

Issue: Group III Written Notice (client abuse); Hearing Date: 07/30/15; Decision Issued: 08/05/15; Agency: DBHDS; AHO: William S. Davidson, Esq.; Case No. 10627; Outcome: No Relief – Agency Upheld; **Judicial Review – Appealed to Staunton Circuit Court (09/04/15); Outcome: AHO’s decision affirmed (01/12/16) [CL150003990-00].**

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 10627

Hearing Date: July 30, 2015  
Decision Issued: August 5, 2015

**PROCEDURAL HISTORY**

On February 6, 2015, the Grievant was issued a Group III Written Notice for:

Positive finding of physical patient abuse under DI 201, Reporting and Investigating Abuse and Neglect of Clients.<sup>1</sup>

On February 6, 2015, in lieu of termination, this matter was mitigated and the Grievant was required to attend additional training on dealing with aggressive patients within six months from February 6, 2015.<sup>2</sup> On March 9, 2015, the Grievant timely filed a grievance to challenge the Agency's actions.<sup>3</sup> On June 29, 2015, this appeal was assigned to a Hearing Officer. On July 30, 2015, a hearing was held at the Agency's location.

**APPEARANCES**

Advocate for Agency  
Advocate for Grievant  
Grievant  
Witness

**ISSUES**

Did the Grievant commit physical patient abuse under DI 201?

**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-

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

<sup>2</sup> Agency Exhibit 1, Tab B, Page 5

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

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 tabs A-E. During the course of the hearing, a one-page email document was introduced as evidence and added as Tab F, to the Agency's documentary evidence notebook. 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 a notebook containing tabs A-D, and that notebook was accepted in its entirety as Grievant Exhibit 1, without objection.

A joint exhibit (a CD) was also introduced as evidence.

Most of the facts before me in this matter are undisputed. The patient ("Patient X"), is the person who was allegedly slapped in this matter. Patient X is seriously mentally challenged.<sup>8</sup>

On January 13, 2015, Patient X was in restraints, but those restraints allowed her to walk about the facility. She asked the Grievant if she could take a shower and the Grievant responded, "Not now, but perhaps later." Patient X became agitated and proceeded to follow the Grievant down a hallway. Joint Exhibit 1 shows some of this movement, but all of the parties step out of the screen prior to any alleged slapping of Patient X by the Grievant.

The first witness that the Agency presented before me was an employee who identified her job title as that of a Human Services Care Worker. This position is sometimes referred to as a DNA. This witness' ([Witness 1]) testimony before me was essentially identical to her written statement that she gave the investigator in this matter. In her written statement, she indicated the following:

[Grievant] was trying to talk with [Patient X]. [Patient X] started coming at [Grievant] in a verbally and physically threatening manner. ["CD"] was on direct with [Patient X] grabbed her left arm and I grabbed her right arm and we were holding her back from [Grievant]. [Patient X] made a noise in her throat as if to spit on [Grievant]. [Grievant] automatically reached up and slapped [Patient X] in a reflex manner. The slap was not hard and did not leave a mark.<sup>9</sup>

While [Witness 2] did not testify before me, she also provided a written statement, and in that statement, said as follows:

I was on direct observation with [Patient X] when she wanted to take a shower and asked [Grievant]. [Grievant] said, "no, not right now," because [Patient X] was agitated. [Grievant] started to walk away when [Patient X] followed her fast; [Grievant] explained again that she couldn't shower right then, but maybe later; [Patient X] spit in [Grievant's] face twice and [Grievant's] reaction was to smack [Patient X's] cheek.<sup>10</sup>

Accordingly, two of the four people who were present when this actual event took place, testified that the Grievant did in fact strike Patient X. Documents were introduced summarizing Patient X's statements to the investigator indicating that she had been slapped and that she continued to maintain this posture for several hours after the event. However, I heard from the attending psychiatrist who testified persuasively that Patient X could not be believed. [The

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<sup>8</sup> Agency Exhibit 1, Tab D, Page 15

<sup>9</sup> Agency Exhibit 1, Tab D, Page 30

<sup>10</sup> Agency Exhibit 1, Tab D, Page 32

attending psychiatrist] testified that Patient X consistently accused police, staff members, and doctors of raping her; delivering babies at night; those babies being stolen from her the next morning; being raped again the next night and delivering a baby the following night again and that baby also being stolen. This process repeated itself time and again. At one point when [the attending psychiatrist] was talking with Patient X, she stated to him as follows:

Forget it, I am just making all of this up. <sup>11</sup>

Finally, the Grievant forcefully testified before me that she raised her hand in a manner to block any further spittle that Patient X was trying to expectorate onto her.

Based on the testimony of [the attending physician], I assign no credibility to any of the statements made by Patient X. However, I do not need to rely on that testimony to make a decision in this matter. Both [Witness 1] and [Witness 2] testified that they witnessed the Grievant slap Patient X. A fair amount of testimony was offered as to [Witness 1's] bad hearing. This was done because she testified that she both saw and heard the slap. However, no testimony was elicited to discredit her sight. Further, no credible testimony was offered to indicate why [Witness 1] and [Witness 2] would wish to lie about or fabricate this incident.

Based on the burden of proof defined earlier in this Decision, I find that the Agency has borne its burden of proof and that its decision to issue a Group III Written Notice to the Grievant in this matter was proper.

### **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.

The Agency has already mitigated this matter from a Group III Written Notice with termination, to a Group III Written Notice with a requirement for further training.

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<sup>11</sup> Grievant Exhibit 1, Tab B, Page 1

## DECISION

For reasons stated herein, I find that the Agency has borne its burden of proof in this matter and that the issuance of the Group III Written Notice to the Grievant, with a requirement for further training, was proper.

## 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>12</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>13</sup>

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<sup>12</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>13</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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