Issue: Group III Written Notice with Termination (resident abuse); Hearing Date: 11/27/12; Decision Issued: 12/05/12; Agency: DJJ; AHO: William S. Davidson, Esq.; Case No. 9965; Outcome: Full Relief; **Administrative Review: DHRM Ruling Request received 12/20/12; DHRM Ruling issued 01/22/13; Outcome: AHO's Decision Affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9965

Hearing Date: November 28, 2012
Decision Issued: December 5, 2012

PROCEDURAL HISTORY

A Group III Written Notice was issued to the Grievant on October 3, 2012, for:

> Physical abuse of a resident. On 04-02-12, at approximately, 1524 hours, you were on a shield team entering HB306 to place a resident in full mechanical restraints. Upon entering the room and making initial contact with the resident, you are observed on video stomping with your foot towards the resident's midsection, and then punching downward repeatedly toward the resident's head. **This is a direct violation of DHRM Policy 1.60, Group III (Abuse of a Client).** [1]

Pursuant to the Group III Written Notice, the Grievant was terminated on October 2, 2012. [2] On October 8, 2012, the Grievant timely filed a grievance to challenge the Agency's actions. [3] On October 29, 2012, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On November 28, 2012, a hearing was held at the Agency's location.

APPEARANCES

Advocate for Agency
Agency Party
Attorney for Grievant
Grievant
Witnesses

ISSUE

Did the Grievant physically abuse a Resident on April 2, 2012?

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[1] Agency Exhibit 1, Tab III, 3
[2] Agency Exhibit 1, Tab III, 3
[3] Agency Exhibit 1, Tab I, Page 1

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. [4] 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. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. 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. 5 However, proof must go beyond conjecture. 6 In other words, there must be more than a possibility or a mere speculation. 7

FINDINGS OF FACT

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

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[4] *See* Va. Code § 2.2-3004(B)
[5] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[6] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)
[7] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

The Agency provided the Hearing Officer with a notebook containing eleven (11) tabs and one (1) cd. There was an objection to the contents of Tab 5, and there was an objection to all pages contained in Tab 11, with the exception of the first page. The Hearing Officer excluded all pages contained in Tab 11, with the exception of the first page. The Hearing Officer stated that he would make a ruling as to the admissibility of the contents at Tab 5, if the Agency attempted to make use of those contents through one (1) of its witnesses. The Agency never moved to introduce the contents at Tab 5 and, accordingly, they were excluded. Except as above-referenced, the Agency notebook and cd were accepted in their entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing thirteen (13) tabs. That notebook was accepted in its entirety as Grievant Exhibit 1.

Many of the facts in this matter are uncontradicted. On April 2, 2012, at approximately 3:24 p.m., a Shield Team entered HB306. The purpose of this entry was to place the resident in full mechanical restraints. The Agency now concedes that this entry was a violation of the Agency's written policy and, accordingly, was an illegal entry into this room. The Team consisted of four (4) Juvenile Corrections Officers ("JCO"), a Sergeant who was operating a video camera, and a Lieutenant who was theoretically in charge of this operation. Testimony before this Hearing Officer indicates that three (3) of the JCO's, the Sergeant, and the Lieutenant have all been terminated or resigned in lieu of termination. The Grievant before the Hearing Officer is the fourth JCO.

From the testimony presented before the Hearing Officer by both the Agency and the Grievant, it appears that the purported reason for entry into this room, as well as the authority given for entry into this room, violated the Agency's written procedures and protocols. There appears to be nothing that was done correctly regarding this matter. Indeed, as is evident by the Written Notice presented to the Hearing Officer, it appears that the Grievant was terminated on October 2, 2012, one (1) day prior to his issuance of the Group III Written Notice. [8] It would seem difficult to terminate someone prior to the issuance of the Written Notice.

