

Issues: Group II Written Notice (client abuse), and Notice of Improvement Needed; Hearing Date: 08/16/16; Decision Issued: 09/04/16; Agency: DBHDS; AHO: Lorin A. Costanzo, Esq.; Case No. 10848; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 10848

Hearing Date: August 16, 2016
Decision Issued: September 4, 2016

PROCEDURAL HISTORY

On May 13, 2016 Grievant was issued a Group II Written Notice for Offense Category 81, "Patient/inmate/client abuse" (Offense date: 3/15/16). On June 2, 2016 Grievant filed her *Grievance Form A* to challenge the Agency's action. The matter went through the Resolution Steps and, when matters were not resolved to her satisfaction, on June 16, 2016 Grievant requested a hearing. Her request for hearing was qualified and undersigned was appointed hearing officer effective July 26, 2016.

A telephone conference was held on July 26, 2016 between Grievant, Agency Advocate at Hearing, and Hearing Officer. By agreement of the parties, the grievance hearing was held August 16, 2016 beginning at 10:00 a.m. at Facility.

APPEARANCES and EXHIBITS

- A. The following appeared at hearing:
- Agency's Advocate at Hearing
 - Agency Party Representative
 - Grievant (who was also a witness)
 - Grievant's Advocate at Hearing
 - Witnesses
- B. Exhibits were admitted, by agreement of the parties, *en masse* and consists of:
- a. One folder of Grievant's exhibits (page numbered 1-9).
 - b. One binder of Agency's exhibits (page numbered 1-169).
 - c. Three joint exhibits (admitted at hearing).

ISSUES

Whether the issuance of a Group II Written Notice was 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 action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.¹

The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.²

FINDINGS OF FACT

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

01. Grievant has been employed by Agency as a Direct Service Provider (D.S.P.) at Facility for approximately 4 years.³

02. Client is an approximately 60-year-old male who is non-verbal and non-ambulatory. He has resided at Facility since the early 1980's and has been diagnosed as having a profound Intellectual Disability.⁴ He has Cerebral Palsy with spastic quadriplegia, a history of seizures (last 12/84), and dysphagia.⁵ Client uses a wheelchair with seatbelt or a rollator. He uses gestures, body language and facial expression as a primary means of communicating his wants, needs, likes, and dislikes.⁶

03. Client independently feeds himself with the support of adaptive eating and positioning devices. He uses a long-handled Teflon spoon, nose cup, dycem, and sits in a wheelchair with protective chest straps and a headrest while eating.⁷ Due to medical conditions, including difficulty in swallowing, he needs liquids thickened to honey consistency, meats and pasta dishes pureed, and fruits and vegetables ground. He does not eat bread or bread products. When eating a meal or snack he must use a wheelchair equipped with chest straps and headrest. Client's Individual Service Plan ("ISP") indicates he may require Staff support with encouraging him to continue to eat as he will pause and stare.⁸

04. Client was on a follow-up visit to Group Home on 3/15/16. Grievant was accompanying Client on the visit to Group Home which was being evaluated as a possible placement for Client.⁹

05. On 3/15/16 an incident involving Grievant and Client occurred during the Group Home visit which led to an Agency investigation. Group Home staff prepared dinner for Client but he didn't appear to want to eat it. Group Home staff then prepared mashed potatoes for Client who took a few bites but did not seem interested in eating more.

¹ Dept. of Employment Dispute Resolution, *Grievance Procedure Manual*, Sections 5.8 and 9.

² Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

³ Testimony.

⁴ A. Ex. pg. 41, 82.

⁵ A. Ex. pg. 61.

⁶ A. Ex. pg.17, 48, 51-52.

⁷ A. Ex. pg. 57.

⁸ A. Ex. pg. 48-49, 50-77.

⁹ A. Ex. pg. 61-78.

