

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 06/11/12; Decision Issued: 06/13/12; Agency: DBHDS; AHO: William S. Davidson, Esq.; Case No. 9830; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9830

Hearing Date: June 11, 2012
Decision Issued: June 13, 2012

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on March 29, 2012, for:

Violation of Departmental Instruction #201. *“Reporting and Investigating Abuse and Neglect of Individuals Receiving Services in Department Facilities”* - A facility investigation substantiated that on March 6, 2012, you abused an individual in your care. Specifically, you hit individual (AB) on the left side of her head. 24-Hour letter issued on March 15, 2012. ¹

Pursuant to the Group III Written Notice, the Grievant was terminated on March 29, 2012. ² On April 2, 2012, the Grievant timely filed a grievance to challenge the Agency’s actions. ³ On May 9, 2012, the Department of Employment Dispute Resolution (“EDR”) assigned this Appeal to a Hearing Officer. On June 11, 2012, a hearing was held at the Agency’s location.

APPEARANCES

Agency Representative
Counsel for Grievant
Grievant
Witnesses

ISSUE

Did the Grievant abuse Individual AB (“AB”) by hitting her on the left side of her head?

AUTHORITY OF HEARING OFFICER

¹ Agency did not provide the Hearing Officer with the Written Notice as a part of its documentary evidence. The Hearing Officer is relying on the Written Notice received from EDR

² Written Notice provided by EDR

³ Agency Exhibit 1, Tab 1, Page 1

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in Tatum v. VA Dept of Agriculture & Consumer Servs., 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

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

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") §5.8. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.⁴ However, proof must go beyond conjecture.⁵ In other words, there must be more than a possibility or a mere speculation.⁶

FINDINGS OF FACT

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

The Agency provided the Hearing Officer with a notebook containing twenty (20) tabs. This notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing seven (7) tabs. This notebook was accepted in its entirety as Grievant Exhibit 1.

Most of the basic facts in this matter are neither complicated nor objected to by either the Agency or Grievant. The Grievant testified that at approximately 9:00 p.m., on March 6, 2012, she was responsible for bathing AB. Pursuant to this responsibility, the Grievant, with the assistance of a gait belt, was leading AB down an internal hall in Building 15B towards the

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

⁵ Southall, Adm'r v. Reams, Inc., 198 Va. 545, 95 S.E. 2d 145 (1956)

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

showers. The Agency provided a schematic of Building 15B.⁷ The testimony of the Grievant and one (1) of her witnesses would indicate that the Grievant and AB were proceeding on the right-hand side of the central hall in a direction from right to left on the schematic exhibit. It is unclear as to where they started, but their ultimate end point was going to be Room 119, as this is the shower room. The Hearing Officer believes that they were starting somewhere in the vicinity of Room 116 and were moving down the right-hand side of that hall. AB is blind and would have had her right hand on a hand railing that runs down the hall. The Grievant had her left hand on the gait belt helping to both steady and direct AB. When the Grievant and AB reached the doorway, that the schematic seems to indicate goes from the hall into Room 120, they turned right and entered into that room. Based on other documentation and photographs, the schematic seems to be inaccurate in the sense that it later appears that Room 119 is the room one would enter into directly from the central hall.⁸

Two Agency employees, at approximately 9:00 p.m., on March 6, 2012, were walking on the sidewalk towards Building 15B. They were both EMT's and they were there to replace the batteries in an AED. With the permission of both the Agency Advocate and counsel for the Grievant, the Hearing Officer marked on Agency Exhibit 1, Tab 16, Page 1, to indicate that the sidewalk was perpendicular to the building and that the door they entered would be designated as the front of the building. One of these Agency employees ("XY") testified that the two employees were talking and laughing as they approached the building and there came a moment when they looked up and saw the Grievant strike AB three (3) times on her head. XY testified that she saw the Grievant use her right hand to strike AB on the left side of her head. The Agency introduced two picture exhibits at Tab 11, Page 1. The picture on the left is purportedly where Agency witness XY was standing when she looked through the window of Building 15B and saw the Grievant striking AB.⁹ The picture on the right purports to show the doorway to Room 119, where XY testified that the assault took place.¹⁰ XY testified that both of those pictures represent where people were standing on the night in question.