Subsequent to the illegal entry into HB306, the Resident filed an Emergency Grievance Request. Pursuant to this request, the Hearing Officer heard testimony that the Major, who may or may not have given authority to enter the room, the Sergeant, who was filming the entry, and an Assistant Superintendent viewed the video that was made of the entry. The Grievant testified that he saw these three (3) viewing the video on a full-size computer monitor. The Major testified that he was viewing the video on the camera itself which probably gave him a screen no larger that 2"x2". The Major testified that he only looked at this monitor for a moment as it was simply too small to see any detail. He did this in the face of an emergency grievance and, apparently, being able to see very little, chose to see nothing. He relied on the written reports of the Shield Team to determine that the Resident's grievance was unfounded. This decision was made on or about April 2, 2012.

The Agency, through its witnesses, established that there was a requirement in this matter that the Shield Team's entry into HB306 be videotaped. The Hearing Officer must assume that

[8] Agency Exhibit 1, Tab 3, Page 1

the purpose of such a requirement is to produce a video record of the actual events that take place when such an entry is made. The Hearing Officer further assumes that such a record is created in order to have a pictorial record to prove or disprove the written record that is subsequently produced by those who actually entered HB306. In this matter, the Major was fully alerted to the possibility of a problem with this entry. The problem with the entry, if any, was set forth in the first one (1) or two (2) minutes) of the video. Had the Major taken the time to properly view no more than two (2) minutes of that video, he would have been in a position to make a decision in this matter on or about April 2nd and not several months later. The Major testified that he looked at the video on a screen that was insufficient to allow him to properly view the video. At best, this is an act of misfeasance by the Major. The Grievant testified that he saw the Major viewing the video on a full-size computer monitor. If this is accurate, when the Major found that the Resident's grievance was unfounded, based on the Major's testimony before this Hearing Officer, the Major committed an act of malfeasance.

Some time in July of 2012, the resident approached a staff member of the Agency and asked for the name of an attorney because he wanted to bring suit against the people who entered his room. Apparently, the Resident's request for an attorney prompted the Agency to now seriously review what took place on April 2, 2012. The Hearing Officer heard from the Major and the Assistant Superintendent that the video was now viewed on a large screen and the alleged behavior could now be witnessed.

The only meaningful piece of evidence in this matter is the video. The Hearing Officer viewed the video along with the parties at the hearing. The Assistant Superintendent testified about what he saw on the video. Early in the video, it is clear that the Grievant is lifting his foot and stepping down on something. The allegation is that he is stomping and that may be the best word to describe his actions. From the video, the Hearing Officer cannot see what the Grievant is attempting to step or stomp on, or what he did in fact step or stomp on at that time. Subsequently, the Grievant is seen thrusting down with his right hand in a direction that appears to be at the Resident. The problem with the entirety of the video is that the other three (3) JCO's have completely obscured the Resident's body by laying on, over and around him. Again, the Hearing Officer cannot tell if the Grievant was striking the Resident, or was reaching for something.

The Assistant Superintendent testified that, at least in his opinion, you could hear the foot and the hand striking flesh. The Hearing Officer could not hear these sound delineations.

The Grievant testified that he was attempting to kick a pen or a pencil out of the Resident's hand, as he viewed it as a weapon. He then testified that the Resident pulled that hand up under his body and that is why the Grievant was thrusting down with his right hand, to attempt to get to the Resident's hand and/or arm to remove a potential weapon. The Agency called no witness to rebut this testimony. The Hearing Officer, after viewing the video several times, neither sees nor doesn't see a potential weapon in the Resident's hand. There is simply no camera angle that would confirm or refute that allegation. Perhaps, had the Major properly performed his duty in responding to the Emergency Grievance Request by the Resident on or about April 2, 2012, there would have been evidence of a pen or pencil in the Resident's cell. By the Major's act of misfeasance or malfeasance, it is now too late to determine whether such an object existed or did not exist.