Grievant told Client a number of times, in an elevated tone/voice, that he needed to eat and he had to eat. While saying this she put her hand over his hand, moved his hand to his spoon, and tried to get him to put food in his mouth. Client would close his mouth and turn his head away from her when this happened.¹⁰

While this was going on Grievant tried to give Client a pill. She placed the pill into his spoon of mashed potatoes and tried a number of times to get Client to swallow the spoon with mashed potatoes and his pill. However, Client kept turning his head away and clamping his mouth shut. Grievant told Client in an elevated voice a number of times he had to take his medication. Client continued to clamp his mouth shut, shake his head, and/or turn his head when she tried to put the spoon with the mashed potatoes and pill to his mouth. At one point, Client put the clothing protector he was using over his mouth when she attempted to give him the spoon with mashed potatoes and pill.¹¹

06. After failing a number of times to get Client to take the pill in the spoon of mashed potatoes, Grievant lowered the spoon. When Grievant had lowered the spoon, Client took the clothing protector down off his face. Grievant then took the pill out of the mashed potatoes with her fingers and pushed the pill into the cheek of Client's mouth using her ungloved fingers. While doing this with one hand Grievant had placed her other hand on Client's forehead. She then put a drink to his lips and said he had to drink. During these matters Client was, as provided in his ISP, secured in a wheelchair.¹²

07. Grievant does not contest she took the pill out of the mashed potatoes and put the pill in Client's mouth with her un-gloved fingers.¹³

08. Abuse allegations as to the 3/15/16 incident were reported to Facility Director on 3/16/16. On 3/16/16 Facility Director assigned Investigator to conduct an Agency investigation of the allegations.¹⁴

09. Investigator submitted a written report dated March 25, 2016, entitled "*Investigator's Summary*", a copy of which was tendered to Facility Director and to Facility Advocate. Investigator concluded, "The results of the investigation did not substantiate Abuse to [Client], based on physical, testimonial and documentary evidence."¹⁵

10. After receiving and reviewing the *Investigator's Summary* Facility Advocate requested Investigations Manager conduct a review the *Investigation Summary* and the Investigator's findings therein.¹⁶ Facility Advocate presented to Investigations Manager concerns with the findings of the Investigator. She indicated the evidence seems to support Grievant became impatient with Client, pressured him to eat, forced medication (with gestures and actions consistent with refusal), and this was immediately followed by the thickened liquid. She expressed concern evidence indicated Grievant created a danger to Client by forcing the pill into his mouth despite the dysphagia precautions in place.¹⁷

¹⁰ A. Ex. pg. 16-32.

¹¹ A. Ex. pg. 20-21,29, 32, 34.

¹² A. Ex. pg. 21, 29, 32, 34, 50-77.

¹³ A. Ex. pg. 35-36.

¹⁴ A. Ex. pg. 13 & 16-37.

¹⁵ A. Ex. pg. 16 et seq.

¹⁶ A. Ex. pg. 38.

¹⁷ A. Ex. pg. 38 and testimony.

11. Upon reviews conducted by Investigations Manager and Central Office Review Panel, the Investigations Manager affirmed the Investigator's finding of unsubstantiated Verbal/Psychological abuse but found Physical Abuse could be substantiated by a preponderance of the evidence with regard to [Grievant] force feeding Client medications, which the client had a right to refuse.¹⁸

12. On May 13, 2016 Grievant was issued a Group II Written Notice (Offense Date: 3/15/16) for Written Notice Offense Code 81 "Patient/inmate/client abuse". *Nature of Offense and Evidence* provided:

A finding of Physical Abuse was Substantiated that on March 15, 2016, you force fed a client his medications in which the client had a right to refuse. This resulted in a Violation of Departmental 201, Reporting and Investigating Abuse and Neglect of Clients and [Facility] Policy # 10 Resident Abuse. Violation of [Facility] Instruction 570, Behavioral Support Plans.

Furthermore, under *Section IV – Circumstances Considered* the Written Notice indicated:

Due to the employee's good work history, a Group Three and Termination was mitigated to a Group II and a Needs of Improvement.¹⁹

13. Grievant has received in-service training on Abuse/Neglect and Human Rights.²⁰ Grievant has read or had explain the contents of Instruction #010-Resident Abuse.²¹

CONCLUSIONS:

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 of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in part:

"It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001."

To establish procedures on Standards of Conduct and Performance for employees pursuant to §2.2-1201 of the Code of Virginia, the Department of Human Resource Management ("DHRM") promulgated the *Standards of Conduct, Policy No. 1.60, effective April 16, 2008*.²² 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 of Conduct* 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.

¹⁸ A. Ex. pg. 39-40.

¹⁹ Joint Exhibit 1.

²⁰ A. Ex. pg. 109, 111,113,115,118, and 121.

²¹ A. Ex. pg. 124.