The Lead Abuse Investigator testified that, while he did not measure this area, he felt that XY was standing approximately 12-15 feet from the building. The Hearing Officer notes that it appears more likely that they were standing approximately 20-25 feet from the building when they observed the alleged assault.

XY testified that the light that appears in the picture on the left of Agency Exhibit 1, Tab 11, Page 1, was not burning on the night in question.¹¹ She testified that the lights in Room 134, which is the room to which the windows are attached, were out but the internal hallway lights and the lights to Room 119 were burning. She indicated that she had a clear view and she was certain as to what she saw.

The Investigator, on March 7, 2012, took a nighttime photograph to attempt to show what would be seen while outside of the building.¹² This photograph was taken at 7:28 p.m., which was approximately an hour-and-a-half earlier than the event of the prior night. However, there

⁷ Agency Exhibit 1, Tab 16, Page 1

⁸ Agency Exhibit 1, Tab 11, Page 1

⁹ Agency Exhibit 1, Tab 11, Page 1

¹⁰ Agency Exhibit 1, Tab 11, Page 1

¹¹ Agency Exhibit 1, Tab 11, Page 1

¹² Agency Exhibit 1, Tab 12, Page 1

was no objection to the fact that this photo was taken earlier in the day as all parties agreed that it was dark both at 7:28 p.m., on March 7, 2012 and approximately 9:00 p.m., on March 6, 2012. The Investigator stood in the exact spot that XY told him she was in when she observed the alleged incident.

XY testified that she saw the Grievant holding AB's gait belt with her left hand and then strike her with her right hand. All witnesses before the Hearing Officer agreed that a gait belt is attached at the waist. It is clear from the photograph at Agency Exhibit 1, Tab 12, Page 1, that the waist of the person who has been positioned in that photograph cannot be seen. Further, it is clear that there is a structure in that picture that is blocking a significant amount of the person located in the picture. The Grievant, in her notebook, provided a photograph that purports to look from Room 119 backwards to this window.¹³ It would appear that structure is a computer monitor or something like a computer monitor. To the left of that monitor, there is a narrow open space and then the window frame itself blocks essentially the balance of the picture, as it regards the doorway into Room 119. Accordingly, it would appear that XY had a very narrow view into the building in which to look through Room 134, through the doorway out of Room 134, across the central hall and into the doorway of Room 119.

The Agency introduced into evidence a four (4) page document, titled Behavior Support Plan for AB.¹⁴ At Page 1 of this document, it states in part as follows:

Throughout the course of her institutionalization, [AB'] maladaptive behaviors have consisted of head-banging, face-slapping, hair pulling, and pressing her fingers into her eye sockets. Reportedly, her maladaptive behaviors caused severe damage to her eyes and eventually led to her blindness...¹⁵

It was conceded by the Agency that AB had and continues to have a maladaptive behavior wherein she strikes herself on the side of her head or on her thighs.

The Agency introduced an exhibit which purported to give a timeline of her self-injurious behavior.¹⁶ That exhibit indicated that, from April of 2011, through December of 2011, AB only had a reported self-injurious behavior on three (3) separate incidents. However, that exhibit indicated that in January of 2012, there were four (4) such incidents of self-injurious behavior; in February of 2012, there were eight (8) such incidents; and in March of 2012, there were eleven (11) such incidents. It would appear that something was triggering AB to have an escalating number of self-injurious behaviors in the first three (3) months of 2012.

The Grievant called as a witness an Agency employee who was working in Building 15B at the day and time in question. This witness testified that she observed AB striking herself on her head in the evening prior to when the Grievant took AB to be bathed. The Grievant testified that, as she was taking AB to be bathed, when they made the turn into the doorway to Room 119, AB commenced striking herself with her left hand. The Grievant told her to stop this behavior and, while standing behind AB and holding the gait belt with her left hand, reached up with her

¹³ Grievant Exhibit 1, Tab 6, Page 1

¹⁴ Agency Exhibit 1, Tab 5, Pages 1-4

¹⁵ Agency Exhibit 1, Tab 5, Page 1

¹⁶ Agency Exhibit 1, Tab 8, Page 4

right hand to attempt to either deflect the blows being administered by AB with her left hand or to grab her left hand and stop her. The Grievant testified that AB was able to strike herself three (3) times before she stopped. Agency witness XY testified that she saw, from outside the building, three (3) blows being struck to the left side of AB's head by the Grievant.

