

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 02/15/18; Decision Issued: 02/26/18; Agency: VCU; AHO: John R. Hooe, III, Esq.; Case No. 11134; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA  
Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER**

**In the matter of: Case No. 11134**

Hearing Date: February 15, 2018  
Decision Issued: February 26, 2018

**PRELIMINARY MATTERS**

Upon being appointed as the Hearing Officer in this matter, effective December 5, 2017, the Hearing Officer arranged a pre-hearing telephone conference which was conducted on December 13, 2017. The telephone pre-hearing conference was conducted with the Grievant's attorney and the Agency's attorney. During the telephone pre-hearing conference, it was agreed that the grievance hearing was to be conducted on Thursday, February 15, 2018 beginning at 10:00 a.m. It was also agreed that a copy of all exhibits a party intends to introduce at the hearing and a list of witnesses to be called would be provided to the Hearing Officer and the other party no later than Thursday, February 8, 2018 by 5:00 p.m.

**APPEARANCES**

Grievant  
Grievant's Attorney  
Agency Representative  
Agency's Attorney  
Three Agency Witnesses  
One Grievant Witness

**ISSUES**

1. Did the Grievant violate 22 VAC 40-185-410. Forbidden Actions. by "... roughly handling or shaking a child...?"
2. If the Grievant did violate 22 VAC 40-185-410 as alleged, was such violation a violation of the Commonwealth of Virginia's Standards of Conduct, Group III Offense as

alleged?

3. If the Grievant's conduct is a Group III offense, were mitigating circumstances considered and should the Grievant have been terminated from employment?

### **EXHIBITS**

The Agency Exhibits admitted into evidence are contained in one notebook with the following contents:

1. Grievant's procedure forms and attachments
2. Group III Written Notice
3. Standards of Conduct, Policy 1.60 and Agency Code of Conduct
4. Job Description
5. Staff handbook
6. Code of Ethical Conduct
7. 22 VAC 40-185-410. Forbidden Actions
8. Memo dated 9/22/17
9. Email dated 9/25/17
10. Counseling memo dated May 19, 2017
11. Active Group II Written Notice issued August 11, 2017
12. Prior Counseling Memo dated 3/23/16
13. Employee work profile
14. Photographs

The Hearing Officer overruled the objection of Grievant's attorney to the admission of Agency Exhibit 10 and Agency Exhibit 12 on the basis of relevance. The Hearing Officer did advise that the objections would be noted in considering the weight, if any, given to the exhibits in making the Hearing Officer's decision.

The Grievant's Exhibits admitted into evidence were contained in a single notebook as follows:

1. Employee Grievance procedure documents
2. Email dated October 3, 2017 with attachment.
3. Hearing Officer's Order and Agency's response
4. Grievant's resume
5. Grievant's application for employment and college transcript
6. Letter dated August 30, 2000
7. 2016 employee work profile performance evaluation
8. 2015 employee work profile performance evaluation
9. 2014 employee work profile performance evaluation
10. Recognition award action form dated December 13, 2011
11. Letters concerning Grievant from co-workers

12. Letters concerning Grievant from parents
13. Curriculum vitae
14. Copy of 22 Va. Admin. Code Section 40-185-410
15. Va. Code Ann. 63.2-1508 and 63.2-1509
16. *Turner v. Jackson*, 14 Va. App. 423 (Virginia Court of Appeals 1992)
17. Letter dated August 4, 2017
18. Policy No. 1.60 “Standards of Conduct”

The Hearing Officer sustained the objection made by the Agency’s attorney to the admission of a letter signed “Jen” which was included with Grievant Exhibit 11. The Hearing Officer admitted the remainder of Exhibit 11 subject to the Agency’s right to call rebuttal witnesses.

The Hearing Officer did not admit Grievant’s Exhibit 12 to which Grievant’s counsel objected.

### **FINDINGS OF FACT**

The Agency’s main witness, the Interim Director of the Center where the Grievant was an employee, testified that the Center provides child care services for staff and students of the Agency. The Interim Director holds a B.A., Masters and P.H.D. and is licensed as a teacher of pre-k through twelfth grade. He testified that the center is conducted on the basis of a “...very positive approach...the opposite of “don’t do this...” approach. He testified that the fact the Center is accredited by and follows the NAEYC Code of Ethical Conduct and Statement of Commitment (Agency Exhibit 6) validates to the Center’s clients the high standards of child care followed by the Center.

