

Issue: Group III Written Notice with Termination (patient abuse); Hearing Date: 08/14/14; Decision Issued: 09/03/14; Agency: DBHDS; AHO: Ternon Galloway Lee, Esq.; Case No. 10404; Outcome: Full Relief; **Administrative Review**: EDR Ruling Request received 09/19/14; Outcome; No ruling – untimely; **Administrative Review**: DHRM Ruling Request received 09/19/14; Outcome: No ruling – untimely.

## **DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 10404**

**Hearing Date: August 14, 2014**

**Decision Issued: September 3, 2014**

---

### **SUMMARY OF DECISION**

The Agency had found Grievant violated Departmental Instruction (DI) 201 regarding reporting and investigating abuse and neglect to clients. It also found Grievant violated Agency Policy # 4060 regarding abuse of residents. Then, the Agency issued Grievant a Group III Written Notice with removal. The Hearing Officer found the Agency was unable to meet its burden and rescinded the discipline. Reinstatement is ordered under the order here.

### **HISTORY**

On May 27, 2014, the Agency issued Grievant a Group III Written Notice with removal. This notice asserted that Grievant violated (i) DI 201 on reporting and investigating the abuse and neglect of clients and (ii) Agency Policy # 4060 on abuse of residents. On July 2, 2014, this hearing officer was assigned this case by the Office of Employment Dispute Resolution (EDR).

The Hearing Officer held a telephonic prehearing conference (PHC) on July 14, 2014.<sup>1</sup> Based on discussions during the PHC, the Hearing Officer found the first available date for the hearing was August 14, 2014. Accordingly, by agreement of the parties, the hearing was set for that date. On July 14, 2014, the Hearing Office issued a scheduling order addressing those matters discussed and ruled on during the PHC.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. Grievant's Advocate requested that a witness not previously disclosed to the Agency's Advocate be permitted to testify. The Agency objected. The Hearing Officer sustained the objection because Grievant had failed to timely disclose this individual as a potential witness.<sup>2</sup> During the hearing the Hearing Officer admitted Agency Exhibits 1 through 10 to which Grievant did not object. She also admitted Grievant's Exhibits 1 through 11 without objection.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During the proceeding, the Agency was represented by its advocate. Grievant was represented by his advocate.

---

<sup>1</sup> This was the parties' first date available for the PHC.

<sup>2</sup> Of note, Grievant did timely provide a statement by this witness which was admitted into evidence as Grievant's Exhibit 11.

## **APPEARANCES**

Advocate for Agency  
Witnesses for the Agency (4 witnesses)  
Grievant  
Witnesses for Grievant (3)  
Joint Witness (1)

## **ISSUE**

Was the written notice with removal warranted and appropriate under the circumstances?

## **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8(2). A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

## **FINDINGS OF FACT**

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

1. The Agency is a facility under the Department of Behavioral Health and Developmental Services (Department). On May 9, 2014, Grievant, an employee of the Agency, was in the staff office of Home # 1. The area is very small. He was seated in a chair at the desk/counter working on the computer. A co-worker was performing a task also at the other desk/counter on the opposite side of the office. Grievant’s back was facing the area where someone could walk into the office. Resident had entered the office area several times. He appeared agitated. At one point, Grievant acknowledged Resident and briefly interacted with him. The co-worker at some point also interacted with Resident and then resumed his task. Resident then walked out and returned within seconds. He positioned himself at the entrance of the office and was in close proximity to Grievant. At that point, it appears Resident clapped his hands. Grievant continued in his seated position using the computer. His back remained facing the area where one would enter the office. Within seconds of clapping, Resident made a solid swing at Grievant, slapping him with force on the back of his head. (A Exh. 10).

2. Grievant then turned around, raised his arms and hands and tried to temporarily move Resident away from him. By the momentum of this activity, the Resident was moved into the adjacent desk and cabinets. Grievant immediately backed away. During the process, Grievant never made a fist. At one point during the incident, Grievant’s hand made contact with Resident’s face. Co-worker immediately reacted and briefly restrained Resident. (A Exh. 10; Testimonies of Psychologist and Acting Team Leader; G Exh. 9).

