

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 07/21/15; Decision Issued: 07/29/15; Agency: DBHDS; AHO: William S. Davidson, Esq.; Case No. 10623; Outcome: Full Relief; **Administrative Review: EDR Ruling Request received 08/13/15; EDR Ruling No. 2016-4209 issued 09/16/15; Outcome: Remanded to AHO; Remand Decision issued 09/24/15; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 08/13/15; DHRM Ruling issued 10/06/15; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 10623

Hearing Date: July 21, 2015  
Decision Issued: July 29, 2015

**PROCEDURAL HISTORY**

On March 31, 2015, the Grievant was issued a Group III Written Notice for:

Violation of Departmental Instruction #201, Reporting and Investigating Abuse and Neglect of Clients. A facility investigation (Case #707-2015-009) has substantiated that on 2/24/15, you were physically and **verbally** abusive to individual (DM). While showering ([the Patient]) in an ICF home in [locality], you scrubbed his back so hard that it re-opened an old wound. Also when ([the Patient]) started to whine and cry, **you threatened to place him in handcuffs** and you used an unauthorized restraint technique by holding his arms across his chest, which kept him pinned to a couch for a **short period of time** to keep him from picking at his face and head. 24-Hour Letter issued on 4/16/15. <sup>1</sup> (Emphasis added)

On April 24, 2015, pursuant to this Written Notice, the Grievant was terminated. <sup>2</sup> On May 22, 2015, the Grievant timely filed a grievance to challenge the Agency's actions. <sup>3</sup> On June 10, 2015, this appeal was assigned to a Hearing Officer. Due to the parties' calendar conflicts, the hearing in this matter was held on July 21, 2015, at the Agency's location.

**APPEARANCES**

Advocate for Agency  
Grievant  
Witness

**ISSUES**

Did the Grievant physically and verbally abuse Individual Patient (“[the Patient]”)?

**AUTHORITY OF HEARING OFFICER**

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

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

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

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. 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. 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 the witness, I make the following findings of fact:

The Agency provided me with a notebook containing ten tabs and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

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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 Grievant provided me with no documentary evidence, choosing to rely on the documentation in Agency Exhibit 1.

The facts in this case are largely uncontradicted. The issue is what inference to draw from those facts. The Grievant, on or about February 24, 2015, was a member of a team from the Agency that escorted [the Patient] to [the local] ICF. [The local ICF] is a facility in [locality], and it was hoped that [the Patient] could transition from the Agency's location to [the local ICF]. On February 24, 2015, the Grievant showed two staff members of [the local ICF], AB and JJ, how to shower [the Patient]. During the course of this shower, a pre-existing scab that was on [the Patient's] back, approximately one centimeter in size,<sup>8</sup> became dislodged and bled. AB and JJ, who were present during this incident, testified before me and both testified that they felt that the Grievant was scrubbing [the Patient's] back too strongly and that caused the scab to be removed.

Following his shower, [the Patient] laid on a sofa with his head in the lap of AB and his feet in the lap of the Grievant. Pursuant to the testimony of AB, over the course of one to two hours, [the Patient] would - attempt to scratch his face; the Grievant would take [the Patient's] hands and hold them in [the Patient's] lap for a short period of time; [The Patient] would leave the sofa; and then [the Patient] would return to the sofa. AB did not testify as to what she did during this time period to prevent [the Patient] from scratching his face other than to eventually suggest that she and the Grievant walk with [the Patient].

These are the only two events for which any evidence was introduced before me. The Agency completely abandoned any thought of the allegation in its Written Notice dealing with the Grievant threatening to handcuff [the Patient]. The issues regarding handcuffs was a part of the Group III Written Notice<sup>9</sup> and it was a significant part of a letter dated April 16, 2015, to the Grievant from MH, the person who signed the Group III Written Notice.<sup>10</sup> In this letter, MH stated in part, as follows:

...Also, when [the Patient] started to whine and cry, you threatened to place him in handcuffs.<sup>11</sup>

Further, in his Investigative Report, the Agency investigator, who testified before me, wrote in part as follows:

...On 2/24/15 [local] ICF staff member [AB] states that she personally heard [Grievant] threaten to use handcuffs on [the Patient] if he did not stop whining and crying. This reportedly happened just after the shower. **The fact that [Grievant] had 'no idea about that' shows continued deception on the part of [Grievant].**<sup>12</sup> (Emphasis added)