²² A. Ex. pg. 148 et seq.169 and back of page 169 (which was not numbered).

DHRM Policy 1.60 - *Standards of Conduct* organizes offenses into three groups according to the severity of the behavior. Group I Offenses include acts of minor misconduct that require formal disciplinary action. Group II Offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. Group III Offenses include acts of misconduct of such a severe nature that a first occurrence normally would warrant termination.

Facility has promulgated Facility Instruction 106 (Revised: 1/12/16) which establishes procedures for implementing corrective action in accordance with the provisions of the *State Standards of Conduct*.²³ "Abuse or neglect of clients" is listed in Attachment A of Policy 1.60 and Attachment A of Agency Instruction 106 as an example of a Group III Offense.

Departmental Instruction-201:

Departmental Instruction 201 ("DI-201") sets forth a zero tolerance policy for abuse and neglect and defines "Abuse" stating:

This means any 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 or might have caused physical or psychological harm, injury, or death to an individual receiving care or treatment for mental illness, intellectual disability, or substance abuse.

DI-201 further provides, in pertinent part, examples of abuse include, but are not limited to:

Assault or battery;

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;

Instruction 10:

Facility Instruction 10 (Subject: Resident Abuse) provides abuse or neglect of residents shall not be condoned or tolerated. This Instruction defines the term "Abuse" stating:

Abuse means any act or failure to act by an employee or other person responsible for the care of an individual that was performed or was failed to be performed knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm, injury or death to an individual receiving services.

Instruction 570:

Facility Instruction 570 defines "Restraint" to include, among other matters, physical intervention or hands-on-hold to prevent or limit the ability of an individual to move his body... . Physical Guidance also is discussed in Instruction 570 which provides if a staff person holds the individual's hand or other body part in such a way that the individual cannot free himself, it is considered a restraint.

12 VA C35-115-110. - *Use of Seclusion, Restraint, and Time Out* provides each individual is entitled to be completely free from any unnecessary use of restraint and provides that use of restraints should not be viewed as a treatment modality but a safety measure of last resort.

12 VAC 35-115-70 states that each individual as a right to participate meaningfully in decisions regarding all aspects of services affecting him.

²³ A. Ex. pg. 136-147.

§ 37.2-400 of the Code of Virginia provides that each individual admitted to a hospital, training center, other facility, or program operated, funded, or licensed by the Department shall, among other rights:

- retain his legal rights as provided by state and federal law;
- be treated with dignity as a human being and be free from abuse or neglect;
- be treated under the least restrictive conditions consistent with his condition and not be subjected to unnecessary physical restraint ...

Client:

Client has an Intellectual Disability (profound) and is non-verbal and non-ambulatory. He uses a wheelchair with seat belt or a rollator. Client receives 24-hour care and requires assistance with his daily living activities. He can dress and undress with verbal supports from staff and receives physical assistance with tying his shoes, buttoning, and snapping. Client can become very spastic when frustrated or excited. While non-verbal, Client uses gestures, body language, and facial expression as a primary means of communicating his wants and needs and his likes and dislikes. He comprehends verbal and gesture communication and can let you know his wants and wishes. Additionally, staff reports he listens to people very closely and understands what they are saying, although, he may choose not to respond at times. He is described as having a sense of humor.²⁴

Incident:

On 3/15/16 Client was accompanied by Facility staff, including Grievant, for a visit to Group Home which was being considered as a community placement for him. During the visit Group Home staff prepared a dinner for Client but he appeared not to want to eat. Group Home staff offered to make Client some mashed potatoes with pepper and catsup which he had eaten on a previous visit and appeared to like. Client took a few bites but did not seem interested in eating more.

Staff observed Grievant telling Client a number of times, in what was described as an elevated tone/voice, that he needed to eat and he had to eat. While saying this she put her hand over his hand, moved his hand to his spoon, and tried to get him to put food in his mouth. Client closed his mouth and turned his head away from her when this happened.

Grievant was given a pill for Client to take during the visit. Issues arose as to the circumstances surrounding Grievant's actions when giving the pill to Client. Grievant took Client's pill out of its packaging and put the pill into a spoonful of the mashed potatoes she had been trying to get him to eat. She then tried to put this into Client's mouth a number of times. Client kept turning his head away, clamping his mouth shut, and he used his clothing protector to block her from putting this in his mouth.

