, "seclusion". These actions of Grievant were in violation of Center Instruction No. 2411. Grievant's used physical restraint that is not in compliance with policy.

Grievant contended that impeding a child's egress has been a standard of conduct with regard to a "time-out" since he has worked there, whether officially written down in policy or not. However, there was no evidence to support this contention. Grievant's witness testified that grabbing the door handle and holding the door so the person in the room could not get out of the room was in fact a "seclusion" and was not a "time-out".

Advance Notice and Reasonable Opportunity to Respond:

Policy Number 1.60, Section E. provides for an advance notice of discipline to employees prior to the issuance of a written notice and that the employee must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

At the direction of Facility Director, Human Resources Regional Manager and other management met with Grievant on October 7, 2010, the day prior to the issuance of a Written Notice. The Agency discussed with Grievant matters concerning the incident of 9/24/2010. Grievant was previously aware of the investigation being conducted and was interviewed by the investigator during the investigation process. At this meeting on 10/7/2010 Grievant was informed of the investigation findings by management and was notified of the proposed disciplinary action. He was given notification

of the offense and given advance notice of the proposed issuance of a Group III Written Notice with termination. Grievant raised that he believed he was acting in furtherance of safety procedures.

At the 10/7/2010 meeting, Grievant was offered an opportunity to meet the next day with the Facility Director to respond, provide his side of matters, and discuss more details of the investigative findings and concerns. However, Grievant declined the Agency's offered opportunity to meet with the Facility Director. He stated to Human Resources Regional Manager that he was never stepping foot back inside the place again.

The evidence indicates that, prior to the issuance of a Written Notice, Grievant was given oral notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond and present mitigating factors or denial of the charge.

Discrimination:

Grievant raised discrimination due to his being disabled and indicated he had a brain injury. DHRM Policy 2.05 provides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability. Under DHRM Policy 2.05 "disability" as defined in accordance with the Americans with Disability Act.[28] Like DHRM Policy 2.05, the Americans with Disability Act prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.

The term "qualified individual" means an individual with a disability, who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.[29] An individual is "disabled" if he (A) has a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) has a record of such an impairment; or (C) has been regarded as having such an impairment.[30] "Essential Functions" are the basic job duties that an employee must be able to perform, with or without reasonable accommodation.

To establish a *prima facie* claim of wrongful disability discrimination under the ADA, the Grievant must show that:

(1) he is within the ADA's protected class (i.e., a "qualified individual with a disability");
(2) he suffered an adverse employment action;
(3) his job performance met his employer's expectations when he suffered the adverse employment action; and
(4) his adverse employment action occurred under the circumstances that raise a reasonable inference of unlawful discrimination.[31]

[28] 42 U.S.C.§§ 12101 et seq. In 2008 Congress passed the Americans with Disabilities Act Amendments Act of 2009 (ADAAA) which became effective on January 1, 2009.
[29] 42 U.S.C.§ 12111(8).
[30] 42 U.S.C. § 12102(1).
[31] Rohan v. Networks Presentations, LLC, 2003 U.S. Dist LEXIS 26687, at n.5 (D. Md. Apr. 17, 2003) aff'd, 375 F.3d 266 (4th Cir. 2004). Once an employee establishes a *prima facie* case, an agency may nevertheless prevail if it can establish one of the defenses enumerated in 29 C.F.R. § 1630.15.

Grievant suffered an adverse employment action in that he was issued a Group III Written Notice and terminated. If the Hearing Officer were to assume, for the sake of argument, that Grievant is a qualified individual with a disability, there is no credible evidence that Grievant's job performance met his employer's expectations when he suffered the adverse employment action. Grievant's actions on 9/24/10 violated policies at Facility promulgated to protect Facility patients. These policies were applicable to all Facility employees including Grievant. The evidence indicates that Grievant's job performance of 9/24/10 did not meet employer's expectations when he suffered the adverse employment action. Additionally, Grievant has not presented evidence to show a connection between his disability and his use of physical restraint on a minor not in compliance with policy. There is no evidence that Grievant's adverse employment action occurred under circumstances that raise a reasonable inference of unlawful discrimination. There is no credible evidence that the Agency disciplined Grievant for any reason other than his violation of policy which occurred on September 24, 2010.

Based upon the evidence admitted in this cause, disability discrimination is not found.

Mitigation:

§ 2.2-3005.1 of the Code of Virginia authorizes hearing officers to order appropriate remedies including" mitigation or reduction of the agency disciplinary action". § 2.2-3005 of the Code of Virginia charges the hearing officer with considering evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Department of Dispute Resolution.[32]

§ VI.B.1. of the Department of Employment Dispute Resolution *Rules for Conducting Grievance Hearings* provides,

> **Mitigating and Aggravating Circumstances:** The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. ….

The evidence indicates that Agency gave consideration to mitigating and aggravating circumstances. Agency gave consideration to Grievant's work history and Grievant's prior active Group III Written Notice (issued on 6/25/09) for matters relating to the hold Grievant used on a patient. Agency gave consideration to the active life of a Group III Written Notice being is 4 years from the issuance date and that any subsequent Written Notice during the active life of the Written Notice may result in discharge. Also, Agency took into consideration the nature of the incident of 9/24/2010.

Based upon the evidence in this cause, the issuance of a Group III Written Notice with termination does not exceed the limits of reasonableness.

[32] § 2.2-3005 of the Code of Virginia.

CONCLUSION

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

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action. *and*
5. Unlawful discrimination is not found.

DECISION

For the reasons stated above, the Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group III Written Notice with termination was warranted and appropriate under the circumstances and Agency's discipline does not exceed the limits of reasonableness. The Agency's issuance to Grievant of a Group III Written Notice with termination is ***UPHELD.***

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

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 are the basis for such a request.

2. A challenge that the hearing decision is inconsistent with state policy 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. Requests should be sent to:

Director, Department of Human Resources Management
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

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. Requests should be sent to:

Director, Department of Employment Dispute Resolution
600 East Main St., Suite 301
Richmond, VA 23219.

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 **15 calendar days** of the date of the original hearing decision. (Note: the 15-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 15 day following the issuance of the decision is the first of the 15 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 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: 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. You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

_____
Lorin A. Costanzo, Hearing Officer