The Interim Director testified that the Center is divided into six rooms with different age groups in each room. He testified that the Grievant was assigned to the room which cared for children two to three years old. He testified that outside each room is an observation room where one can see the activities in the room where the children are located. He testified that on September 25, 2017 he went to the observation room for the initial purpose of observing blinds which had been installed or repaired. He testified that he observed the Grievant sitting beside a cot on which a child was lying. He testified that he saw the Grievant grab the child by the shoulder and leg and flip him over from his stomach to his back. He testified that when the child immediately turned back on his stomach the Grievant did the same thing two more times. He testified that he intervened before the Grievant could flip the child a fourth time. He testified that he stayed to observe until another teacher returned to the room ten to fifteen minutes later at which time he called Human Resources for advice on how to proceed.

The Interim Director further testified that after speaking with HR he met with the Grievant in the presence of another staff person who reduced her recollection of what happened in the meeting to a memo (Agency Exhibit 8). Although the Exhibit is dated September 22, 2017, it was agreed that the meeting occurred September 25, 2017. He testified that the Grievant told

him she wanted the child to lie on his back and that it had become a “power struggle.” He testified that the Grievant admitted that she was “too rough” with the child. The Interim Director testified that during the conduct in question the child looked “tormented” or “upset”, while the Grievant looked “stern” or “angry” with a “scowl” on the Grievant’s face. He testified that as reflected in Agency Exhibit 8, the Grievant explained she often uses a stern face to convey sternness. He further testified that when he asked the Grievant which of the “forbidden actions” (Agency Exhibit 7) did the Grievant believe concerned him as Interim Director, the Grievant responded that “she was rough with the child.”

The Interim Director also testified that night (September 25, 2017) he received an email from the child’s mother (Agency Exhibit 9). In the email the mother states that when she picked the child up that afternoon when she asked him if he had a good day and had he napped the child said “(Grievant’s name)...my body” and cried. The email continued “I went on and asked him “did she push you?, he responded “yes” and continued to cry. I asked “did it hurt?”, he said “yes.” cried even harder... he cried almost all the way home and fell asleep five minutes before arriving home..”. The mother went on to say in the email “it is NOT acceptable for us to have (Grievant’s name) back to the classroom to care for (child’s name).”

The Interim Director testified that he made a report to Child Protective Services but never heard back from a representative of Child Protective Services and never followed up. He emphasized that the Grievant’s conduct does not necessarily constitute criminal “abuse” but it is a violation of the standards to be followed as an employee of the Center.

The Interim Director testified that the Grievant also had an active Group II Written Notice which was issued on August 11, 2017 for violating the Standards of Conduct by leaving her classroom of 2-3 year old children to go in the observation room to scream and by discussing with a parent personal or Center business in violation of the Staff Handbook.

In conclusion, the Interim Director testified that while he considered mitigating factors before terminating the Grievant’s employment, the fact that she had an active Group II Written Notice would still result in termination even if this Group III had been reduced to a Group II. Further, he testified that if she had been allowed to return to the Center, at least the one parent would have removed her child from the Center.

During cross examination the Interim Director stated that he took the Interim Director position in order to set up “lab” schools and that he had never worked in day care. He also stated that while he did consider the Grievant’s written response dated October 4, 2017 (Agency Exhibit 1, Page 17 and 18) his decision to terminate her was not in retaliation for the Grievant’s challenge of the Interim Director’s qualifications.

In response to questions from the Grievant’s attorney, the Interim Director also made the following statements:

- He was approximately ten feet from the Grievant and the child when he made his

observations.

- The Grievant was not looking his way while he was observing her conduct.
- He could see the Grievant's face while she was interacting with the child. He did not intervene until after the third flipping of the child because he was processing what he was seeing.
- He stated that the child was not crying or speaking and that he did not check the child to see if the child was injured in any way.
- He stated that after he intervened the Grievant knew he was still there observing and moved about the room in a normal manner.
- He stood in the doorway and continued observing until the other teacher returned to the room.
- The event he observed happened at approximately 1:45, he called CPS around 3:30 and the child's mother arrived at the school around 3:40.

The Agency's second witness, an Executive Assistant (now retired), testified that she was present when the Interim Director met with the Grievant, that she made handwritten notes during the meeting (Agency Exhibit 15) and then typed the memo, incorrectly dated September 22, 2017 (Agency Exhibit 8). She stated that the Interim Director had no input into the content of the memo and that she did not know the Grievant prior to September 25, 2017. When asked about the portion of the memo that says "She stated that she was rough with (the child's name)..." she confirmed that the Grievant admitted that she was rough with the child and was not simply identifying the guideline of concern to the Interim Director.