The Shield Team also had, either as a member or as a person who was required to be close by the Agency, an Agency nurse. That nurse testified before the Hearing Officer and testified regarding her written notes. [9] The nurse's notes indicate in part as follows:

> Irritation noted to left shoulder, left side face and nose. Left cheek slightly swollen. Tiny scratch (superficial) noted to neck (midfront). No active bleeding. Unable to do a full assessment as resident refused to fully cooperate - sitting upright banging head and back against wall and laughing (with tears running down face). Jeering and threatening staff with what he is going to do when he gets out of restraints. When told to stay still so he could be fully assessed, he stated, "I'm alright nurse," then continued with threats to staff...[10]

The nurse's testimony before this Hearing Officer and her written notes did not reflect any issues regarding being stepped or stomped on in the leg or abdominal region. Further, after having reviewed the video numerous times, the issues that she speaks to are not to be unexpected when you view the Resident with the other three (3) JCO's on top of him as he continued to struggle.

The Resident did not testify before this Hearing Officer.

The Superintendent for this Agency testified before this Hearing Officer. He testified that the Grievant had been a good employee and that, when this offense first came before him, he was interested in finding a way to mitigate this matter so that he would not have to terminate the Grievant. The Superintendent was in fact the person who issued the Written Notice in this matter. Early in his testimony, the Superintendent stated that he would have mitigated this matter down from a termination but for Human Resources telling him that a prior Group II inactive Notice prevented him from doing this. The inactive Group II Written Notice was issued on October 22, 2007 and became inactive on October 22, 2010. [11] That Group II Written Notice was for, "an unauthorized restraint on a resident during a search."

Upon questioning by the Hearing Officer, the Superintendent stated that the relevant Policy in this matter was 1.60(G)(1)(b) Standards Of Conduct. That Policy states as follows:

> Written Notices that are no longer active shall not be considered in an employee's accumulation of Written Notices; however, an inactive notice **may be considered** in determining the appropriate disciplinary action **if the conduct or behavior is repeated.** For example, misconduct which if a "first" offense would normally be addressed through counseling may warrant a Written Notice when the employee has an active Notice on file **for the same misconduct.** [12] (Emphasis added)

When it was pointed out to the Superintendent that the language used did not make it mandatory that it be considered, the Superintendent's testimony began to change, and then

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[9] Agency Exhibit 1, Tab VI, Page 8
[10] Agency Exhibit 1, Tab VI, Pages 8 and 9
[11] Agency Exhibit 1, Tab XI, Page 1
[12] Grievant Exhibit 1, Tab 1, Page 17

became that the mere fact that there was a prior Written Notice was sufficient for him to change his mind regarding mitigation.

When the Assistant Superintendent testified before the Hearing Officer, he stated that during the course of his investigation, files disappeared, the video camera itself disappeared, and from his testimony it could be concluded that there was a reasonably sincere and dedicated effort to remove any evidence that might incriminate the Agency in this matter.

The Hearing Officer recognizes that the Grievant in this matter clearly has a bias to create a factual reason for his actions on the video tape. Likewise, the Hearing Officer recognizes that those who testified for the Agency seem to have a bias regarding their testimony. It seems unlikely to the Hearing Officer that, on or about April 3, 2012, in the face of an Emergency Grievance by a Resident, that the Major, who was the Chief of Security for this Agency, would take such a cavalier attitude regarding the video as to view it for a moment and then determine that it was worthless and then to merely rely on the written statements of his JCO's and Officers.

The testimony regarding who authorized the entrance into HB306, was disjointed at best and contradictory at worst. All of this raises a serious question in the Hearing Officer's mind as to the character and quality of the evidence received from not only the Agency's witnesses but the Grievant as well. The one thing that is clear from the evidence is someone from the Agency ordered this event to take place and the entry into this room was clearly against Agency policy and written procedure. The subsequent handling of the Resident's Emergency Grievance was careless and haphazard. Only upon the threat of the Resident filing suit against the Agency did anyone at the Agency take this matter seriously. Then, according to an Agency witness, things began to disappear. Finally, the Superintendent testified that he wanted to mitigate but he was precluded by instructions from HR which appear to contradict the language quoted earlier in this Decision. The video tape, as viewed by the Hearing Officer, not only at the hearing itself, but in preparation of this Decision, shows that the Grievant did appear to use both his foot and his hand aggressively against the Resident. The problem is, even with the reduced standard of proof required in matters such as this, it is not clear to the Hearing Officer that the Grievant abused the Resident or was attempting to disarm the Resident. Accordingly, the Hearing Officer finds that the Agency has not bourne its burden of proof in this matter.

