

Issue: Group III Written Notice with Termination (patient abuse); Hearing Date: 04/15/11; Decision Issued: 05/02/11; Agency: DBHDS; AHO: Ternon Galloway-Lee, Esq.; Case No. 2011-9554; Outcome: Full Relief;  
**Administrative Review: AHO Reconsideration Request received 05/17/11; Hearing Reopened. Reopened Hearing Decision issued 06/30/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 05/17/11; EDR Ruling No. 2011-2988 issued 08/31/11; Outcome: Remanded to AHO; Remand Decision issued 09/15/11; Outcome: Original decision affirmed.**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 9554**

**Hearing Date: April 15, 2011**

**Decision Issued: May 2, 2011**

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**SUMMARY OF DECISION**

The Agency has found the allegation that the Grievant physically abused a resident was substantiated through an investigation. Thus, the Agency issued the Grievant a Group III Written Notice with termination. After finding the Agency cannot show by a preponderance of the evidence that (i) the Grievant physically abused a resident and (ii) the Grievant violated Agency policy, the hearing officer reversed the Agency's disciplinary action, ordered the agency to reinstate the Grievant to her former position, pay her full back pay and benefits, vacate the finding of physical abuse, and remove all documentation of such abuse from the Grievant's record.

**PROCEDURAL HISTORY**

On November 24, 2010, Grievant was issued a Group III Written Notice of disciplinary action with termination. The Agency described the nature of the offense and evidence as "[p]hysical abuse of resident in Cottage 3A was investigated and substantiated." (A Exh. 2).

On December 18, 2010, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the third resolution step was not satisfactory to the Grievant and she requested a hearing. (A Exh. 3). The Department of Employment Dispute Resolution appointed the Hearing Officer on March 28, 2011. A pre-hearing conference was held by telephone on March 31, 2011. Subsequently, the Hearing Officer issued a Scheduling Order, which is hereby incorporated by reference. The Hearing Officer scheduled the hearing for April 15, 2011, the first date available between the parties and the Hearing Officer. During the hearing, the Hearing Officer admitted Agency Exhibits one through ten and the Hearing Officer exhibits one through five. The grievant offered no exhibits.

## APPEARANCES

Grievant  
Witness for Grievant (Grievant)  
Grievant Representative/Advocate  
Agency's Advocate  
Two Witnesses for the Agency

## ISSUES

1. Did the Grievant abuse a resident?
2. Was the Agency's discipline warranted and appropriate?

## BURDEN OF PROOF

In disciplinary actions, 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") Section 5.8). A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. (GPM Section 9).

## FINDINGS OF FACT<sup>1</sup>

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

1. The Grievant was on duty on November 10, 2010, from 1:15 p.m. to 10:45 p.m. She worked in Cottage 3A of the Agency as a floor supervisor where her duties included helping to provide care for residents. One of those residents was Ms. B. (Testimony of Grievant; Agency Exh. 1).

2. Ms. B cannot verbalize in a coherent manner; however, she can be vocal by making loud noises and screaming. She can also be combative. She also attempts to communicate by making gestures and facial expressions. Ms. B can accurately express by gesture that she is sorry. A common practice of Ms. B is to seek attention. (Testimony of LC, PM, and Grievant; A Exh. 1).

3. Approximately 5:30 pm on November 10, 2010, emergency paramedics entered the cottage to provide medical care to a resident identified as resident #00694 who had injured herself. While in the dining room providing that care, another resident, Ms. B, entered by wheel chair. (A Exh. 1; Testimony of Grievant).

4. Ms. B made great efforts to attract attention to herself in the dining room by

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<sup>1</sup> The Hearing Officer admitted as evidence all documents and letters presented as exhibits, to include all referenced herein.

becoming loud and combative, screaming, and pointing to various areas of her body as if she was experiencing pain. Her actions interfered with staff attending to resident #00694's emergency. To assist in managing Ms. B's behavior, the Grievant tried to redirect Ms. B's behavior and remove Ms. B from the emergency. Ms. B then rolled over the Grievant's feet with her wheelchair. The Grievant rolled the wheelchair off her feet. Continuing her attempts to attract attention, Ms. B rolled into the Grievant with her wheelchair in an effort to reach the nurses attending to the emergency. Then Grievant took control of Ms. B's wheelchair and pushed her into the living/day room area of the cottage. (A Exh. 1; Testimony of Grievant; Testimony of PM).

5. The next day, PM reported to the director of the agency that she followed the Grievant and Ms. B into the living/day room and witnessed the Grievant make a fist and hit Ms. B in the back of her head. PM also reported that after Grievant left, Ms. B signed that Ms. B was sorry. (Testimony of PM; A Exh. 1/5 -6).

6. The Grievant was the floor supervisor and PM's immediate supervisor during the 1:15 p.m. to 10:45 p.m. shift on November 10, 2010. The Grievant and PM had known Ms. B for five years as of November 10, 2010. (Testimony of Grievant and PM).

7. Upon receiving PM's allegation of physical abuse, the Agency initiated an investigation on November 12, 2010, under Departmental Instruction 201, *Reporting and Investigating Abuse and Neglect of Clients*. Investigator LC was assigned as the investigator. (A Exh. 1).

8. During the investigation and subsequent to its conclusion, the Grievant has denied she physically abused Ms. B. Investigator LC concluded in his investigation that the allegation of physical abuse was substantiated by a gesture made by Ms. B. (Testimony of LC). Investigator LC reports in his investigation the following:

When this investigator entered cottage 3A to speak to [Grievant], Ms. [B] was sitting on the sofa directly behind her when she leaned to her left side, pointed her finger at [Grievant], made a fist and simulated hitting herself in the back of the head.