The mother of the child testified that on September 25<sup>th</sup> she came to the Center at lunch time (approximately 1:00) to the observation room and saw the Grievant holding a cot and moving it across the classroom with her child saying in an "adult" voice "It is not wake up time." She testified that she could not see anything else and left. She said that her child is always cheerful but not when she picked him up on September 25<sup>th</sup>. She testified that they would not have returned their child to the Center if the Grievant had not been terminated. In cross examination she stated that the child had not received any counseling or treatment as a result of the events of September 25<sup>th</sup>.

At the conclusion of the Agency's evidence, the Grievant called a friend who was a co-teacher with the Grievant with four and five year olds from 2004 to 2008. The witness testified that the Grievant was always dedicated, kind and loyal. She said she never saw any kind of abusive behavior by the Grievant during the time she worked with the Grievant.

The Grievant testified and referred to her resume (Grievant Exhibit 4) while indicating that her expertise is with toddlers, and making reference to the information included on her application for employment (Grievant Exhibit 5), her letter of employment (Grievant Exhibit 6), her performance evaluations for 2016, 2015 and 2014 (Agency Exhibits 7, 8 and 9) and her achievement award dated December 11, 2011 (Grievant Exhibit 10). The Grievant also referred to a letter dated January 29, 2018 (Grievant Exhibit 11) from the former Director of the Center (2009-2014) who stated that she never saw the Grievant act in an inappropriate manner toward children in her care and that she followed the NAEYC guidelines.

The Grievant testified that prior to the events of September 25, 2017, she thought that “I was targeted” by the Interim Director. She testified that on September 22, 2017 he told her that there was “two much crying” coming from her room.

The Grievant testified that on September 25<sup>th</sup> her co-teacher was on vacation and the class was “out of ratio.” She recalled that the child in question had a difficult drop off that morning with his mother. She testified that the child did not want to wash his hands, that his mother appeared to be in a hurry to leave and that each time his mother tried to leave the child pulled on her. The Grievant testified that after the mother left that morning the child was fine. She stated that at 12:30 she went to lunch. The Grievant testified that when she returned from lunch at 1:30 only two children were napping with the other children on their cots but not asleep.

She testified that she moved the child in question to the window area and sat beside the cot with her back against the wall. She testified that she was trying to get him to lay on his back, that she flipped him over by reaching under him, grabbing the child at the waist and flipping the child away from her. She stated that he immediately turned back onto his stomach. She testified that on this first “flip” she believed the child thought it was funny and that he laughed. She testified that after the first flip it was “a battle”. She testified that each time she did the same thing and that he never cried. She stated that she knew she wasn’t getting any where so she quit. She testified that after she quit she looked up and saw the Interim Director who just stood there. She testified that the Interim Director did not intervene, never said anything to her and that he just turned around and walked out of the room. The Grievant testified that she was trying to keep the child still “so he wouldn’t hurt himself” by turning the cot over. The Grievant testified that her co-teacher came back around 2:30 and they proceeded in a normal fashion until they went out to the playground between 3:30 and 4:30. She stated that during that period nothing else happened with the child in question. The Grievant testified that she was on the playground when the Interim Director called me in at 4:00. She testified that she asked him what she had done and “he just laughed at me.”

The Grievant testified that when she was in the room with the Interim Director and the witness, she was asked by the Interim Director “which one” of the forbidden actions did she think he was concerned about. She testified that she said “I guess I was too rough with him.” The Grievant testified that the Interim Director told her she could leave for the day so she did.

During cross examination, the Grievant said “I think he (the child) was reacting to his mother” and not to anything the Grievant did.

When asked by the Agency’s attorney why the Grievant did not deny any wrong doing when she met with the Interim Director and the witness, the Grievant testified “I was a deer in headlights.”

## **APPLICABLE LAW AND OPINION**

The General Assembly enacted the Virginia Personnel Act, Va. Code ' 2.2-2900 et. seq., establishing the procedures and policies applicable to employment within the Commonwealth. 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 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).

Code ' 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 the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under ' 2.2-3001.

Standards of Conduct, Policy: 1.60 provides that the Group III offense category includes acts of misconduct of such a severe nature that a first occurrence should warrant termination. This level is appropriate for offenses that, for example, endanger others in the work place, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws. One Group III offense normally should result in termination unless there are mitigating circumstances. In addition, a second active Group II notice normally shall result in termination unless there are mitigating circumstances.

The Center's staff handbook (Agency Exhibit 5) provides that the Center is licensed by the Virginia Department of Social Services and accredited by the National Association for the Education of Young Children (NAEYC). The staff handbook states as follows:

Inappropriate behavior is dealt with primarily through positive guidance...All staff...must use calm and quiet voice tones and speak to children in a manner that is understandable to them...In accordance with NAEYC required criteria No. 1.B.09, at no time will physical punishment, psychological abuse, coercion or verbal abuse be used as a behavioral management tool...Should a child demonstrate persistent challenging behaviors or need added assistance, teachers, family and Center Director will work as a team to develop and implement an individualized plan that supports the child's inclusion and success.