The above-described incident was videoed (A Exh. 10).

3. When Resident slapped Grievant, Grievant was not in a position to move back and give Resident space because Grievant was attacked from behind. In addition, the staff's office space gave very little room to maneuver. (A Exh. 10).

4. Grievant then reported the incident to his supervisor, Acting Team Leader. In doing so, Grievant stated words to the effect of "I made a mistake, I hit [Resident] back." As instructed by his boss, next Grievant reported the occurrence. (Testimony of Acting Team Leader).

5. An investigation ensued with Investigator finding Grievant abused Resident because he used excessive force. Specifically Investigator found abuse, because, from his observations, Grievant put his hand in Resident's face and the other hand was on Resident's arm. Then, per Investigator, Grievant pushed Resident and bent him on the counter. (Testimony of Investigator: A Exh. 6).

6. Grievant was then issued a Group III Written Notice with removal. The written notice stated that Grievant violated the Agency's policy #4060 regarding abuse of residents and the Department's Instruction 201 regarding abuse and neglect of clients. (A Exh. 1).

7. The measurement of open space from one desk/counter to the other desk/counter in the staff office is 5'9." When the desk chairs in the office are extended out from the counters, the open space significantly decreases to as little as 3'4." (G Exh. 6). During the May 9, 2014 incident, two chairs were fully extended out from the counters. Another chair was partially extended from the desk/counter. This chair was opposite the chair Grievant occupied. Hence, when the incident occurred there was very little room, if any, for Grievant to distance himself from Resident. (A Exh. 10).

8. Resident is taller and heavier than Grievant. (A Exh. 10; Testimony of Former Team Leader). He has an extensive history of mental illness. Also, Resident is one of the most severely aggressive individuals housed at the Agency, necessitating a behavior intervention plan. Resident has a history of persistent explosive behavior and causing serious injuries to people. This includes Resident becoming agitated, followed by aggressive behaviors such as hitting others repeatedly. Because of his severe aggressive conduct, his behavior plan permits mechanical restraints. He is the only resident with such restraints in his behavior plan. (Testimony of Psychologist; G Exh. 3).

9. Also, Resident's behavior plan detailed that when Resident comes in an area and walks back and forth, looking agitated, staff is supposed to redirect him or socialize with him. Socializing is defined as responding to any inquiry of his once, as responding more will not alleviate his agitation. (Testimony of Acting Team Leader; G Exh. 3).

10. Resident's behavior plan does not endorse staff running away from Resident once he becomes aggressive. (Testimonies of Psychologist and Investigator).

11. Psychologist has been Resident's psychologist since 2006. As such he is very familiar with Resident. He conducts comprehensive evaluations of Resident, assists in designing

behavior programs for Resident, and is responsible for determining when mechanical restraints are needed. (Testimony of Psychologist).

In the past, Psychologist has also held the position in the Department/Agency of abuse investigator. (Testimony of Psychologist).

12. Psychologist reviewed the video of the May 9, 2014 incident between Grievant and Resident. He then concluded based on his experience working with Resident that Grievant was in danger of being hurt and needed to get Resident away from him after Resident slapped Grievant on the back of his head. Psychologist concluded that had Resident not gotten Resident away from him, Resident would have charged at Grievant. Further, he concluded that Grievant's actions were permissible under Agency policy and were not abuse. (Testimony of Psychologist).

13. Retired TOVA trainer and coordinator worked for the Department for 37 years. Before his retirement in 2013, he was employed as a service training coordinator, as well as a TOVA trainer during the 1980-2013 timeframe. Further, Retired TOVA trainer had significant input in the Commonwealth's TOVA manual, as he was the primary TOVA trainer for 33 years. He also was a certified TOVA instructor/trainer. Retired TOVA trainer and coordinator has also held the position in the Department/Agency as its primary abuse investigator. (Testimony of Retired TOVA trainer; Testimony of O'Hara).