(A Exh. 1/3).

9. The investigation produced no physical evidence of the alleged abuse and there were no physical signs of injury resulting from the alleged abuse. (A Exh. 1/1)

10. At the time of the alleged abuse, superiors of the Grievant - Team Leader CB and the Shift Supervisor AB - were available for PM to report any abuse. (Testimony of Grievant; A Exh. 1).

11. Investigator LC was not a caregiver of Ms. B; however, he has known Ms. B for 14 years and sees her regularly. (Testimony of LC).

12. *Prima facie*, PM, the Grievant, nor Investigator LC have formal training in sign language.

13. The Agency, *prima facie*, did not provide or enter into evidence Departmental Instruction 201, *Reporting and Investigating Abuse and Neglect of Clients*.

14. The Agency, *prima facie*, did not provide or enter into evidence the Agency's definition of abuse.

15. The Grievant does not get along with staff, particularly her subordinates, on the 1:15 p.m. to 10:45 p.m. shift. (Testimony of Grievant).

16. Sometime in the past, the Grievant had been promoted to floor supervisor. (Testimony of Grievant).

17. Physical Abuse of a resident of the Agency must be reported immediately. (Testimony of Grievant; Testimony of PM).

18. *Prima facie*, the Agency did not provide documentation of its policy on reporting abuse.

### **DETERMINATIONS 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/her 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).

Va. Code Section 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

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

access to the procedure under Section 2.2-3001.

Below, the Hearing Officer examines the evidence to determine if the Agency has met its burden.

**I. Analysis of the Issues**

**A. Did the Grievant abuse a resident?**

**1. Did the Grievant engage in the behavior described in the Written Notice?**

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, Section 5.8. The *Rules for Conducting Grievance Hearings*, Section IV(C) defines preponderance of the evidence as “more likely than not.”

To determine if the Agency has met its burden, the Hearing Officer examines the evidence presented, to include witness testimony, to decide if the Agency has shown that the Grievant engaged in the behavior described in the Written Notice.

Clearly, unambiguously, emphatically, and consistent with her prior statement, the Grievant testified. She presented her version of what occurred on November 10, 2010. She denied as in her written statement hitting Ms. B with her fist. Further, the Hearing Officer notes that the evidence shows the Grievant volunteered to undergo a lie detector test. While the results of this testing may not have been permissible in the investigation or the grievance proceedings, Grievant’s offering to undergo this testing substantiates her position that she did nothing wrong and therefore was fearless. Having observed the demeanor of this witness, the Hearing Officer finds the Grievant’s testimony credible.

Even more, the Hearing Officer notes that the Grievant’s testimony contradicts the Agency’s assertion that the only interpretation of Ms. B’s gesture on November 12, 2010, was that the Grievant hit Ms. B. The evidence shows that the Grievant had known Ms. B for five years and had provided care for Ms. B during that time. And, further, that through her experience with Ms. B, the Grievant had learned that Ms. B’s signing/gesturing was not always accurate. For example, the Grievant testified that Ms. B has been known to express “yes” when she meant “no” and vice versa. This testimony was not disputed. Also, Ms. B easily adopts and expresses the view or feelings of others. For example, Grievant noted that if Ms. B observes someone is mad, she is prone to adopt and express that sentiment. In the instant case, the evidence shows that PM perceived or reported that on November 10, 2010, the Grievant punched Ms. B on the back of Ms. B’s head with her fist. Further, the evidence shows that PM was one of Ms. B’s caretakers and from November 10, 2010, to November 12, 2010 - the date Investigator LC reported Ms. B made the gesture - PM would have reasonably had contact with Ms. B. Thus, the Hearing Officer finds the perception or sentiment of another could have swayed Ms. B to make the November 12, 2010 gesture reported by Investigator CL.

Having considered all the evidence and found the Grievant's testimony credible, the Hearing Officer finds that Ms. B's gesture on November 12, 2010, may have more than one interpretation and that no one interpretation is more credible than the other. Or, further, Ms. B's gesture on November 12, 2010, may have been the adoption of a sentiment of someone else. Accordingly, the Hearing Officer finds the gesture reported by Investigator LC does not substantiate that the Grievant physically abused Ms. B two days before.<sup>2</sup>

In her deliberations, the Hearing Officer also considered testimony regarding Ms. B's "attention seeking" characteristic. The Grievant as well as the Agency witnesses testified that Ms. B seeks attention. The Hearing Officer notes that the evidence shows that Ms. B sought attention when emergency workers attempted to address another resident's injury just prior to the alleged physical abuse on November 10, 2010. Her attention seeking behavior included yelling and screaming to the point that she became combative and disrupted emergency workers. The Grievant testified that if the Grievant had hit Ms. B as alleged, to get attention, Ms. B would have caused a similar commotion. The Hearing Officer finds the Grievant's assessment persuasive in that the assessment is consistent with other evidence showing Ms. B's attempts to acquire attention.<sup>3</sup>

In addition, the evidence shows that PM was needlessly slow to report the alleged physical abuse. The Hearing Officer finds as discussed below that this delay corroborates the Grievant's position.