After she was unable to get Client to take the pill she had placed in his mashed potatoes, Grievant lowered the spoon. After Grievant lowered the spoon, Client then took the clothing protector off his face. When Client had taken the clothing protector off his face, Grievant took the pill out of the mashed potatoes with her fingers and pushed the pill into the cheek of Client's mouth using her ungloved fingers. While doing this Grievant had her other hand placed on Client's forehead. She then put a drink to his lips and said he had to drink.²⁵

Investigation:

Allegations concerning Grievant's actions on 3/15/16 were addressed to Facility Director on 3/16/16. The "Description of Incident" set forth in Form 201A indicated:

²⁴ A. Ex. pg. 17, 51, 81-83.

²⁵ A. Ex. pg. 21, 29, 32, 34.

During a visit at a community home [Client] refused to eat his food and take his medication. In an effort to assure that he did [Grievant] repeatedly insisted that he had to do so in a harsh tone (rather than asking), placed an uncrushed pill into his mash potatoes, and inserted them into his mouth despite [Client's] objections and an offer of a pill crusher by a worker at the community home. ...

On March 16, 2016 Facility Director assigned Investigator to conduct an investigation of the allegations.²⁶ Matters were investigated and Investigator filed his report entitled "*Investigator's Summary*" on 3/25/16 with Facility Director and Facility Advocate. Investigator indicated in his report, "The finding is unsubstantiated for abuse and administrative issues were identified."²⁷

Facility Advocate and Review:

Facility Advocate is charged with monitoring abuse and neglect investigations under DI-201 and is authorized under DI-201 to request the Investigations Manager to review the investigation and its findings.

Facility Advocate expressed concern that Client's right to choose and participate in decision making was violated. Facility Advocate also was concerned that abuse may have occurred because more restrictive procedures were knowingly used by Grievant that were not consistent with Client's ISP.²⁸ Facility Advocate requested the Investigations Manager conduct a review of matters, including the Investigator's findings. She presented concerns the evidence supported Grievant became impatient with Client, pressured him to eat, and forced medication. She further expressed concern Client's gestures and actions were consistent with his refusal and Grievant created a danger to Client by forcing the pill into his mouth despite the dysphagia precautions in place.²⁹

Investigations Manager undertook a review of the investigation and its findings. Upon his review and the review of the Central Office Review Panel, Investigations Manager affirmed the Investigator's finding of Unsubstantiated Verbal/Psychological Abuse but also determined a finding of Physical Abuse could be substantiated by a preponderance of the evidence with regard to Grievant's force feeding Client his medication, which he had a right to refuse.³⁰

Grievant:

Grievant contends she did not abuse Client in any way and contends:

- Staff at Group Home talked to everyone in baby tone voices and she didn't talk to them like a baby but was not being harsh in any way.³¹
- The Investigations Manager's determination was not proper and the findings set forth in the *Investigator's Summary* should be upheld.
- She was not forcing Client to eat. She tried to give Client his pill with a little food but he didn't want the food so she put the pill in his mouth and gave him some thickened liquids to wash it down with. Client was not refusing the pill but was refusing the food. Client can't take medicine himself and can't say if he is refusing it or not.

Tone and Crushed Pill:

²⁶ A. Ex. pg. 13.

²⁷ A. Ex. pg. 16.

²⁸ A. Ex. pg. 16, Joint Exhibit 2, Testimony of Facility Advocate.

²⁹ A. Ex. pg. 38.

³⁰ A. Ex. pg. 39-40.

³¹ A. Ex. pg. 21.

Allegations addressed Grievant's tone/volume of voice as well as her administering a pill which was not crushed. However, Investigations Manager affirmed the Investigator's finding of "Unsubstantiated Verbal/Psychological Abuse". The evidence also indicates there was no physician's order to crush pills on 3/15/16. It was only after 3/15/16 that a physician's order to crush Client's pills was secured.

Investigations Manager Review:

Departmental Instruction 201 ("DI-201") sets forth policies, procedures, and responsibilities for the reporting and investigation of allegations of abuse and neglect. This Instruction provides Facility Advocate can seek a review by the Investigations Manager of an Investigator's findings if the Facility Advocate has concerns with or disagrees with the Investigator's findings. If a review is requested, DI-201 provides that the Investigations Manager is to then make the final determination of the investigation.