14. Retired TOVA Trainer trained Recreational Therapist/TOVA instructor and Investigator. (Testimony of Retired TOVA Trainer).

15. Retired TOVA Trainer is familiar with Resident. By way of example, in 2013, he was a member of the team designing Resident's behavior program. (G Exhs. 1 and 2; Testimony of Retired TOVA Trainer).

16. Retired TOVA Trainer reviewed the video of the May 9, 2014 incident and based on his background and experience regarding TOVA training and abuse, concluded that Grievant's behavior was reasonable and without undue force. He disagreed with the finding of Investigator. He also disagreed with TOVA Instructor's conclusion that Grievant did not use proper TOVA procedures during the incident. Retired TOVA Trainer had trained TOVA Instructor. (Testimony of Retired TOVA Trainer).

17. Former Team Leader worked with Resident on a regular basis for about eight years. She retired August, 2013. While working as team leader and hence supervisor, she witnessed his severe aggression and participated in meetings to design a behavior plan for him. Her observations of Resident indicated socialization often did not deescalate his aggression. Further, once Resident hit a person, additional battery followed. Accordingly, his behavior plan necessitated restraints. She viewed the video of the May 9, 2014 incident and Grievant's behavior after being slapped. She concluded that Grievant's behavior was consistent with procedures the Agency had taught regarding TOVA. She noted that his block was textbook. (Testimony of Former Team Leader).

18. Quality Control Manager has worked in the Department's central office for 30 years. She

manages the manuals, revisions, and instructors of the TOVA program. From time to time, Quality Control Manager may be asked to review a video by one investigating an abuse allegation to render an opinion as to whether abuse has occurred. (Testimony of Quality Control Manager).

19. Because Investigator had not taught TOVA in a while and was unsure whether what he reviewed in the video was abuse, he requested Quality Control Manager review the video and render an opinion. Upon her review, she concluded abuse had taken place. Specifically, she found that because Grievant's hand was in Resident's face during the incident, abuse had occurred. She also noted that Grievant failed to give Resident space. (Testimony of Quality Control Manager).

20. Quality Control Manager testified that TOVA instruction does not direct an employee to put his hands on a resident, unless the resident is harming himself or others. Further, she noted that TOVA teaches employees to take a stance with their hands up and give the resident some space. Quality Control Manager testified that blocking is not taught to employees as an acceptable procedure to use. (Testimony of Quality Control Manager).

21. Quality Control Manager has had no interactions with Resident and was not familiar with him until viewing the video of the May 9, 2014 incident. (Testimony of Quality Control Manager).

## **TOVA**

22. Therapeutic Options of Virginia (TOVA) is a procedure taught for managing aggression. Its goal is to maintain safety. It is about redirecting forces, particularly the force of an aggressor or self injurious person. When employees are trained regarding the TOVA technique, they are informed that their application of TOVA in a given situation may not be precisely as taught in a class. TOVA has been used by the Department since 2002. (A Exh. 7; Testimonies of Retired TOVA Trainer, Acting Team Leader, Quality Control Manager, and Investigator).

20. The TOVA manual teaches that when a person is charging toward you to attack you, your hands should remain open. This is so, because making a fist may suggest to the other person that you are attempting to fight. (A Exh. 7, p. 1).

21. The TOVA manual does not address the situation where someone is being attacked from behind and while seated in a chair. (Testimony of Psychologist; A Exh. 7).

However, the Agency has taught that when possible, if an employee is hit from behind by an aggressor, the employee should turn around, face the person, and put distance between the aggressor and employee. (Testimonies of Investigator and Quality Control Manager).