The Grievant, who was a floor supervisor on the date of the alleged offense, also testified that policy requires staff to immediately report abuse. The Grievant contends that if PM had witnessed the Grievant punch Ms. B in the back of her head, PM should have reported the abuse without delay to the Grievant's supervisors on duty. The evidence shows that at the time of the alleged abuse, two of the Grievant's supervisors were on duty - Team Leader CB and Shift Supervisor AB. Further, at least five hours remained of the shift. Yet, according to PM's testimony she could not report the abuse until the next day. PM testified that policy requires staff to report abuse to the director. The Hearing Officer notes that the Agency offered no evidence to support PM's interpretation of the Agency's abuse reporting policy. The Hearing Officer finds that a reasonable person would conclude that when there is physical abuse as described by PM, it would be deemed an emergency situation and immediate reporting and efforts to prevent further abuse would be required. Further, since the team leader and shift supervisor were

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<sup>2</sup> The Hearing Officer makes this finding, as discussed here and later in this decision, after considering investigator LC's testimony that he has known Ms. B for 14 years, that Ms. B in the past has demonstrated an ability to make gestures and show him she has fallen, and that he could not interpret the gesture in any way other than Ms. B expressing that the Grievant punched Ms. B in the back of the head.

<sup>3</sup> While PM reported that after the alleged physical abuse, Ms. B signed she was sorry. The Hearing Officer does not find this signing was an attempt to get attention. The evidence shows that Ms. B is able to sign she is sorry for her misbehavior. The Hearing Officer notes Ms. B had just misbehaved when the staff was addressing an emergency with another resident and her signing that she was sorry could reasonably be explained as Ms. B expressing sorrow for her very recent combative and disruptive behavior.

on duty at the time of the alleged physical abuse, PM could have immediately made a report of what she witnessed. Thus, the Hearing Officer gives great weight to the Grievant's testimony that if abuse had occurred, PM was required to report it immediately during her shift, especially considering five hours remained of it. The Hearing Officer finds that PM's failure to report the alleged abuse immediately during the shift corroborates the Grievant's position. The Hearing Officer also notes that when Investigator LC interviewed both of the Grievant's superiors, they reported witnessing no abuse by the Grievant.<sup>4</sup> <sup>5</sup>

As referenced previously herein, the Hearing Officer also observed the demeanor of the Agency's witnesses and considered their testimony. Investigator LC testified that he has known Ms. B for 14 years and sees her regularly. He also testified that Ms. B was aware of his role inferring that Ms. B knew he investigated allegations of resident abuse. Further Investigator LC testified that he had never seen Ms. B make the type of gesture she made on November 12, 2010. Investigator LC then concluded that the only way to interpret the gesture was that the Grievant had hit Ms. B in the back of Ms. B's head with her fist.

The Hearing Officer acknowledges the investigator's subjective conclusion, but finds the gesture could have other interpretations. In making this finding, the Hearing Officer considered all the evidence, to include but not limited the following:

- (i) the undisputed testimony that Ms. B seeks attention;
- (ii) the fact that Investigation LC has no formal training or expertise in sign language/communication by gesturing;
- (iii) the fact that although Investigator LC has known Ms. B for 14 years and sees her daily, the evidence does not show that he (1) is involved in Ms. B's day to day care and (2) has acquired the degree of familiarity with Ms. B that allows him to accurately interpret her signing and gestures;
- (iv) Investigator's LC report that states in pertinent part that Ms. B has a diagnosis of "sever[e] intellectual disability" and notes that "[Ms. B's] expressive language is limited to a few gestures, signs and changes in facial expressions, which she uses **"in an attempt"** to communicate;

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<sup>4</sup> Having made this notation, the Hearing Officer is mindful of the Agency's contention that neither supervisor was in a position to see the abuse due to the make up of the cottage.

<sup>5</sup> The Agency contends there would be no reason for PM to report abuse if it did not occur. The Hearing Officer does note that the Grievant testified that she did not get along with the workers under her, to include PM, on the 1:15 p.m. to 10:45 p.m. shift. Grievant also stated that at least on one occasion, PM became mad at the Grievant and told the Grievant to mind her own business. In addition, the Hearing Officer notes that the Grievant testified that her subordinates on the shift, including PM, have ridiculed the Grievant. Further, the Grievant testified that she reported this problem to her supervisor, but no action was taken. Having observed the demeanor of the Grievant, the Hearing Officer finds this testimony credible.



(A Exh. 1 emphasis added)

- (v) two days had passed from the time of the alleged offense and Ms. B making the gesture;
- (vi) inaccurate communication by Ms. B per testimony of the Grievant;
- (vii) no signs of physical injury of Ms. B; and
- (viii) LC's disputed testimony that the Grievant asked Ms. B "what are you doing?" when Ms. B made the gesture

The Hearing Officer has also considered the testimony of PM, to include PM's contention that she was only a few feet away when she observed the alleged abuse. The Hearing Officer does not find it convincing for several reasons. First PM delayed reporting the alleged physical abuse. The evidence shows that five hours remained in the shift at the time PM contends the abuse occurred. What is more, PM could have reported the alleged abuse to one or both of the Grievant's supervisors who were on duty. PM did not. Second, PM's statement notes that the Grievant informed PM that Shift Supervisor AB saw the Grievant hit Ms. B. The evidence shows that Shift Supervisor AB stated he did not observe the Grievant abuse Ms. B<sup>6</sup> and the Grievant in her statement and in testimony denied hitting Ms. B. Moreover, no signs of physical abuse of Ms. B existed.

Considering the above, the Hearing Officer finds that the Agency can not meet its burden and show by a preponderance of the evidence that the Grievant engaged in the conduct described in the Written Notice.

## 2. Did the alleged behavior constitute misconduct?

The Agency contends the Grievant violated Departmental Policy 201 regarding abuse of residents. Yet, the Agency failed to provide or introduce into evidence the policy that was in effect on November 10, 2010, the date of the alleged offense. What is more, the Agency failed to provide or introduce into evidence its definition of abuse or the necessary elements to prove the offense. Without this critical evidence, the Hearing Officer is unable to determine if the Grievant, assuming she engaged in the conduct alleged, violated agency policy.