The Grievant on October 23, 2016 acknowledged that she had read the staff handbook and agreed to comply with all policies and procedures set forth in the handbook. (Agency Exhibit 5, Page 44)



The State Board of Social Services standards for licensed child day centers, 22 VAC 40-185 provides at 22 VAC 40-185-410. Forbidden Actions:

The following actions or threats thereof are forbidden:

1. Physical punishment, striking a child, roughly handling or shaking a child, restricting movement through binding or tying, forcing a child to assume an uncomfortable position, or exercise as punishment; ...

Considering all of the evidence and argument by counsel, it is the Hearing Officer's opinion that the Grievant roughly handled a child as testified to by the Interim Director. The Grievant admitted that she roughly handled the child. The Hearing Officer notes that the Grievant's description of the events in question cannot be reconciled with the details described by the Interim Director, a matter of concern to the Hearing Officer.

It is the Hearing Officer's opinion that the Grievant's conduct was a forbidden act under 22 VAC 40-185-410, a violation of the NAEYC Code of Ethical Conduct and statement of Commitment and of the Staff handbook, and a violation of the Standards of Conduct.

## **DECISION**

The Hearing Officer upholds the Written Notice, Group III issued October 13, 2017 and termination as being consistent with policy and procedure.

The Hearing Officer upholds the Agency determination that mitigation does not warrant discipline short of termination.

## **APPEAL RIGHTS**

A hearing decision must be consistent with law, policy, and the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings). A hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to administrative review by both EDR and the DHRM Director based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or email. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests for administrative review must be provided to the other party, EDR and the Hearing Officer.

Important Note: Requests for administrative review must be in writing and received by the reviewer within fifteen calendar days of the date of the original hearing decision. AReceived by@ means delivered to, not merely post-marked or placed in the hands of a delivery service.

**Requesting Administrative Review:**

1. **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 refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. The director=s authority is limited to ordering the Hearing Officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 North Fourteenth Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or fax to 804-371-7401 or emailed.

2. **A challenge that the hearing decision is not in compliance with the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings)**, as well as a request to present newly discovered evidence, is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance. EDR=s authority is limited to ordering the Hearing Officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the office of Employment Dispute Resolution, 101 North Fourteenth Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or fax to 804-786-1606 or emailed.

In response to any requests for administrative review, the opposing party may submit a written challenge (rebuttal) to the appropriate reviewer. If the opposing party chooses to submit a rebuttal, it must be received by the reviewer within ten calendar days of the conclusion of the original fifteen day appeal period. A copy of any such rebuttal must also be provided to the appealing party, EDR, and the Hearing Officer.

Administrative review decisions issued by the Director of DHRM and EDR are final and not appealable. If the DHRM Director or EDR orders the Hearing Officer to reconsider the hearing decision, the Hearing Officer must do so. If request for administrative review have been made to both the DHRM Director and EDR, the Hearing Officer need not reconsider his/her decision, if ordered to do so on remand, until both administrative reviews are issued or otherwise concluded unless otherwise directed by EDR in the interest of procedural efficiency. If requests for administrative review have been made to both the Director of DHRM and EDR, EDR shall generally respond first. Administrative reviews by the Director of DHRM should be issued within thirty calendar days of the conclusion of any other administrative reviews.

**Final Hearing Decision.** A Hearing Officer=s original decision becomes a final hearing decision, with no further possibility of 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:** Once an original hearing decision becomes final, either party may seek review by the Circuit Court on the ground that the final hearing decision is contradictory to law. Neither the Hearing Officer nor the Department of Human Resources Management (or any employee thereof) shall be named as a party in such an appeal.

An employee does not need EDR=s approval before filing a notice of appeal. However, an agency must request and receive approval from EDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal. The request for approval to appeal must be received by EDR within 10 calendar days, which means delivered to, not merely postmarked or placed in the hands of a delivery service. The agency may make its request by email or fax. The agency must provide a copy of its appeal request to the employee. EDR will provide a response within 10 calendar days of the agency=s request.

A notice of appeal must be filed with the Clerk of the Circuit Court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision. At the time of filing, a copy of the notice of appeal must be provided to the other party and EDR. The judicial review procedure shall be as more particularly set out in the Grievance Procedure Manual.

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John R. Hooe, III  
Hearing Officer