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<sup>8</sup> Agency Exhibit 1, Tab 5, Page 1

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

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

<sup>11</sup> Agency Exhibit 1, Tab 2, Page 2

<sup>12</sup> Agency Exhibit 1, Tab 3, Page 11

The issue regarding the handcuffs directly relates to the credibility of the Agency witnesses who testified before me. AB gave the investigator a written and signed statement that is dated April 5, 2015.<sup>13</sup> That written statement reads in part as follows:

Q: ...What can you tell me about a staff member of [the Agency] telling [the Patient] that he would be handcuffed if he did not stop picking his face and head? Where were you and who was present when it was said?

A (by AB): I did hear these remarks; however lack knowledge of detail as I was distracted with other resident...<sup>14</sup>

Four days later, on April 9, 2015, the investigator had a telephonic interview with AB. In this unsigned interview, the investigator summarized AB's response to the following question as follows:

Q: What can you tell me about a staff member of [the Agency] telling [the Patient] he would be handcuffed if he did not stop picking at his face and head? Where were you and who was present when this happened?

A (by AB): ...I do not remember when it was but [the Patient] would not stop whining and the [Grievant] said if he did not stop he would put handcuffs on [the Patient]. I heard this but I do not remember where we were at the time...

Q: So the [Grievant] held [the Patient] down for picking his face and head and he threatened to handcuff him for whining is that correct?

A (by AB): Yes that is exactly what happened. Like I said I don't remember where we were when the [Grievant] threatened to use handcuffs on [the Patient] but I did hear him say that to [the Patient].<sup>15</sup>

Clearly, in four days, AB's testimony has changed substantially. In her written statement, she "lacks knowledge of detail." In the summary of the telephonic interview, the investigator has her clearly remembering that it was the Grievant who made the reference to handcuffs. In her sworn testimony before me, she never referenced a threat of the use of handcuffs. Finally, in his conclusion, the investigator stated that AB personally heard the Grievant threaten to use handcuffs on [the Patient] and the fact that the Grievant stated that he had 'no idea about that' showed continued deception on the part of the Grievant. It is difficult to determine the truth in AB's written and signed statement, the investigator's summary of her telephonic statement and her actual testimony before me. She starts from a position of lacking

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<sup>13</sup> Agency Exhibit 1, Tab 4, Pages 3-4

<sup>14</sup> Agency Exhibit 1, Tab 4, Page 4

<sup>15</sup> Agency Exhibit 1, Tab 4, Pages 5-6

knowledge of detail regarding the handcuffs, then moves to specific knowledge regarding the detail about the handcuffs and then there is deafening silence regarding the handcuffs in the testimony from her before me. Accordingly, her credibility and that of the investigator regarding the threat of handcuffs is lacking and that impacts the credibility of the remainder of the allegations in the Written Notice.

The other staff member for [the local ICF], JJ, who was present during the shower emphatically testified that she heard nothing about handcuffs.

Regarding the scab on [the Patient], there appears to be no dispute that a scab did dislodge from [the Patient's] back during the course of his shower. Apparently the amount of blood that came from the dislodged scab was so inconsequential that, when [the Patient] was dried, it left a mark that was the size of either a dime or a quarter on the towel and it required no band-aid.

The two [local ICF] staff members who testified before me were dealing with [the Patient] for the first time. Perhaps the real concern regarding the shower was best stated by JJ, when her telephonic interview of March 18, 2015, was summarized by the investigator in part as follows:

...He was being treated like a little animal. We have a trolley and we have a regular bath tub. **[Grievant] put [the Patient] on all fours.** Honestly what I said to [employee] was he put him into the tub on all fours like a dog. That's what it reminded me of was a dog on all fours. It was AB and me in the bathroom with the [Grievant] and I got nauseated at the way he was washing [the Patient]. The [Grievant] was acting like this is how we do it around [the Agency]. He acted like there was nothing wrong with treating [the Patient] like this...<sup>16</sup>  
(Emphasis added)

Both of the [local ICF] employees testified that they were shocked and mortified at seeing [the Patient] on all fours. Indeed, JJ, in her written response to the investigator stated in part as follows:

...**[The Patient] got into the tub and went straight into the hands and knees position.** Water was coming out at full force from shower head and the spout part. [The Patient] put his head under it and it was coming out so fast me and [AB] told [Grievant] [the Patient] was going to drown. [Grievant] said [DM] was ok.<sup>17</sup> (Emphasis added)

JJ, in her written and signed statement, said, "[The Patient] got into the tub and went straight into the hands and knees position." In the investigator's synopsis of her telephonic statement, he wrote that she said, "[Grievant] put [the Patient] on all fours." Both JJ and AB testified before me that [the Patient] put himself into a position that they characterized as a "dog on all fours." Again, I have a significant discrepancy between witnesses written and signed

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<sup>16</sup> Agency Exhibit 1, Tab 4, Page 11

<sup>17</sup> Agency Exhibit 1, Tab 4, Page 8

statements and the investigator's synopsis of a telephonic statement and actual testimony before me.

Both JJ and AB testified before me that they now realize that this type of posture, while being bathed, is normal for [the Patient].

When I consider that this was the very first time that JJ and AB had seen [the Patient] take a shower, that they were shocked and mortified that he was on all fours, and that the water was coming out with enough force that they were concerned about [the Patient] drowning, it is as likely as not that any scab on [the Patient's] back either washed off because of the water flow, or came off with **reasonable** force while being washed.

Departmental Instruction 201(RTS)03 at 201-3, states in part as follows:

#### Abuse

This means any act...by an employee...responsible for the care of an individual in a Department facility that was performed...**knowingly, recklessly or intentionally**, and that caused or might have caused physical or psychological harm, injury...to a person receiving care...for mental illness, mental retardation...Examples of abuse include, but are not limited to, acts such as:

- Rape, sexual assault, or other criminal sexual behavior;
- Assault or battery;
- Use of language that demeans, threatens, intimidates or humiliates the person;
- Misuse or misappropriation of the person's assets, goods or property;
- Use of excessive force when placing a person in physical or mechanical restraint;
- Use of physical or mechanical restraints on a person that is not in compliance with federal and state laws, regulations, and policies, professionally accepted standards of practice or the person's individualized services plan; and
- Use of restrictive or intensive services or denial of services to punish the person or that is not consistent with his individualized services plan. <sup>18</sup> (Emphasis added)

From the examples provided above, the only one that possibly applies is assault or battery. There is no credible evidence before me that the Grievant assaulted or battered [the Patient]. Further, to the extent that the Agency would deem that the washing-off of the scab was either an assault or battery, no credible evidence was presented before me that the Grievant acted knowingly, recklessly, or intentionally in the removal of the scab.

[Facility] Policy 128 defines abuse in part as follows:

Abuse - means any act...by an employee...responsible for the care of an individual receiving services that was performed...**knowingly, recklessly or**

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<sup>18</sup> Agency Exhibit 1, Tab 8, Page 1

**intentionally**, and caused or might have caused physical or psychological harm, injury...to an individual receiving services.<sup>19</sup> (Emphasis added)

The Grievant testified before me that he did not scrub [the Patient's] back with excessive force. Further, an employee of the Agency for 22 years and is now retired and working part-time for the Agency testified before me that, in dealing with the Patient] during showers, he himself has scrubbed off scabs in the past. This employee testified that [the Patient] often inadvertently removes his own scabs.

In weighing the testimony of the two employees from [the local ICF], who were observing [the Patient] shower for the first time, the testimony of the Grievant and the testimony of a seasoned Agency employee, I find from the evidence presented before me that there was no abuse in the shower.

Finally, the issue of unauthorized restraint arises. The investigator testified that removing [the Patient's] hands from his face and placing them on his chest or lap was a violation of Therapeutic Options of Virginia ("TOVA"). There was no testimony presented before me either orally or documentary, as to what a proper TOVA technique would be in this situation. The investigator described to a Psych Associate 1 the behavior that had been told to him by AB. This Psych Associate, who was not present, stated that the Behavioral Support Plan for [the Patient] included the following:

If [the Patient] is scratching himself, it may be necessary to gently redirect his hands away from his head and face, notify the nurse, and/or other medical staff of any injuries during the episode and document accordingly.