The Hearing Officer also notes that the abuse offense for which the Agency contends in its Written Notice that the Grievant engaged in is inconsistent with other evidence presented for the Agency. That additional evidence states in part that the Agency suspects the Grievant of neglect.<sup>7</sup> This inconsistency fails to enhance or affirm

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<sup>6</sup> As noted previously, the Hearing Officer does note the Agency contends that the shift supervisor was not in a position to see the abuse.

<sup>7</sup> The Agency's letter to the Grievant dated November 12, 2010, commences by stating that an allegation of resident abuse has been brought against the Grievant. However, later in the same paragraph, the Agency

the Agency's position.

**B. Was the Agency's discipline warranted and appropriate?**

The Hearing Officer has found the Agency can not meet its burden for the reasons noted here. Neither is the Agency able to show the Grievant violated Agency policy. Thus, the Agency's discipline is unwarranted and inappropriate.<sup>8</sup>

**DETERMINATION/DECISION**

Accordingly, the Hearing Officer reverses the disciplinary action challenged by the Grievant.

Further, the Hearing Officer orders the Agency to reinstate the Grievant to her former position with full back pay and benefits. Also, the Hearing Officer orders the Agency to vacate the finding of physical abuse and remove any documentation of such from the Grievant's file/record.

**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 review 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. Request should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> floor Richmond, VA 23219 or faxed to (804) 371-7401.
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 that the decision is not in compliance.

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states the Grievant is suspected of neglect, not abuse. (A Exh. 4).

<sup>8</sup> The Hearing Officer again notes that she has considered the testimony of all the witnesses and all other evidence to include the Agency's exhibits one through ten.

The Director's authority is limited to ordering the hearing officer to revise the decisions so that it complied with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

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 days; the 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 final decisions, a party may appeal on the ground 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 Directory before filing a notice of appeal.

Entered this 2nd day of May 2011.

/s/ Ternon Galloway Lee

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Ternon Galloway Lee, Hearing Officer

cc: Grievant  
Grievant's Advocate  
Agency Advocate  
Agency representative  
Hearings Program Director of EDR

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 9554**

**Reconsideration and Reopening Decision Issued: June 1, 2011**

**RECONSIDERATION and REOPENING DECISION**

**II. RECONSIDERATION**

The Agency timely submitted a request for reconsideration to the Hearing Officer on May 17, 2011.

In support of its request, the Agency makes several allegations. It contends that the Hearing Officer erred when she concluded that Investigator LC substantiated his finding of abuse by Ms. B's gesture. The Agency contends that in LC's investigative report, the finding of abuse was based on PM's eyewitness testimony. Also, the Agency disagrees with the weight and credibility the Hearing Officer assigned to the testimony of certain witnesses, specifically the Grievant and PM. Determinations on the facts, weight and credibility of the witnesses are entirely within the hearing officer's authority. The Hearing Officer had an opportunity to observe the demeanor of each witness. She reviewed all the evidence to include, but not limited to, Investigator LC's testimony that he believed PM's allegation of abuse over the Grievant's denial because of B's gesture. The Hearing Officer finds no reason to alter her findings of fact nor the weight and credibility she assigned to testimony.

The Hearing Officer also notes the Agency's objection to her consideration of the Grievant's offer to take a "lie detector test" in accessing the Grievant's credibility. The Agency in its request for reconsideration correctly notes that § IV D of the *Rules for Conducting Grievance Hearings* provides that over a party's objection the results of polygraph tests are not admissible in a grievance hearing. In this case, however, no

results of a polygraph test were offered as evidence, only the offer to take such a test. For the sake of argument though, even if the above cited rule applies to offers to take polygraph tests, only an objection by a party automatically excludes that evidence. The Agency did not object to the Grievant's testimony regarding her offer to take the polygraph test and the evidence was properly admitted. Again assuming the previously mentioned rule applies to offers to take polygraph test, the Agency has waived its objection because it was raised for the first time in its request for reconsideration.

Also, in its request for reconsideration, the Agency attached DBHDS Department Instruction (DI) 201, *Reporting and Investigating Abuse and Neglect of Individuals Receiving Services in Department Facilities* ("Policy DI 201"). The Agency has requested the Hearing Officer consider this policy. *Grievance Procedure Manual* § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. Generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request."

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material; and
- (5) the evidence is such that it is likely to produce a new outcome if the case were retried, or is such that it would require the Hearing Decision to be amended.

The Agency does not claim that Policy DI 201 is newly discovered evidence. It represents that the "facility's representative" inadvertently neglected to include it in the Agency's exhibit package. Thus, clearly this evidence was in existence prior to and at the time of the hearing. The Hearing Officer, therefore will not consider it.

Moreover, the Hearing Officer is cognizant of the Agency's claim that she should take judicial notice of the policy under §8.01-386 and §8.01-388 of the Code of Virginia (as amended). The Hearing Officer declines to do so as noted here. Under § 5.8(2) of the *Grievance Procedural Manual*, in disciplinary actions and dismissals, the Agency has the burden of proof at the hearing. It must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances. The tasks of reviewing exhibits and timely submitting those the Agency believes are necessary to meet its burden/prove its case are the responsibility of the Agency. The Agency has asserted

that the Grievant abused a patient and violated its policy DI 201. It reported conducting an investigation pursuant to the policy. Yet, the Agency failed to cause that policy to be admitted as evidence at the hearing. The Hearing Officer is the impartial adjudicator in a grievance hearing. Therefore, it would be improper for her to, as argued by the Agency, “take judicial notice” of its policy to in effect supply evidence that the Agency was obliged to provide at the hearing. Accordingly, for this reason also, the Hearing Officer will not consider policy DI201.<sup>9</sup>

As noted previously here, the Hearing Officer in issuing her decision reviewed all the evidence and observed the demeanor of the witnesses presented at the hearing. Thus, the Hearing Officer declines to review the record and reassess her opinion of the relative credibility of the Grievant as compared to PM.

