

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 12/11/13; Decision Issued: 12/17/13; Agency: DBHDS; AHO: William S. Davidson, Esq.; Case No. 10206; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 01/02/14; EDR Ruling No. 2014-3788 issued 01/14/14; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 10206

Hearing Date: December 11, 2013  
Decision Issued: December 17, 2013

**PROCEDURAL HISTORY**

A Group III Written Notice was issued to the Grievant on September 11, 2013, for the following reason:

Reporting and Investigating Abuse and Neglect of Clients: The results of the investigation substantiated the allegation of “physical abuse.” Corroborating evidence disclosed that you used excessive force by grabbing a patient by the camisole and forcing her to the ground.<sup>1</sup>

Pursuant to this Group III Written Notice, the Grievant was terminated on September 11, 2013.<sup>2</sup> On October 9, 2013, the Grievant timely filed a grievance to challenge the Agency’s actions.<sup>3</sup> On October 28, 2013, the Office of Employment Dispute Resolution (“EDR”) assigned this Appeal to a Hearing Officer. The original hearing in this matter was scheduled for November 25, 2013, however, due to conflicts on the Grievant’s advocate’s calendar, it was continued first until December 5, 2013, and lastly until December 11, 2013, when a hearing was held at the Agency’s location.

**APPEARANCES**

Advocate for Agency  
Advocate for Grievant  
Grievant  
Witnesses

**ISSUE**

Did the Grievant violate DI 201 and, accordingly, physically abuse a Client of the Agency?

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<sup>1</sup> Agency Exhibit 1, Tab 2, Page 1

<sup>2</sup> Agency Exhibit 1, Tab 2, Page 1

<sup>3</sup> Agency Exhibit 1, Tab 1, 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.<sup>4</sup> 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.<sup>5</sup> However, proof must go beyond conjecture.<sup>6</sup> In other words, there must be more than a possibility or a mere speculation.<sup>7</sup>

## **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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<sup>4</sup> See Va. Code § 2.2-3004(B)

<sup>5</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>6</sup> *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>7</sup> *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 eight tabs and a cd containing camera footage of the event. During the course of the hearing, six pages were added to Tab 3. That notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing two pages. That notebook was accepted in its entirety as Grievant Exhibit 1.

Departmental Instruction 201-3, relies on Virginia Code Section 37.2-100, to define Abuse. Accordingly, as set forth in Virginia Code Section in 37.2-100, Abuse is defined as follows:

Abuse means any act...by an employee...responsible for the care of an individual in a facility ...operated...by the Department, that was performed...knowingly, recklessly, or intentionally, and that caused or **might have caused** physical or psychological harm, injury...to an individual receiving care or treatment for mental illness...Examples of such abuse include such acts as...Assault or battery...<sup>8</sup> (Emphasis added)

While there were several other examples of Abuse, none of them were present in this matter before me.

The Agency also deems certain other acts as being included within the definition of Abuse or Neglect pursuant to Virginia Code 37.2-100. These additional acts include such things as pushing or shoving, **that is the proximate cause of psychological harm or physical injury** to the patient receiving services.<sup>9</sup> (Emphasis added)

I note that the Agency's Exhibit at page 20, references Virginia Code Section 37.1-1, which is a Code section that no longer exists.

The best evidence before me in this matter was the video that was recorded by the Agency's monitoring system. During the course of testimony, I viewed the relevant events numerous times and subsequently reviewed them many more times in preparation of this Decision. The video had no audio component. In reviewing the video, it is clear that the Client was combative. As the video began, the Patient was in what the Agency calls a camisole, which in reality, is a straightjacket. Because of her agitation and violence, she also had two-point ankle restraints placed on both of her ankles. As it appears that she was targeting her 1:1 at that time, the Grievant and the 1:1 traded positions, so that now the Grievant became the Client's 1:1. The video shows that the Client stood up from the chair in which she was seated and began to proceed toward the former 1:1. The video clearly shows that the Grievant reached out from behind the Client and took a grasp of the lower part of the camisole as if there was a hand-hold on it. The Grievant then began to back the Client up and direct her away from the former 1:1. It is clear to me that the former 1:1 was never in any danger from the Client, inasmuch as the Client was in a straightjacket and two-point ankle restraints. In the process of bringing her back towards the chair, the Client head-butted the Grievant. The Grievant then clearly took a two-handed grasp of the back of the straightjacket and forcibly put the Client back into the chair.