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..." [13] 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

[13] Va. Code § 2.2-3005

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 bourne 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 he 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 if any of the following apply:

1. 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. You may fax your request to 804-371-7401, or address your request to:

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

2. 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. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution
101 North 14th Street, 12th Floor
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 of the original hearing decision. A copy of all requests for administrative review must be provided to the other party, EDR and the hearing officer. 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.[14] 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.[15]

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

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William S. Davidson
Hearing Officer

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

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Juvenile Justice
January 22, 2013

The agency has requested an administrative review of the hearing officer's decision in Case No. 9965. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

According to the evidence in this case, the agency issued a Group **III** Written Notice to the Grievant on October 3, 2012, for:

> Physical abuse of a resident. On 04-02-12, at approximately, 1524 hours, you were on a shield team entering HB306 to place a resident in **full** mechanical restraints. Upon entering the room and making initial contact with the resident, you are observed on video stomping with your foot towards the resident's midsection, and then punching downward repeatedly toward the resident's head. **This is a direct violation of DHRM Policy 1.60, Group III (Abuse of a Client).**[1]

Pursuant to the Group III Written Notice, the Grievant was terminated on October 2, 2012. On October 8, 2012, the Grievant timely filed a grievance to challenge the Agency's actions. On October 29, 2012, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On November 28, 2012, a hearing was held at the Agency's location.

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Did the Grievant physically abuse a Resident on April 2, 2012?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage

the affairs and operations of state government. 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*, 41 VA. 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.

The hearing officer gave the relevant facts of this case are follows:

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 eleven (11) tabs and one (1) cd. There was an objection to the contents of Tab 5, and there was an objection to all pages contained in Tab 11, with the exception of the first page. The Hearing Officer excluded all pages contained in Tab 11, with the exception of the first page. The Hearing Officer stated that he would make a ruling as to the admissibility of the contents at Tab 5, if the Agency attempted to make use of those contents through one (1) of its witnesses. The Agency never moved to introduce the contents at Tab 5 and, accordingly, they were excluded. Except as above referenced, the Agency notebook and cd were accepted in their entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing thirteen (13) tabs. That notebook was accepted in its entirety as Grievant Exhibit 1.

Many of the facts in this matter are uncontradicted. On April 2, 2012, at approximately 3:24 p.m., a Shield Team entered HB306. The purpose of this entry was to place the resident in full mechanical restraints. The Agency now concedes that this entry was a violation of the Agency's written policy and, accordingly, was an illegal entry into this room. The Team consisted of four (4) Juvenile Corrections Officers *("JCO"),* a Sergeant who was operating a video camera, and a Lieutenant who was theoretically in charge of this operation. Testimony before this Hearing Officer indicates that three (3) of the JCO's, the Sergeant, and the Lieutenant have all been terminated or resigned in lieu of termination. The Grievant before the Hearing Officer is the fourth JCO.

From the testimony presented before the Hearing Officer by both the Agency and the Grievant, it appears that the purported reason for entry into this room, as well as the authority given for entry into this room, violated the Agency's written procedures and protocols. There appears to be nothing that was done correctly

regarding this matter. Indeed, as is evident by the Written Notice presented to the Hearing Officer, it appears that the Grievant was terminated on October 2, 2012, one (1) day prior to his issuance of the Group III Written Notice. It would seem difficult to terminate someone prior to the issuance of the Written Notice.

Subsequent to the illegal entry into HB306, the Resident filed an Emergency Grievance Request. Pursuant to this request, the Hearing Officer heard testimony that the Major, who may or may not have given authority to enter the room, the Sergeant, who was filming the entry, and an Assistant Superintendent viewed the video that was made of the entry. The Grievant testified that he saw these three (3) viewing the video on a full-size computer monitor. The Major testified that he was viewing the video on the camera itself which probably gave him a screen no larger than 2"x2". The Major testified that he only looked at this monitor for a moment as it was simply too small to see any detail. He did this in the face of an emergency grievance and, apparently, being able to see very little, chose to see nothing. He relied on the written reports of the Shield Team to determine that the Resident's grievance was unfounded. This decision was made on or about April 2, 2012.