The Investigations Manager's final determinations is based on the preponderance of the evidence.³²

Facility Advocate requested a review by the Investigations Manager and stated her concerns with Investigator's findings. Investigations Manager conducted a review, as did the Central Office Abuse/Neglect Review Panel, prior to Investigations Manager's making a final determination of the investigation which differed from that of Investigator's determination. The evidence indicates that Investigations Manager's made the final determination as to Agency's investigation and his determination was made in a manner consistent with the provisions and requirements of DI-201.

Grievant's actions:

Grievant contends she did not abuse Client in any way. Grievant noted that Client did take a bite or two of the potatoes and wouldn't take any more. She does not contest she put Client's pill into a spoon of mashed potatoes and tried to get Client to take the pill in the mashed potatoes. She does not contest she subsequently took the pill out of the mashed potatoes with her fingers and inserted the pill into Client's mouth with her fingers. However, she states she did not remember if her other hand was on Client's head when she inserted the pill into his mouth. She also testified Client would take her hand and put it on his head to rub his forehead but she wasn't holding his head as any form of abuse.³³

A number of witness provided written statements and/or testimony as to Grievant's actions on 3/15/16. CSP testified at hearing and provided a written statement to investigator concerning her observations of Grievant and Client. Her written report to Investigator, provided, in pertinent part:

... She got the pill from the bag, took it out of the packet, and placed it in her hand with no gloves on. She then took the pill (uncrushed) and placed it on a spoon with mashed potatoes. She tried several times to put the spoon in his mouth, but he continued to refuse by turning his head. [Staff] offered to get applesauce to take the pill with, but [Grievant] did not respond. [Grievant] continued to put the spoon of mashed potatoes with pill up to [Client's] mouth, telling [Client] to take his pill. [Client] continued to refuse by turning his head, and at one point [Client] used his shirt protector to block [Grievant]. Then, [Grievant] took the pill out of his mashed potatoes with her bare hands. She placed one of her hands on [Client's] forehead and used her other bare hand with the pill (uncrushed) in it, and pried it into [Client's] cheek.³⁴

³² Joint Exhibit 2.

³³ Testimony of Grievant.

³⁴ A. Ex. pg. 20-21 & 32.

CSP was sitting next to Client who, while non-verbal can express what he wants with gestures. She believed it was clear Client was not happy with matters and that Grievant used some degree of force to keep Client's head from moving when she inserted the pill. She testified Grievant was turning his head and Grievant appeared to hold his head so she could put the pill into his mouth. She believed Grievant's hand on his head kept Client from moving his head. CSP felt Grievant was impatient with Client and indicated she was concerned with how the pill was inserted into Client's mouth.³⁵

Residential Specialist's written statement indicated Grievant tried to get Client to eat, put her hand over his hand, and moved Client's hand to the spoon trying to get him to put the spoon into his mouth. Client would close his mouth and turn his head away from her. Group Home staff brought out some mashed potatoes. At this time Grievant appeared to want to administer Client a pill and put the pill into a spoon full of mashed potatoes. She tried to put this into Client's mouth. Client continued to turn his head away and at one point used this clothing protector to block Grievant from putting it in his mouth. Residential Specialist observed and reported Grievant took the pill out of Client's mashed potatoes, used her other hand to hold Client's forehead, and pushed the medication into the cheek of Client's mouth.³⁶

CLS testified at hearing and a written statement of hers was provided Investigator. She observed Grievant put the pill in a spoon of mashed potatoes present it to Client who clamped his mouth and shook his head. She indicated Grievant told Client he had to take his medication in a harsh, elevated voice and, when Grievant attempted to give the medication in the potatoes, Client continued to clamp his mouth and shake his head whenever Grievant put the spoon to his mouth. Client then put the cloth protector over his mouth when Grievant attempted to give him the pill. She also stated that when Grievant had lowered the spoon with the pill, Client took the clothing protector down and then Grievant put the pill into his open mouth.

CLS opined Client was very clearly indicating he did not want to take the medications and Client refused the pill by his actions several times. She opined concern excessive force was used by Grievant and noted that Staff who observed matters expressed strong concerns to her as to what happened with Client. She also noted staff reported they were uncomfortable with Grievant's tone, that Grievant had a harsh tone, and Grievant told Client to do things with no patience.³⁷

The evidence in this case indicates that, while Client is non-verbal, he uses gestures, body language, and facial expression to communicate wants, needs, likes, and dislikes.³⁸ Grievant was familiar with Client. Grievant attempted a number of times to administer the pill only to have Client clamp his mouth shut, turn his head, or place a clothing protector over his mouth. By Client's gestures and actions Grievant knew or should have known he was rejecting the offered spoon of mashed potatoes with the pill she placed therein.