22. Blocking is a permissible technique employed by TOVA and the Agency. One form of blocking is putting your hands up to prevent being hurt by an aggressor. In addition, in cases where an individual could inflict harm to himself, blocking includes putting your hands between the person's hands and his head to prevent the individual from hurting himself. Blocking can

also include taking a stance with your hands up (Testimony of Psychologist; G Exhs. 10 and 11; Testimony of Quality Control Manager).<sup>3</sup>

23. At the time Investigator conducted the investigation, he had not taught TOVA for a while. (Testimony of Investigator).

24. Certified TOVA trainers/instructors are superior to TOVA instructors. The certified instructors train the TOVA instructors. TOVA Instructor is not certified. (Testimony of Quality Control Manager and TOVA Instructor).

## **POLICY**

25. In pertinent part Departmental Instruction 201, section 201-3 defines abuse as follow:

...[A]ny act or failure to act by an employee or other person responsible for the care of an individual in a department facility that was performed or was failed to be performed knowingly, recklessly, or intentionally, and that caused her might have cause physical or psychological harm, injury or death to a person receiving care or treatment for mental illness, mental retardation or substance abuse.

(A Exh. 8).

26. DI 201, at 201-3 continues by giving several examples of abuse. One example pertinent to this case is “use of excessive force when placing a person in physical or mechanical restraint.”

(A Exh. 8).

27. Agency Policy #4060 references DI 201 regarding abuse and neglect and incorporates by reference DI 201’s definition of abuse.. (A Exh. 9).

## **DETERMINATIONS AND OPINION**

The General Assembly enacted the *Virginia Personnel Act, VA. Code §2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee’s ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its

---

<sup>3</sup> While Quality Control Manager testified that there was no blocking permitted by TOVA, her testimony shows TOVA does permit one to take a stance when attacked by an aggressor and put one’s hands up. Hearing Officer finds that while this procedure may not be identified as a block per se, in effect it is a form of a block. Hence the Hearing Officer finds for this reason as well as the testimony of other witnesses that the Agency permits blocking to address aggressive residents. (Testimonies of Quality Control Manager, Psychologist, Former Team Leader).

employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

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

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>4</sup>

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (Policy 1.60). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. Further, Group III offenses are the most severe and normally a first occurrence warrants termination unless there are sufficient circumstances to mitigate the discipline. *See* Standards of Conduct Policy 1.60.

On May 27, 2014, 2014, management issued Grievant a Group III Written Notices with removal for the reasons stated in the above section. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

## **I. Analysis of Issue(s) before the Hearing Officer**

### **Issue: Whether the discipline was warranted and appropriate under the circumstances?**

The Agency contends Grievant abused a resident by using excessive force during the incident detailed in "Findings of Facts" 1 and 2.

Several witnesses testified they reviewed the video of the incident multiple times and Grievant complied with Agency policy on handling an aggressive resident. By way of example, Psychologist testified that Grievant's behavior was proper. He is Resident's psychologist.

---

<sup>4</sup> Grievance Procedural Manual §5.8

Psychologist's testimony indicated that after Grievant was slapped by Resident, Grievant was in danger of being hurt and Grievant needed to get Resident away from him. Psychologist's testimony went on to indicate that had Grievant not gotten the Resident away from him, Resident with his agitated and aggressive nature would have charged at Grievant again. Psychologist testified that Grievant blocked the Resident from employing further battery on Grievant and that Grievant's blocking procedure was proper.

Former team leader and supervisor was also familiar with Resident. She substantiated Psychologist's testimony. She referred to Grievant's blocking as "textbook." She also noted Grievant employed proper TOVA procedures. In addition, Former Team Leader testified that socialization often failed to deescalate Resident's aggression.

Further, Retired TOVA Trainer reviewed the video several times. He was a certified TOVA trainer and even trained the TOVA instructor who testified on behalf of the Agency. The Retired TOVA Trainer disagreed with the investigator's finding and that of the TOVA instructor. Retired TOVA Trainer concluded after watching the video that Grievant's behavior and procedures used were reasonable and he did not use of excessive force. His recognition that TOVA procedures must be adapted to the situation was corroborated by Acting Team Leader. By way of illustrating this point, Acting Team Leader testified as follows:

"TOVA only really works in the classroom. The reason I say this is because in the classroom it is set, but our clients have slight problems and they don't come at us in normal ways, and sometimes we have to maneuver differently."