The Agency, through its witnesses, established that there was a requirement in this matter that the Shield Team's entry into HB306 be videotaped. The Hearing Officer must assume that the purpose of such a requirement is to produce a video record of the actual events that take place when such an entry is made. The Hearing Officer further assumes that such a record is created in order to have a pictorial record to prove or disprove the written record that is subsequently produced by those who actually entered HB306. In this matter, the Major was fully alerted to the possibility of a problem with this entry. The problem with the entry, if any, was set forth in the first one (1) or two (2) minutes) of the video. Had the Major taken the time to properly view no more than two (2) minutes of that video, he would have been in a position to make a decision in this matter on or about April 2nd and not several months later. The Major testified that he looked at the video on a screen that was insufficient to allow him to properly view the video. At best, this is an act of misfeasance by the Major. The Grievant testified that he saw the Major viewing the video on a full-size computer monitor. If this is accurate, when the Major found that the Resident's grievance was unfounded, based on the Major's testimony before this Hearing Officer, the Major committed an act of malfeasance.

Some time in July of 2012, the resident approached a staff member of the Agency and asked for the name of an attorney because he wanted to bring suit against the people who entered his room. Apparently, the Resident's request for an attorney prompted the Agency to now seriously review what took place on April 2, 2012. The Hearing Officer heard from the Major and the Assistant Superintendent that the video was now viewed on a large screen and the alleged behavior could now be witnessed.

The only meaningful piece of evidence in this matter is the video. The Hearing Officer viewed the video along with the parties at the hearing. The Assistant Superintendent testified about what he saw on the video. Early in the video, it is clear that the Grievant is lifting his foot and stepping down on something. The allegation is that he is stomping and that may be the best word to describe his actions. From the video, the Hearing Officer cannot see what the Grievant is attempting to step or stomp on, or what he did in fact step or stomp on at that time. Subsequently, the

Grievant is seen thrusting down with his right hand in a direction that appears to be at the Resident. The problem with the entirety of the video is that the other three (3) CO's have completely obscured the Resident's body by laying on, over and around him. Again, the Hearing Officer cannot tell if the Grievant was striking the Resident, or was reaching for something.

The Assistant Superintendent testified that, at least in his opinion, you could hear the foot and the hand striking flesh. The Hearing Officer could not hear these sound delineations.

The Grievant testified that he was attempting to kick a pen or a pencil out of the Resident's hand, as he viewed it as a weapon. He then testified that the Resident pulled that hand up under his body and that is why the Grievant was thrusting down with his right hand, to attempt to get to the Resident's hand and/or arm to remove a potential weapon. The Agency called no witness to rebut this testimony. The Hearing Officer, after viewing the video several times, neither sees nor doesn't see a potential weapon in the Resident's hand. There is simply no camera angle that would confirm or refute that allegation. Perhaps, had the Major properly performed his duty in responding to the Emergency Grievance Request by the Resident on or about April 2, 2012, there would have been evidence of a pen or pencil in the Resident's cell. By the Major's act of misfeasance or malfeasance, it is now too late to determine whether such an object existed or did not exist.

The Shield Team also had, either as a member or as a person who was required to be close by the Agency, an Agency nurse. That nurse testified before the Hearing Officer and testified regarding her written notes. The nurse's notes indicate in part as follows:

> Irritation noted to left shoulder, left side face and nose. Left cheek slightly swollen. Tiny scratch (superficial) noted to neck (midfront). No active bleeding. Unable to do a full assessment as resident refused to fully cooperate - sitting upright banging head and back against wall and laughing (with tears running down face). Jeering and threatening staff with what he is going to do when he gets out of restraints. When told to stay still so he could be fully assessed, he stated, "I'm alright nurse," then continued with threats to staff. ..

The nurse's testimony before this Hearing Officer and her written notes did not reflect any issues regarding being stepped or stomped on in the leg or abdominal region. Further, after having reviewed the video numerous times, the issues that she speaks to are not to be unexpected when you view the Resident with the other three (3) JCO's on top of him as he continued to struggle.