This Psych Associate opined that the facts given to the investigator and then as the investigator summarized them to her, indicated that the Grievant's behavior was not an approved TOVA technique. However, I have no evidence before me as to what would be an approved TOVA technique. The testimony before me is that [the Patient] had his head in the lap of the [local ICF] staff member and was scratching his face and that the Grievant took [the Patient's] hands and placed them in his lap. On one occasion I have testimony that it was for a "short period." On another occasion, I have testimony that this went on for "one to two hours" with [the Patient] getting up and walking around intermittently during this time frame. I have no credible testimony before me that the Grievant did anything other than prevent [the Patient] from self-injurious behavior. Indeed, the advocate for the Agency, at one point during his questioning of a witness stated, "No one would be criticized for stopping a child from touching a hot stove." [The Patient's] Behavioral Support Plan states in part under "Interventions" as follows:

...If [the Patient is scratching himself, it may be necessary to gently redirect his hands away from his head and face...<sup>20</sup>

I have no credible evidence that the Grievant did anything other than comply with this Intervention Policy. I heard no credible testimony that the Grievant acted other than reasonably.

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<sup>19</sup> Agency Exhibit 1, Tab 9, Page 11

<sup>20</sup> Agency Exhibit 1, Tab 6, Page 6



And, of equal importance, I heard no evidence as to what the Agency thinks that the Grievant should have done.

It is of some interest that the events before me took place on February 24, 2015. Apparently, the employees and/or management of [the local ICF] were so concerned regarding this that it took them nine days to report it to the Agency and it took approximately 31 days for that person to report it to the Director at the Agency.

### **MITIGATION**

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the Agency disciplinary action.” 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.

Because of my finding that the Grievant followed proper protocol and there being insufficient evidence for the remaining allegations, I do not need to address mitigation, pursuant to such evaluation.

### **DECISION**

For reasons stated herein, I find that the Agency has not borne its burden of proof in this matter. I order that the Agency reinstate the Grievant to the same position or an equivalent position. I further order 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.

### **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

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>21</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>22</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>21</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>22</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
RECONSIDERATION DECISION OF HEARING OFFICER  
In Re: Case No: 10623

Hearing Date: July 21, 2015  
Decision Issued: July 29, 2015  
EDR Request for Reconsideration Received: September 16, 2015  
Response to Request: September 23, 2015

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review by both the Department of Human Resource Management ("DHRM") and the Office of Employee Dispute Resolution ("EDR"). A request for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A copy of all requests must be provided to the other party and to the DHRM Director. I have received an Administrative Review Ruling from the Director of EDR requesting that I reconsider my original Decision.

OPINION

Pursuant to guidance from EDR, I have used initials instead of names for witnesses and the initials may not be used to identify the parties who testified. Specifically, I used the initials "AB" in my Decision for an Agency witness who testified before me whose actual initials are "CO." While it is serendipitous that the initials for a witness for the Grievant were "AB," as used in my Decision, AB was the witness for the Agency whose actual initials are CO.

The first issue raised by the Director relates to witness credibility.<sup>23</sup> The Director requested that I reconsider my Findings regarding Agency witness CO. The Director set forth the following written response, dated April 5, 2015, from CO:

...I did hear these remarks; **however, lack knowledge of detail as I was distracted with other resident...**<sup>24</sup> (Emphasis added)

After again being questioned by the Investigator, on April 9, 2015, CO telephonically stated the following:

...I do not remember when it was but [Patient] would not stop whining and the guy [Facility] staff said if he did not stop he would put handcuffs on

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<sup>23</sup> Administrative Review dated September 16, 2015, Page 3

<sup>24</sup> \*\* Originally cited at Agency 4(b), at 2; Currently cited at Administrative Review dated September 16, 2015, Page 3

[Patient]. I heard this but I do not remember where we were at the time...  
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While none of this was introduced before me at the hearing by way of the Agency questioning its own witness about this topic, it is simply problematic with regards to credibility when, at the time closest to the actual event, a witness states that she has a “lack of knowledge of detail as she was distracted with other residents.” The first statement was made in writing when, I have to presume, this witness was given the time and space to compose her thoughts. Subsequently, when further questioned about this matter telephonically, her lack of knowledge of detail had greatly improved and now she could name a particular person, while still having no recollection as to where she was when this took place and presumptively when it took place.

Had this witness actually testified to that before me, I would have had serious concerns regarding how her memory was refreshed the second time that she spoke to the investigator. However, I was not given the opportunity to hear any testimony to attempt to clarify how it is that her knowledge became significantly better later in time after the alleged event.