The Hearing Officer had an opportunity to observe the demeanor of each of the forenamed witnesses. She also considered their knowledge of Resident, his behavior plan, and the use of permissible procedures when dealing with Resident/an aggressive resident. Of further note, Psychologist and Retired TOVA Trainer had experience investing the abuse of residents. Having undergone this thorough consideration, the Hearing Officer finds the testimony of the above mentioned witnesses persuasive and she gives great weight to it. Hence, the Hearing Officer finds the Agency has not met its burden and shown that Grievant abused Resident by using excessive force or in any other manner.

Having made this decision, the Hearing Officer also considered all other evidence of record, to include the testimony of Quality Control Manager. The Hearing Officer was not persuaded by her testimony that Grievant engaged in abusive behavior. Indeed, Quality Control Manager's testimony substantiates that there was no abuse. For example, she testified that TOVA does not direct an employee to put his hands on an employee **unless** the resident is harming himself or others. (Emphasis added). The evidence shows Grievant had just received a slap with force across the back of his head. Further, the evidence indicates that Resident does not usually stop with one blow or hit. Hence, without Grievant taking the action he did, it is very likely he would have suffered another hit. Thus, by Quality Control Manager's own testimony, because Grievant was already harmed and facing imminent harm, Agency policy permitted him to place his hands on Resident for safety and to prevent further harm. Of note as well, the looming harm to Grievant is evident by the superior height and size of Resident as compared to

Grievant.

In addition, Quality Control Manager testified that TOVA teaches one to take a stance with one's hands up and give the aggressor space. The evidence shows that at one point, Grievant did raise his hands. No fist was made. Regarding giving the aggressor space, the evidence shows there was little or no space for Grievant to get away from Resident. In addition, the evidence shows that Resident's behavior plan did not endorse staff running away from Resident once he becomes aggressive. What is more, the evidence demonstrates that Quality Control Manager has only worked in the central office and has no familiarity with Resident (to include his behavior plan and how socialization is to occur to avoid further aggression) and less experience regarding the practical application of TOVA.

Further, the Hearing Officer was not persuaded by the testimony of Investigator or TOVA Instructor. These witnesses concluded Grievant's actions constituted abuse. Yet both were trained in TOVA by the Retired TOVA Trainer. As mentioned above, this trainer, with more experience in the use of TOVA, reviewed the video and concluded Grievant's technique, while not perfect was acceptable practice. In addition, Investigator admitted that he had not taught TOVA in a while.

What is more, the Hearing Officer did consider the video, the statement Grievant made to his supervisor at the time of the incident regarding having made a mistake, as well as the testimony of Facility Director. However, considering all the evidence, whether specifically mentioned or not, the Hearing Officer finds the Agency has not met its burden.

Hence any discipline for Grievant's actions on May 9, 2014, would be inconsistent with law or policy. This is so because the evidence fails to show his behavior was misconduct

## **II. Decision and Order**

Therefore, for the reasons stated here, the Hearing Officer rescinds the Agency's discipline.

Moreover, the Agency is ordered to take the following action:

1. rescind the Group III Written Notice with termination;
2. pay full back pay for the period Grievant has been separated from his job (back pay is to be offset by interim earnings);
3. appropriately restore other benefits and seniority;
4. reinstate Grievant to his former position or, if occupied, to an equivalent position.

### **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 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 N. 14th St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371 – 7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 N. 14th St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov). or by fax to (804) 786-1606.

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 provide a copy of all of your appeals 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 requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. 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>5</sup>

Entered this 3rd day of September, 2014.

---

Ternon Galloway Lee, Hearing Officer  
cc: Agency Advocate/Agency Representative  
Grievant/Grievant's Advocate  
EDR's Director

---

<sup>5</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.