The Resident did not testify before this Hearing Officer.

The Superintendent for this Agency testified before this Hearing Officer. He testified that the Grievant had been a good employee and that, when this offense first came before him, he was interested in finding a way to mitigate this matter so that he would not have to terminate the Grievant. The Superintendent was in fact the person who issued the Written Notice in this matter. Early in his testimony, the Superintendent stated that he would have mitigated this matter down from a termination but for Human Resources telling him that a prior Group II inactive Notice

prevented him from doing this. The inactive Group II Written Notice was issued on October 22, 2007 and became inactive on October 22, 2010. That Group II Written Notice was for, "an unauthorized restraint on a resident during a search."

Upon questioning by the Hearing Officer, the Superintendent stated that the relevant Policy in this matter was 1.60(G)(1)(b) Standards Of Conduct. That Policy states as follows:

> Written Notices that are no longer active shall not be considered in an employee's accumulation of Written Notices; however, an inactive notice **may be considered** in determining the appropriate disciplinary action **if the conduct or behavior is repeated.** For example, misconduct which if a "first" offense would normally be addressed through counseling may warrant a Written Notice when the employee has an active Notice on file **for the same misconduct.** (Emphasis added)

When it was pointed out to the Superintendent that the language used did not make it mandatory that it be considered, the Superintendent's testimony began to change, and then became that the mere fact that there was a prior Written Notice was sufficient for him to change his mind regarding mitigation.

When the Assistant Superintendent testified before the Hearing Officer, he stated that during the course of his investigation, files disappeared, the video camera itself disappeared, and from his testimony it could be concluded that there was a reasonably sincere and dedicated effort to remove any evidence that might incriminate the Agency in this matter.

The Hearing Officer recognizes that the Grievant in this matter clearly has a bias to create a factual reason for his actions on the video tape. Likewise, the Hearing Officer recognizes that those who testified for the Agency seem to have a bias regarding their testimony. It seems unlikely to the Hearing Officer that, on or about April 3, 2012, in the face of an Emergency Grievance by a Resident, that the Major, who was the Chief of Security for this Agency, would take such a cavalier attitude regarding the video as to view it for a moment and then determine that it was worthless and then to merely rely on the written statements of his JCO's and Officers.

The testimony regarding who authorized the entrance into HB306, was disjointed at best and contradictory at worst. All of this raises a serious question in the Hearing Officer's mind as to the character and quality of the evidence received from not only the Agency's witnesses but the Grievant as well. The one thing that is clear from the evidence is someone from the Agency ordered this event to take place and the entry into this room was clearly against Agency policy and written procedure. The subsequent handling of the Resident's Emergency Grievance was careless and haphazard. Only upon the threat of the Resident filing suit against the Agency did anyone at the Agency take this matter seriously. Then, according to an Agency witness, things began to disappear. Finally, the Superintendent testified that he wanted to mitigate but he was precluded by instructions from HR, which appear to contradict the language quoted earlier in this Decision. The videotape, as viewed by the Hearing Officer, not only at the hearing itself, but in preparation of this Decision, shows that the Grievant did appear to use both his foot and his hand aggressively

against the Resident. The problem is, even with the reduced standard of proof required in matters such as this, it is not clear to the Hearing Officer that the Grievant abused the Resident or was attempting to disarm the Resident. Accordingly, the Hearing Officer finds that the Agency has not bourne its burden of proof in this matter.

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 ..." 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 bourne 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 he 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.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent or is misinterpreted. In its request request for an administrative review of a policy violation by the hearing officer in making his decision, the agency did not identify that the hearing officer violated any state or agency human resource management policy. Rather, it appears that the agency is disagreeing with what information the hearing officer considered and how he assessed that information. The information the agency submitted in its appeal is evidentiary in nature and this agency has no authority evaluate that information. Therefore, the DHRM will not interfere with the application of this hearing decision.

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Ernest G. Spratley
Assistant Director
Office of Equal Employment Services