Client at one point covered his mouth with the cloth protector to communicate he didn't want to take the spoon contents. Only after Grievant lowered the spoon did Client remove the clothing protector covering his mouth. And, it was then that Grievant used the fingers of one hand to insert the pill into Client's mouth while also placing her other hand on Client's forehead.

³⁵ Testimony of CSP.

³⁶ A. Ex. pg. 21, 34.

³⁷ A. Ex. pg. 20, 29, Testimony of CSP.

³⁸ A. Ex. pg.17, 48, 51-52.

While Grievant testified she didn't remember if she placed a hand on Grievant's forehead, witnessed to the incident stated she did. By her actions Grievant forced a medication to be taken by Client who had indicated a number of times by his gestures and actions he did not wish to take the offered pill. Furthermore, by her actions of placing one hand on his forehead and the other hand being used to insert the pill into his mouth, Grievant restricted Client's freedom of movement.

ISP and Medical Conditions:

Due to Client's medical conditions, including dysphagia, Facility has strong concerns as to safety issues involved with his eating and swallowing. His ISP addresses a number of concerns, guidelines, and requirements concerning eating and swallowing. His ISP provides, when he needs to eat a meal or snack, he needs his wheelchair which is equipped with chest straps and headrest that he must use.³⁹ His ISP provides he independently feeds himself with the support of adaptive eating and positioning devices and he sits in a wheelchair with protective chest straps and a headrest while eating. His ISP provides he may require staff support of encouraging him to continue to eat as he will pause and stare.

There is no evidence of any court order, medical order, or provision in his ISP to force Client to take food, liquid, or medication. Grievance forced fed the pill into Client mouth while her other hand was on his forehead restraining his movement. Grievant's actions were done knowingly, recklessly, and/or intentionally and in light of the surrounding circumstances, including Client's medical conditions, her actions were such as might have caused physical or psychological harm, injury, or death to Client.

While Grievant contends Client was refusing the food and not the pill, there is insufficient evidence to find that he was refusing the food and not refusing the pill. There is no evidence Grievant offered Client the pill without the mashed potatoes prior to inserting it into his mouth. Grievant only offered the pill mixed in with the mashed potatoes before she inserting the pill into his mouth.

Grievant contends that she was not a Medical Technician, was not trained in giving medications, and only a trained Med Tec or Nurse could give medications. There is no evidence Grievant was a Medical Technician. However, the evidence indicates Facility has regularly given staff accompanying clients off campus the client's medication to be taken while off campus.⁴⁰ Grievant was given a pill to give Client while he was off campus. There is insufficient evidence to find a Nurse or Med Tec was required to give Client his pill while on the off campus visit to Group Home.

While there is no evidence Grievant was trained to give medications there is evidence that Grievant has received training on Abuse/Neglect on 1/13/16, 1/25/15, and 1/22/14⁴¹, on Human Rights on 1/13/16, 1/21/15, 1/22/14⁴², and has signed that she has read or had explained Facility Instruction #010-Resident Abuse.⁴³ Grievant, as a D.S.P., was provided annual training and recertification of TOVA and provided training as to abuse, neglect, and choice making. Grievant has received Person Centered Training as well as training on the right of a resident to consent and have their preferences honored to the greatest extent possible.⁴⁴ Grievant knew or should have known policy as to restraints, and patient rights. She knew or should have known forcing something into a resident's

³⁹ A. Ex. pg. 48-49, 52, 62.

⁴⁰ Testimony of Program Manager.

⁴¹ A. Ex. pg. 109-114.

⁴² A. Ex. pg. 115-123.

⁴³ A. Ex. pg. 124.

⁴⁴ Testimony of Facility Advocate; testimony of Program Manager.

mouth, whether it be a pill or any other matter, was not permitted under the circumstances in this case.

Grievant is employed as a Direct Service Provider and has been so employed for about 4 years. She was familiar with Client and his special needs and requirements related to eating and swallowing. She knew he was non-verbal but communicated with gestures and actions. She knew or should have know he was refusing to take the pill.