Next, the Agency contends the Hearing Officer exceeded her authority when she ordered the Agency to vacate the investigative finding of abuse. The Agency contends this portion of the order does not relate to the discipline. Further, the Agency argues the Hearing Officer does not have the authority to order the vacation because the process for investigating allegations of abuse and documenting those findings are only within management’s right to manage the operations of state government.

Under § 2.2-3005.1 of the Code of Virginia (as amended), and § 5.9 of the *Grievance Procedure Manual*, Hearing Officers have the authority to grant appropriate relief. In the instant case, Grievant’s discipline was based on an investigative report which found abuse. After considering all the evidence, the Hearing Officer has found the Agency is unable to show that the Grievant abused Ms. B not only because the Agency failed to introduce the relevant policy, but also - and critically - because the facts do not support abuse. The Hearing Officer also notes that the Agency’s burden at the hearing was minimal compared to other burdens of proof such as “clear and convincing evidence” and “beyond a reasonable doubt.” Even so, the Agency was unable to show the Grievant engaged in physically abusing Ms. B. Thus, the Hearing Officer finds an equitable and appropriate relief includes directing the Agency to vacate the finding of abuse.

Moreover, under § 5.9(a)5 of the *Grievance Procedure Manual*, the Hearing Officer has the authority to order the agency to comply with applicable law and policy. Further, under § VI(A) of the *Rules for Conducting Grievance Hearings*, the Hearing Officer is not required to defer to Agency actions that are found to be inconsistent with law and policy. The facts showed the Agency can not substantiate that the Grievant abused Ms. B. The Hearing Officer does note that the Agency cites to the *Rules and Regulations to Assure the Rights of Individuals Receiving Services from Providers Licensed, Funded,*

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<sup>9</sup> Further, the Hearing Officer notes that after reviewing all the evidence and the demeanor of the witnesses she found the Agency failed to show that the Grievant hit Ms. B on the back of her head with the Grievant’s fist. Thus, even if policy DI 201 was admitted as evidence, the Hearing Officer would not alter her determination that the Agency failed to meet its burden.

*or Operated by DBHDS* to support its claim that the Hearing Officer exceeded her authority. But, the purpose of those rules does not include erroneously substantiating a claim of abuse. The Agency's finding in its report is therefore inconsistent with policy. The Hearing Officer's directive to vacate that finding of abuse instructs the Agency to comply with policy, an authority granted to the Hearing Officer.

Having considered the Agency's argument regarding the Hearing Officer exceeding her authority to include regulations, laws, and policy cited, the Hearing Officer declines to rescind that portion of her order directing the Agency to vacate its finding of abuse.

## II. REOPENING

The Agency also timely requested on May 17, 2011, that the Hearing Officer reopen the decision to address issues raised by the Agency regarding interim pay, resignation, and relocation of the Grievant if the Hearing Officer declines to revise her decision. As noted above, the Hearing Officer affirms her determination that the Agency was unable to meet its burden.

Regarding the issues raised in the reopening request, the Agency contends that after the Grievant received the Hearing Officer's May 2, 2011 decision, she contacted the Agency and advised it that she had moved out of state and submitted her resignation.

The Hearing Officer held a telephonic post-hearing conference on May 24, 2011, by agreement of the parties, regarding those issues. In addition to the Hearing Officer, those present were the Grievant, the Agency's Representative/Advocate, and the Grievant's Representative/Advocate. Under oath, the Grievant stated she contacted the Agency after receiving the May 2, 2011 decision and inquired when she could return to work. The Grievant stated she informed the Agency that her mother was ill in North Carolina and she desired to visit her and coordinate her visit with returning to work. She stated that the Agency informed her that it was appealing the decision. Further, the Grievant stated the Agency stated words to the effect of "you might as well resign." The Grievant stated she informed the Agency that she was not resigning. Grievant stated she has not moved out of the state and intends to return to work. Regarding interim earnings, the Grievant stated she did work a part time job until late April 2011<sup>10</sup>, but that her earnings from that job were not interim earnings as she was working that job when she was employed by the Agency to supplement her state job.

The Hearing Officer notes conflicting statements from the parties regarding any resignation, interim earnings, and/or relocation of the Grievant. Thus, the Hearing Officer will reopen the hearing for the limited purpose of receiving evidence regarding any interim earnings, relocation out of the state, and resignation.

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<sup>10</sup> The Grievant was unable to give the exact date.

Accordingly, the parties are to provide to the Hearing Officer and each other by 5:00 p.m. on June 21, 2011, any documentation they desire the Hearing Officer to consider in addition to the statements the parties have already made regarding any interim pay, resignation, or out of state relocation. Further, if either party desires a post-hearing evidentiary conference (“PHC”) regarding these issues, the Hearing Officer instructs the party to inform the Hearing Officer in writing by 5:00 p.m. on June 23, 2011, and provide the Hearing Officer with a list of witnesses, if any, the party desires to testify at the PHC. If the Hearing Officer does not receive a timely request for a PHC, she will issue her decision on the reopening request by June 30, 2011. Also, if any party has objections to a PHC taking place by telephone, that party should state the reasons for objecting in its/her request for the PHC.