Upon cross-examination, the Grievant was asked about her written response to the Written Notice. In that written response, the Grievant wrote in part as follows:

...I then redirected her from hitting her head by placing my right hand over her right hand. Her right hand was already too close to her head so she was successful in hitting her head with her fist...¹⁷

The Grievant's testimony before the Hearing Officer was that AB was using her left hand to strike herself. Use of the left hand is consistent with the testimony that AB's right hand was either on the hand rail in the hall or was on a dressing table that was just inside the doorway to Room 119. The Hearing Officer finds that the Grievant was in error when she stated that AB was using her right hand in her written response to the Written Notice.

The Hearing Officer would point out that the Grievant is not the only witness who testified to facts that were not consistent with prior written statements. XY testified that, from the moment that she saw the alleged assault taking place when she was outside of the building, it was no more than 40 seconds before she entered the building and went directly to the shower room to see the condition of AB. However, in her written witness statement, she indicated that two (2) minutes elapsed.¹⁸ XY testified before the Hearing Officer that she saw nothing other than the alleged assault and immediately entered the building. However, in her written witness statement, she stated that, after the alleged assault, she saw the Grievant place AB in a chair and close the shower room door.¹⁹ Finally, XY in her witness statement, conceded that it was possible that AB was striking herself.²⁰ She did not answer nor was she asked about the possibility that what she saw was AB striking herself while the Grievant's arm was attempting to prevent the striking.

By way of further inconsistencies, the Lead Abuse Investigator testified that, when the alleged assault was taking place, AB and the Grievant were standing facing each other, eyeball to eyeball. XY testified that the Grievant was standing behind AB. The Lead Abuse Investigator testified that he would be surprised if XY had testified that AB and the Grievant were not standing face to face. Subsequent to the alleged assault, XY, either within 40 seconds or two (2) minutes, went to the shower room and observed AB. As stated earlier, XY is an EMT and is trained to make quick observations as to someone's health. She observed nothing out of order and indeed testified that AB was calm and quiet and showed no signs of any harm. Shortly thereafter, AB was observed by an institutional nurse and the testimony before the Hearing Officer was that the nurse saw no signs of any assault.

In this matter, the Hearing Officer has an Agency witness testifying that she had a momentary eyewitness snapshot from outside of a building looking through Room 134, across a

¹⁷ Agency Exhibit 1, Tab 1, Page 3

¹⁸ Agency Exhibit 1, Tab 4, Page 4

¹⁹ Agency Exhibit 1, Tab 4, Page 4

²⁰ Agency Exhibit 1, Tab 4, Page 4

hall and into a doorway of Room 119 and saw what she thought was an assault. The Grievant testified to the fact that what was being observed was not an assault but was the Grievant in fact trying to stop AB from assaulting herself. Neither the EMT nor a nurse saw any sign of damage, marking or redness of skin on AB. Based on the totality of the evidence presented before the Hearing Officer, the Hearing Officer finds that it is more probable than not that the Grievant was attempting to minimize AB's maladaptive behavior and what XY saw was not the Grievant striking AB, but rather the Grievant trying to protect AB from herself.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..."²¹ Under the Rules for Conducting Grievance Hearings, "a Hearing Officer must give deference to the Agency's consideration and assessment of any mitigating and aggravating circumstances. Thus a Hearing Officer may mitigate the Agency's discipline only if, under the record evidence, the Agency's discipline exceeds the limits of reasonableness. If the Hearing Officer mitigates the Agency's discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has not borne its burden of proof in this matter. The Hearing Officer orders that the Agency reinstate the Grievant to the same position or an equivalent position. The Hearing Officer orders that the Agency award full back pay, from which interim earnings must be deducted, to the Grievant and that she have a restoration of full benefits and seniority. Should counsel for the Grievant desire to recover attorney's fees, he must, within fifteen (15) days of the date of this Decision, file a petition for such fees with this Hearing Officer.

APPEAL RIGHTS

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

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

²¹Va. Code § 2.2-3005

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

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

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

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

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party and to the EDR Director. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.²² You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.²³ [See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

William S. Davidson
Hearing Officer

²²An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

²³Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.