The Director of EDR poses as a footnote the problem that I had as the Hearing Officer in this matter, wherein he states as follows:

It is troubling in this case that arguably the worst allegation against the grievant, a third instance of misconduct listed on the Written Notice, was apparently not discussed at all at the hearing. The hearing officer found that the agency “completely abandoned any thought” of its allegation that the grievant threatened to place the patient in handcuffs. (Hearing Decision at 3) EDR’s review of the record demonstrates that the agency did not produce evidence at the hearing, beyond those documents already in the agency’s notebook of exhibits, regarding the statement about the handcuffs. Thus we cannot find the hearing officer’s determination that the handcuff allegation was abandoned at all contrary to the record. Indeed, this third allegation is not discussed in the agency’s request for administrative review, either.<sup>26</sup>

As the Director states, “arguably the worst allegation against the Grievant was not discussed at all at the hearing.” While this is not governed by Rules for Conducting Grievance Hearings, Section V(B), regarding adverse factual inferences, I believe that I may make the following assumptions:

1. Either the Agency made a decision on its own that it was concerned regarding the written and telephonic testimony of this witness;
2. The Agency simply forgot that this was a significant part of its case; or,

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<sup>25</sup> \*\* Originally cited at Agency 4(c), at 1; Currently cited at Administrative Review dated September 16, 2015, Page 3

<sup>26</sup> Administrative Review dated September 16, 2015, Page 4 (footnote 18)

3. The Agency had changed its mind regarding threats of handcuffs.

The Agency, in this matter, was represented by a skilled advocate, and I do not for a moment believe that he simply forgot to put on evidence regarding this allegation. Further, I do not find that the Agency determined that threats of handcuffs was no longer an issue. The Agency put evidence before me in its Exhibit 1 containing statements that were simply unbelievable by me, unless I assumed that memory became better with the passage of time or memory became better with either unintended suggestion or pressure from the questioner. I find that if one is willing to not be completely truthful and not forthcoming regarding what should have been the most serious charge before me, then the likelihood of truthfulness on other allegations is subject to being questioned. By itself, this does not render the witness's testimony to be unbelievable; however, it is one of many things including demeanor, forthrightness, and lack of internal contradiction of her own testimony that I considered in determining the credibility of this witness and others.

The second issue brought before me by the Director deals with the re-opened wound of the Patient.<sup>27</sup> I will simply restate what was in my original Decision, which reads as follows:

Regarding the scab on [the Patient], there appears to be no dispute that a scab did dislodge from [the Patient's] back during the course of his shower. Apparently the amount of blood that came from the dislodged scab was so inconsequential that, when [the Patient] was dried, it left a mark that was the size of either a dime or a quarter on the towel and it required no band-aid.

The two [facility] staff members who testified before me were dealing with [the Patient] for the first time. Perhaps the real concern regarding the shower was best stated by JJ, when her telephonic interview of March 18, 2015, was summarized by the investigator in part as follows:

**...He was being treated like a little animal.** We have a trolley and we have a regular bath tub. **[Grievant] put [the Patient] on all fours.** Honestly what I said to [employee] was he put him into the tub on **all fours like a dog.** That's what it reminded me of was a dog on all fours. It was CO and me in the bathroom with the [Grievant] and I got nauseated at the way he was washing [the Patient]. The [Grievant] was acting like this is how we do it around [the Agency]. He acted like there was nothing wrong with treating [the Patient] like this...<sup>28</sup> (Emphasis added)

Both of the [facility] employees testified that they were shocked and mortified at seeing [the Patient] on all fours. Indeed, JJ, in her written response to the investigator stated in part as follows:

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<sup>27</sup> Administrative Review dated September 16, 2015, Page 4

<sup>28</sup> \*\*Originally cited at Agency Exhibit 1, Tab 4, Page 11; Currently cited at Hearing Officer Decision, dated July 29, 2015, Page 5, Case No. 10623

...[The Patient] got into the tub and went straight into the hands and knees position. Water was coming out at full force from shower head and the spout part. [the Patient] put his head under it and it was coming out so fast me and [CO] told [Grievant] [the Patient] was going to drown. [Grievant] said [the Patient] was ok.<sup>29</sup> (Emphasis added)

JJ, in her written and signed statement, said, “[the Patient] got into the tub and went straight into the hands and knees position.” In the investigator’s synopsis of her telephonic statement, he wrote that she said, “ [Grievant] put [ the Patient] on all fours.” Both JJ and AB testified before me that the Patient put himself into a position that they characterized as a “dog on all fours.” Again, I have a significant discrepancy between witnesses written and signed statements and the investigator’s synopsis of a telephonic statement and actual testimony before me.