The parties are reminded to simultaneously provide opposing party with a copy of any documents and/or correspondence provided to the Hearing Officer.

### **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 DHRM, the hearing officer has issued a revised decision.

**Judicial Review of Final Hearing Decision:** Within thirty days of final decisions, a party may appeal on the ground 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.

Entered this 1<sup>st</sup> day of June 2011.

/s/

\_\_\_\_\_  
Ternon Galloway Lee, Hearing Officer

cc: Grievant  
Grievant’s Representative/Advocate  
Agency Representative/Advocate  
EDR Hearing Programs’ Manager  
EEO/Employee Relations Manager



**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number:           9554**

**Reconsideration following Administrative Review Ruling 2011-2988**

**Issued:           September 15, 2011**

**Procedural History**

I issued my original decision in this matter on May 2, 2011, and found the Agency could not show by a preponderance of the evidence that Grievant physically abused a resident and therefore violated Agency policy. I then reversed the Agency's disciplinary action, ordered the Agency to reinstate Grievant to her former position, pay Grievant full back pay and benefits, vacate the finding of abuse and remove all documentation of abuse from Grievant's record.

The Agency timely sought reconsideration by me. By decision issued June 1, 2011, I upheld my original decision which reversed the Agency's disciplinary action.<sup>11</sup>

The Agency also timely sought Administrative Review by the director of the Department of Employment Dispute Resolution ("EDR"). By ruling number 2011-2988, EDR's director remanded this matter to me for reconsideration.

Below, I reconsider this matter pursuant to directives set forth in that ruling.

**Findings of Facts**

Under ruling number 2011-2988, I have thoroughly reconsidered this matter without considering Grievant's willingness to take a polygraph. In doing so, I make the following findings of facts and determinations:

1. Grievant was on duty on November 10, 2010, from 1:15 p.m. to 10:45 p.m.

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<sup>11</sup> Contemporaneously, the Agency also requested I reopen the record on certain "back pay" and "availability to work" issues if I declined to rescind my finding of no abuse. I granted the request and by decision issued June 30, 2011, determined Grievant had not resigned from any position she held with the Agency and that Grievant was available to work. Also, I found Grievant had not received any interim earnings. The order to pay full back pay and benefits was affirmed.

She worked in Cottage 3A of the Agency as a floor supervisor where her duties included helping to provide care for residents. One of those residents was Ms. B. (Testimony of Grievant; Agency Exh. 1).

2. Ms. B cannot verbalize in a coherent manner; however, she can be vocal by making loud noises and screaming. She can also be combative. She also attempts to communicate by making gestures and facial expressions. Ms. B can accurately express by gesture that she is sorry. A common practice of Ms. B is to seek attention. (Testimony of LC, PM, and Grievant; A Exh. 1).

3. Approximately 5:30 pm on November 10, 2010, emergency paramedics entered the cottage to provide medical care to a resident identified as resident #00694 who had injured herself. While in the dining room providing that care, another resident, Ms. B, entered by wheel chair. (A Exh. 1; Testimony of Grievant).

4. Ms. B made great efforts to attract attention to herself in the dining room by becoming loud and combative, screaming, and pointing to various areas of her body as if she was experiencing pain. Her actions interfered with staff attending to resident #00694's emergency. To assist in managing Ms. B's behavior, Grievant tried to redirect Ms. B's behavior and remove Ms. B from the emergency. Ms. B then rolled over Grievant's feet with her wheelchair. Grievant rolled the wheelchair off her feet. Continuing her attempts to attract attention, Ms. B rolled into Grievant with her wheel chair in an effort to reach the nurses attending to the emergency. Then Grievant took control of Ms B's wheelchair and pushed her into the living/day room area of the cottage. (A Exh. 1; Testimony of Grievant; Testimony of PM).

5. The next day, PM reported to the director of the Agency that she followed Grievant and Ms. B into the living/day room and witnessed Grievant make a fist and hit Ms. B in the back of her head. PM also reported that after Grievant left, Ms. B signed that Ms. B was sorry. (Testimony of PM; A Exh. 1/5 -6).

6. Grievant was the floor supervisor and PM's immediate supervisor during the 1:15 p.m. to 10:45 p.m. shift on November 10, 2010. Grievant and PM had known Ms. B for five years as of November 10, 2010. (Testimony of Grievant and PM).

7. Upon receiving PM's allegation of physical abuse, the Agency initiated an investigation on November 12, 2010, under Departmental Instruction 201, *Reporting and Investigating Abuse and Neglect of Clients*. Investigator LC was assigned as the investigator. (A Exh. 1).

8. During the investigation and subsequent to its conclusion, Grievant has denied she physically abused Ms. B. Investigator LC concluded in his investigation that the allegation of physical abuse was substantiated by a gesture made by Ms. B. (Testimony of LC). Investigator LC reports in his investigation the following:

When this investigator entered cottage 3A to speak

to [Grievant] , Ms. [B] was sitting on the sofa directly behind her when she leaned to her left side, pointed her finger at [Grievant], made a fist and simulated hitting herself in the back of the head.

(A Exh. 1/3).

9. The investigation produced no physical evidence of the alleged abuse and there were no physical signs of injury resulting from the alleged abuse. (A Exh. 1/1)

10. At the time of the alleged abuse, superiors of Grievant - Team Leader CB and the Shift Supervisor AB - were available for PM to report any abuse. (Testimony of Grievant; A Exh. 1).

11. Investigator LC was not a caregiver of Ms. B; however, he has known Ms. B for 14 years and sees her regularly. (Testimony of LC).

12. *Prima facie*, PM, Grievant, nor Investigator LC have formal training in sign language.