Upon consideration of the evidence admitted in this cause, including, but not limited to the evidence of Client's medical conditions, his ISP, the actions of Grievant, and the circumstances surrounding the incident of 3/15/16, the Hearing Officer finds, by a preponderance of the evidence that:

- a.) Grievant was employed by Agency and was responsible for providing services to Client, a Resident of Department Facility, who was receiving care or treatment for a mental illness and/or intellectual disability.
- b.) Grievant force fed Client a pill forcing him to take the pill after he communicated, by gesture and actions, refusals to take the pill and Grievant's action was in violation of Policy and Client's ISP.
- c.) Grievant restricted Client's individual freedom of movement, in violation of Policy and Client's ISP, when she placed one hand on his forehead while inserting the pill into his mouth with the fingers of her other hand.
- d.) Grievant's performed these acts, knowingly, recklessly, or intentionally.
- e.) These acts might have caused physical or psychological harm, injury death to Client.

Upon the evidence presented in this case, and for the reasons stated above, the Hearing Officer finds that Agency has met it burden of proof.

Mitigation:

Va. Code § 2.2-3005.1 authorizes a hearing officer to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with the rules established by the Department of Human Resources Management ...".⁴⁵ The hearing officer must receive and consider evidence in mitigation or aggravation of any offense charged by an agency.⁴⁶

The *Rules for Conducting Grievance Hearings* provide that a hearing officer is not a "super-personnel officer" and, therefore, in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy. A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness and, if the hearing officer mitigates the Agency's discipline, the hearing officer is charged with stating in the hearing decision the basis for mitigation.

Grievant has the burden to raise and establish mitigating circumstances that justify altering the disciplinary action consistent with the "exceeds the limits of reasonableness" standard. The Agency has the burden to demonstrate any aggravating circumstances that might negate any mitigating circumstances.⁴⁷

⁴⁵ Va. Code § 2.2-3005.

⁴⁶ Va. Code § 2.2-3005 (C)(6).

⁴⁷ Rules for Conducting Grievance Hearings, § VI. (B.)(2.).

Agency, as was set forth in the Group II Written Notice, took into consideration mitigating circumstances including Grievant's good work history and instead of issuing a Group III and termination issued a Group II Written Notice and a Needs of Improvement.⁴⁸

Grievant has been employed by Agency at Facility for approximately 4 years. No evidence was introduced of Grievant having any prior disciplinary actions. Grievant presented a witness, D.S.P., who has worked with Grievant and who testified as to Grievant's work performance and character. D.S.P. was not present on 3/15/16 at Group Home.⁴⁹

"Abuse of clients" is listed in Attachment A of Policy 1.60 and Instruction 106 as an example of a Group III Offense which include acts of misconduct of such a severe nature that a first occurrence normally would warrant termination. In this case Agency has taken into consideration mitigating circumstances and had issued a Group II.

Based upon review of all the evidence in this cause, and for the reasons discussed above, the Hearing Officer does not find that the issuance of a Group II Written Notice exceeds the limits of reasonableness.

CONCLUSION

For the reasons stated above, based upon the evidence presented at hearing, Agency has proven, by a preponderance of the evidence, that:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action.

Furthermore, Agency has proven by a preponderance of the evidence that the disciplinary action of issuing the Group II Written Notice was warranted and appropriate under the circumstances. Agency's discipline does not exceed the limits of reasonableness.

DECISION

For the reasons stated above, the Agency's issuance to Grievant of a Group II Written Notice and a Needs of Improvement is **UPHELD**.

APPEAL RIGHTS

As the *Grievance Procedure Manual* (effective date: July 1, 2012) sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

⁴⁸ Joint Exhibit 1; Grievant Ex. pg. 1.

⁴⁹ Testimony of D.S.P.

A. Administrative Review:

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of DHRM. This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).

B. Final Hearing Decisions:

A hearing officer's decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if Ordered by EDR or DHRM, the hearing officer has issued a revised decision.

C. Judicial Review of Final Hearing Decision:

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

S/Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

Copy transmitted to:

Grievant's Advocate at Hearing (via e-mail)

Grievant (via mail and with a copy also to be transmitted via Cert: Mail Ret. Rec. Req.)

Agency Advocate (via e-mail)

EDR (via e-mail)