Both JJ and AB testified before me that they now realize that this type of posture, while being bathed, is normal for the Patient.

When I consider that this was the very first time that JJ and CO had seen [the Patient] take a shower, that they were shocked and mortified that he was on all fours, and that the water was coming out with enough force that they were concerned about [the Patient] drowning, it is as likely as not that any scab on DM’s back either washed off because of the water flow, or came off with **reasonable** force while being washed.<sup>30</sup>

Regarding the testimony that was presented before me by these witnesses and the Grievant, I simply found the Grievant’s testimony to be more credible and believable.

The final issue raised by the Director was with regards to unauthorized restraint.<sup>31</sup> The Director quite cogently sums this issue with his statement:

The crux of this particular issue, however, is what factual determinations did the hearing officer make as to the grievant’s alleged misconduct and whether those determinations are supported by the record evidence.<sup>32</sup>

Again, the determination that I made resulted in an attempt to discern the most credible testimony. The Agency’s own documentation states that the staff member should, “gently redirect the patient’s hand away from the head and face.” I heard no testimony that the Grievant did anything other than comply with that rule. There was testimony that the Grievant held the Patient’s hands in the Patient’s lap. There was, however, no testimony before me to indicate whether that was for a second or for an hour; or whether force was used or no force was used. There was evidence before me that this went on for approximately two hours with the Patient periodically leaving the sofa and then returning. When an Agency relies simply on the language,

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<sup>29</sup> \*\*Originally cited at Agency Exhibit 1, Tab 4, Page 8; Currently cited at Hearing Officer Decision, dated July 29, 2015, Pages 5-6, Case No. 10623

<sup>30</sup> Hearing Officer Decision, dated July 29, 2015, Pages 5-6, Case No. 10623

<sup>31</sup> Administrative Review dated September 16, 2015, Page 5

<sup>32</sup> Administrative Review dated September 16, 2015, Page 5

“gently redirect his hands away from his head and face,” and then offers no testimony as to exactly what that means, then the Agency fully leaves the matter in the hands of the Hearing Officer who is hearing this matter *de novo* to determine whether or not the Patient’s hands were gently redirected from the Patient’s face and exactly what that means. Does that mean that his hands can be redirected to his ears? Does that mean that his hands can be redirected to his scalp? Does that mean that his hands can be redirected to thin air? Does that mean that his hands can be redirected to his chest? Does that mean that his hands can be redirected and placed together as if the Patient was praying? Does that mean that his hands can be redirected to his lap? Unfortunately, I effectively had no credible testimony whatsoever to address this.

Further, to the extent that the Agency objects to the Hearing Officer using the words, “knowingly, recklessly and intentionally,” then the Agency surely must be complaining about its own Departmental Instruction 201 RTS03, which uses those words. I simply am interpreting the Agency’s own rule. To the extent that the Agency wishes to delete those modifiers from its Departmental Instruction, then it is surely free to do so.

### DECISION

Having considered the Administrative Review of the Director of EDR, I conclude that there is no reason to set aside my original Decision in this matter.

### APPEAL RIGHTS

Both parties will have the opportunity to request an administrative review of the hearing officer’s reconsidered decision on any other new matter addressed in the remanded decision (i.e., any matters not previously part of the original decision).<sup>33</sup> Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the remand decision.<sup>34</sup>

Pursuant to Section 7.2(d) of the Grievance Procedure Manual, the Hearing Officer’s original Decision becomes a final hearing Decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the Hearing Officer has issued his remanded Decision.

### JUDICIAL REVIEW OF FINAL HEARING DECISION

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.<sup>35</sup> Any such appeal must be based on the assertion that the final hearing Decision is contradictory to law.<sup>36</sup>

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<sup>33</sup> See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

<sup>34</sup> See Grievance Procedure Manual Section 7.2.

<sup>35</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

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Hearing Officer

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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>36</sup> *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).