13. The Agency, *prima facie*, did not provide or enter into evidence Departmental Instruction 201, *Reporting and Investigating Abuse and Neglect of Clients*.

14. The Agency, *prima facie*, did not provide or enter into evidence the Agency's definition of abuse.

15. Grievant does not get along with staff, particularly her subordinates, on the 1:15 p.m. to 10:45 p.m. shift. (Testimony of Grievant).

16. Sometime in the past, Grievant had been promoted to floor supervisor. (Testimony of Grievant).

17. Physical Abuse of a resident of the Agency must be reported immediately. (Testimony of Grievant; Testimony of PM).

18. *Prima facie*, the Agency did not provide documentation of its policy on reporting abuse.

### **Determinations and Opinion**

#### **1. Was there abuse?**

Below, I reconsider whether Grievant physically abused Ms. B.

I had the opportunity to observe the demeanor of Grievant as well as the other witnesses at the hearing. I note Grievant testified clearly, unambiguously, emphatically,

and consistent with her prior statement. She presented her version of what occurred on November 10, 2010. She denied hitting Ms. B with her fist. Having observed Grievant's demeanor, I find her testimony credible.

Also, I note that Grievant's testimony contradicts the Agency's assertion that the only interpretation of Ms. B's gesture on November 12, 2010, was that Grievant hit Ms. B. The evidence shows that Grievant had known Ms. B for five years and had provided care for Ms. B during that time. And, further, that through her experience with Ms. B, the Grievant had learned that Ms. B's signing/gesturing was not always accurate. For example, Grievant testified that Ms. B has been known to express "yes" when she meant "no" and vice versa. This testimony was not disputed. Moreover the evidence shows that Ms. B easily adopts and expresses the view or feelings of others. For example, Grievant noted that if Ms. B observes someone is mad, she is prone to adopt and express that sentiment. In this case, the evidence shows that PM perceived or reported that on November 10, 2010, Grievant punched Ms. B on the back of Ms. B's head with her fist. Further, the evidence shows that PM was one of Ms. B's caretakers and from November 10, 2010, to November 12, 2010 - the date Investigator LC reported Ms. B made the gesture - PM would have reasonably had contact with Ms. B. Thus, I find the perception or sentiment of another could have swayed Ms. B to make the November 12, 2010 gesture reported by Investigator CL.

Having reconsidered all the evidence, excluding evidence regarding Grievant's willingness to take a polygraph, and found the Grievant's testimony credible, I find that Ms. B's gesture on November 12, 2010, may have more than one interpretation and that no one interpretation is more credible than the other. Or, further, Ms. B's gesture on November 12, 2010, may have been the adoption of a sentiment of someone else. Accordingly, I find that the gesture reported by Investigator LC does not substantiate that Grievant physically abused Ms. B two days before.<sup>12</sup>

In my reconsideration, I have also considered testimony regarding Ms. B's "attention seeking" characteristic. Grievant as well as the Agency witnesses testified that Ms. B seeks attention. I note that the evidence shows that Ms. B sought attention when emergency workers attempted to address another resident's injury just prior to the alleged physical abuse on November 10, 2010. Her attention seeking behavior included yelling and screaming to the point that she became combative and disrupted emergency workers. Grievant testified that if Grievant had hit Ms. B as alleged, to get attention, Ms. B would have caused a similar commotion. I find Grievant's assessment persuasive in that the assessment is consistent with other evidence showing Ms. B's attempts to acquire attention.<sup>13</sup>

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<sup>12</sup> I make this finding on reconsideration, as discussed here and later in this decision, after considering investigator LC's testimony that he has known Ms. B for 14 years, that Ms. B in the past has demonstrated an ability to make gestures and show him she has fallen, and that he could not interpret the gesture in any way other than Ms. B expressing that Grievant punched Ms. B in the back of the head.

<sup>13</sup> While PM reported that after the alleged physical abuse, Ms. B signed she was sorry. I do not find this signing was an attempt to get attention. The evidence shows that Ms. B is able to sign she is sorry for her misbehavior. I note that Ms. B had just misbehaved when the staff was addressing an emergency with another resident and her signing that she was sorry could reasonably be explained as Ms. B expressing sorrow

In addition, the evidence shows that PM was needlessly slow to report the alleged physical abuse. I find as discussed below that this delay corroborates the Grievant's position.

Grievant, who was a floor supervisor on the date of the alleged offense, also testified that policy requires staff to immediately report abuse. Grievant contends that if PM had witnessed Grievant punch Ms. B in the back of her head, PM should have reported the abuse without delay to Grievant's supervisors on duty. The evidence shows that at the time of the alleged abuse, two of Grievant's supervisors were on duty - Team Leader CB and Shift Supervisor AB. Further, at least five hours remained of the shift. Yet according to PM's testimony she could not report the abuse until the next day. PM testified that policy requires staff to report abuse to the director. I note that the Agency offered no evidence to support PM's interpretation of the Agency's abuse reporting policy. I find that a reasonable person would conclude that when there is physical abuse as described by PM, it would be deemed an emergency situation and immediate reporting and efforts to prevent further abuse would be required. Further, since the team leader and shift supervisor were on duty at the time of the alleged physical abuse, PM could have immediately made a report of what she witnessed. Thus, I give great weight to the Grievant's testimony that if abuse had occurred, PM was required to report it immediately during her shift, especially considering five hours remained of it. I find that PM's failure to report the alleged abuse immediately during the shift corroborates the Grievant's position. Also, I note that when Investigator LC interviewed both of the Grievant's superiors, they reported witnessing no abuse by the Grievant.<sup>14 15</sup>

As referenced previously herein, I also observed the demeanor of the Agency's witnesses and considered their testimony. Investigator LC testified that he has known Ms. B for 14 years and sees her regularly. He also testified that Ms. B was aware of his role inferring that Ms. B knew he investigated allegations of resident abuse. Further Investigator LC testified that he had never seen Ms. B make the type of gesture she made on November 12, 2010. Investigator LC then concluded that the only way to interpret the gesture was that Grievant had hit Ms. B in the back of Ms. B's head with her fist.