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<sup>8</sup> Agency Exhibit 1, Tab 8, Page 23

<sup>9</sup> Agency Exhibit 1, Tab 8, Page 20

During the course of several frames of the video, the chair moves away from the Client as she falls into it, and the Grievant maintains her grasp in order that the Client not fall to the floor. The Client is allowed to then slowly fall to the floor and then the incident is essentially finished.

The Investigator in this matter testified before me. His Report is found at Tab 3, Pages 1 through 4 and the additional insert of Pages 1 through 6.

The employee who reported this incident, when interviewed by the Investigator, stated that she made the report because she was uncertain as to whether or not it was abuse in the Patient going from a standing position to the floor.<sup>10</sup>

When I questioned the Investigator, he acknowledged that, once this event started, it would clearly have been abuse had the Grievant released the Client and let her fall to the floor.

In his Report, the Investigator next interviewed the Client and the Client indicated that she had no recall of the incident.<sup>11</sup>

Next, the Investigator gave his interpretation of the video. He pointed out that the Client appeared to be spitting and targeting her 1:1. He points out that after the Grievant arrived and took over the 1:1 with the Client, the Client stood up and started to approach the former 1:1. The Investigator states that the Grievant gets up and grasps the Client's camisole and attempts to pull the Client back toward the chair. He stated that the Client attempted to head-butt the Grievant. He then states that the Grievant shoves the Client down across the chair and to the floor.<sup>12</sup>

It is clear to me that the Client was combative and stood up with the intent to move toward the 1:1. It is also clear that the Grievant established a hand-hold on the Client's straightjacket and commenced moving her in a backward direction. It is also clear that the Client head butted the Grievant and the Grievant subsequently, using both hands, attempted to place the Client back in the chair. As the chair moved, the net result was that the Client ended up on the floor. The Grievant did not drop or throw the Client to the floor, but rather eased her to the floor when the attempt to force her into the chair failed.

The question is whether or not this incident rises to the level of Abuse as defined by Virginia Code Section 37.2-100. The only example set forth in that Statute that would be applicable here would be Assault or Battery. The Agency also includes the concept of shoving or pushing. However, uniquely, the Agency adds to its definition a requirement that such shoving or pushing is the proximate cause of psychological harm or physical injury to a person receiving services. This is contrasted with the language in Virginia Code Section 37.2-100, that simply states that the action "might" have caused psychological harm. The Agency, through its Investigator's Report clearly introduced evidence that indicated there likely was no psychological or physical harm in the sense that the Client could not even recall the incident.

However, in viewing the video numerous times, I find that the actions by the Grievant did in fact rise to the level of an assault or battery, as she forcefully attempted to place the Client

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<sup>10</sup> Agency Exhibit 1, Tab 3, Page 2

<sup>11</sup> Agency Exhibit 1, Tab 3, Page 3

<sup>12</sup> Agency Exhibit 1, Tab 3, Page 3

back into her chair. Such action may have caused psychological or physical harm. The Grievant clearly had less intense methods that could have been applied 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...”<sup>13</sup> 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.

I considered mitigation in this matter but, due to issuance of the Notice of Needs Improvement to the Grievant, dated January 14, 2013, for Abuse and Neglect, I found no reason to mitigate this matter further.

### **DECISION**

For reasons stated herein, I find that the Agency has borne its burden of proof regarding the Group III Written Notice, and that termination was appropriate.

### **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 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

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<sup>13</sup> Va. Code § 2.2-3005

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 14<sup>th</sup> Street, 12<sup>th</sup> 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.<sup>14</sup> 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.<sup>15</sup>

[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

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<sup>14</sup>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).

<sup>15</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.