I acknowledge the investigator's subjective conclusion, but find the gesture could have other interpretations. In making this finding, I have considered all the evidence (excluding evidence regarding Grievant's willingness to undergo polygraph testing), to include but not limited to the following:

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for her very recent combative and disruptive behavior.

<sup>14</sup> Having made this notation, I am cognizant of the Agency's contention that neither supervisor was in a position to see the abuse due to the make up of the cottage.

<sup>15</sup> The Agency contends there would be no reason for PM to report abuse if it did not occur. I note that Grievant testified that she did not get along with the workers under her, to include PM, on the 1:15 p.m. to 10:45 p.m. shift. Grievant also stated that at least on one occasion, PM became mad at Grievant and told Grievant to mind her own business. In addition, I note that Grievant testified that her subordinates on the shift, including PM, have ridiculed Grievant. Further, Grievant testified that she reported this problem to her supervisor, but no action was taken. Having observed the demeanor of Grievant, I find this testimony credible.

- (i) the undisputed testimony that Ms. B seeks attention;
- (ii) the fact that Investigation LC has no formal training or expertise in sign language/communication by gesturing;
- (iii) the fact that although Investigator LC has known Ms. B for 14 years and sees her daily, the evidence does not show that he (1) is involved in Ms. B's day to day care and (2) has acquired the degree of familiarity with Ms. B that allows him to accurately interpret her signing and gestures;
- (iv) Investigator's LC report that states in pertinent part that Ms. B has a diagnosis of "sever[e] intellectual disability" and notes that "[Ms. B's] expressive language is limited to a few gestures, signs and changes in facial expressions, which she uses **"in an attempt"** to communicate; (A Exh. 1 emphasis added)
- (v) two days had passed from the time of the alleged offense and Ms. B making the gesture;
- (vi) inaccurate communication by Ms. B per testimony of the Grievant;
- (vii) no signs of physical injury of Ms. B; and
- (viii) LC's disputed testimony that Grievant asked Ms. B "what are you doing?" when Ms. B made the gesture.

On reconsideration, I have also considered the testimony of PM, to include PM's contention that she was only a few feet away when she observed the alleged abuse. I do not find it convincing for several reasons. First PM delayed reporting the alleged physical abuse. The evidence shows that five hours remained in the shift at the time PM contends the abuse occurred. What is more, PM could have reported the alleged abuse to one or both of the Grievant's supervisors who were on duty. PM did not. Second, PM's statement notes that Grievant informed PM that Shift Supervisor AB saw Grievant hit Ms. B. The evidence shows that Shift Supervisor AB stated he did not observe Grievant abuse Ms. B<sup>16</sup> and Grievant in her statement and in testimony denied hitting Ms. B. Moreover, no signs of physical abuse of Ms. B existed.

After a thorough reconsideration, I find that the Agency cannot meet its burden and show by a preponderance of the evidence that the Grievant engaged in the conduct described in the Written Notice.

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<sup>16</sup> As noted previously, I do recognize that the Agency contends that the shift supervisor was not in a position to see the abuse.

## 2. Did the alleged behavior constitute misconduct?

The Agency contends Grievant violated Departmental Policy 201 regarding abuse of residents. Yet, the Agency failed to provide or introduce into evidence at the hearing the policy that was in effect on November 10, 2010, the date of the alleged offense. What is more, the Agency failed to provide or introduce into evidence its definition of abuse or the necessary elements to prove the offense. Without this critical evidence, I am unable to determine Grievant, assuming she engaged in the conduct alleged, violated agency policy.

I also note that the abuse offense for which the Agency contends in its Written Notice that Grievant engaged in is inconsistent with other evidence presented for the Agency. That additional evidence states in part that the Agency suspects Grievant of neglect.<sup>17</sup> This inconsistency fails to enhance or affirm the Agency's position.

## 3. Was the Agency's discipline warranted and appropriate?

I have found that the Agency cannot meet its burden for the reasons noted here. Neither is the Agency able to show Grievant violated Agency policy. Thus, on reconsideration, I find again that the Agency's discipline is unwarranted and inappropriate.

### **Decision/Order**

Accordingly, after careful reconsideration of this matter without considering Grievant's willingness to take a polygraph, I affirm my original finding of no abuse. Further, for personnel purposes only, the Agency is ordered to vacate any finding of abuse and rescind the Written Notice it issued Grievant. For clarification, the Agency is not ordered to modify or append any other existing document.

Moreover, the Agency is ordered to reinstate the Grievant to her former position with full back pay and benefits. For clarity, I note that the *Rules for Conducting Grievance Hearings* § VI (B) (4) provides that back pay is to be offset by any interim earnings.<sup>18</sup>

### **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

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<sup>17</sup> The Agency's letter to Grievant dated November 12, 2010, commences by stating that an allegation of resident abuse has been brought against Grievant. However, later in the same paragraph, the Agency states Grievant is suspected of neglect, not abuse. (A Exh. 4).

<sup>18</sup> The commentary to *Rules for Conducting Grievance Hearings* § VI (B) (4) notes that if an employee had previously engaged in gainful employment in addition to his/her state employment, the earnings from his/her ancillary employment would not count as interim earnings.

