BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

ABDULHIA RAMOS-RODRIGUEZ (DOLLY YAP), Appellant, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	Case No. DISM-00-0025 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair. The hearing was held on January 15 and 16, 2002, in Bremerton, Washington. GERALD L. MORGEN, Vice Chair, reviewed the record and participated in the decision in this matter.

1.2 **Appearances.** Appellant Abdulhia Ramos-Rodriguez (Dolly Yap) was present and was represented by Christopher J. Coker, Attorney at Law, of Parr and Younglove, P.L.L.C. Laura L. Wulf, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from the disciplinary sanction of dismissal for neglect of duty, gross misconduct and willful violation of published employing agency rules or policies. Respondent alleged that Appellant yelled at and pushed a client causing the client to fall and injure herself.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Rainwater v.

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School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

II. FINDINGS OF FACT

2.1 Appellant Abdulhia Ramos-Rodriguez (Dolly Yap) was an Attendant Counselor (AC) 1 and permanent employee of Respondent Department of Social and Health Services (DSHS) at the Frances Haddon Morgan Center (FHMC). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal on March 29, 2000.

2.2 Appellant began employment at FHMC in May 1995. Prior to the incident giving rise to this appeal, Appellant had no history of formal disciplinary action.

2.3 By letter dated March 17, 2000, Carol Kirk, Superintendent of FHMC, informed Appellant of her dismissal for neglect of duty, gross misconduct and willful violation of the published employing agency or Department of Personnel rules or regulations. Ms. Kirk alleged that Appellant yelled at and pushed a client. Ms. Kirk alleged that the push caused the client to fall backwards and strike her head on a table, which resulted in the client being transported to the hospital where she received five staples to close a wound to the back of her head.

2.4 Appellant was assigned to work in FHMC building 3425 Burwell. Karin Christensen and Brian Schauer were also working in this building. At the time of the incident, Ms. Christensen had worked for FHMC for approximately two weeks.

2.5 Client Julie lives at 3425 Burwell. Julie is developmentally disabled, nonverbal and behaves aggressively towards staff and other clients. Her behavior includes kicking and hitting. She occasionally loses her balance and falls when she is kicking and being aggressive. However, her falls do not generally result in serious injuries to herself or others.

2.6 On August 30, 1999, Julie was behaving aggressively towards Appellant. During the afternoon, while Julie and Appellant were at an outside play area, Julie attempted several times to kick Appellant. At one point, Julie made contact with Appellant's hand and severely broke Appellant's artificial fingernail causing her nail bed to bleed. At the time, Appellant laughed, however, she later told several staff about her broken nail and the incident was documented in Julie's progress notes.

2.7 At approximately 6:45 p.m. on August 30, 1999, Julie was in the TV room of 3425 Burwell. Ms. Christensen was also in the room. Appellant was in an adjacent room with a connecting, open, pass-thru window. Mr. Schauer was in a separate dining room with the door closed. Julie began behaving aggressively toward another client in the TV room. As Ms. Christensen approached Julie to intervene, Julie attempted to hit Ms. Christensen. Ms. Christensen used a flotation pad to deflect Julie's blows.

2.8 Appellant saw Julie's behavior toward Ms. Christensen and heard Ms. Christensen telling Julie to stop. Because Ms. Christensen was a new employee, Appellant decided that she needed assistance in handling Julie. Appellant came into the TV room and positioned herself between Julie and Ms. Christensen. Appellant yelled at Julie to stop but instead, Julie attempted to hit Appellant.

2.9 Appellant states that she raised her arms and crossed her wrists to deflect Julie's blows. However, Ms. Christensen states that Appellant raised her arms and shoved Julie causing her to fall backwards and strike her head. A preponderance of the credible testimony establishes that when Appellant raised her arms to deflect Julie's blows, she made contact with Julie, which caused Julie to fall backward and injure herself. After Julie fell, Appellant repeatedly told Julie she was sorry.

2.10 The loud voices were audible to Mr. Schauer who was behind the closed doors to the dining room. In addition to hearing loud voices, Mr. Schauer heard a loud bang. He responded to the TV

room and when he arrived, Julie was on the floor, Ms. Christensen was tending to Julie and Appellant was standing to the side still yelling at Julie.

2.11 Ms. Christensen and Mr. Schauer helped Julie to the bathroom and nursing staff arrived to assess Julie's injury. Nursing staff determined that Julie needed to go to the emergency room to receive stitches for a wound on her head. Ms. Christensen reported to nursing staff that Julie slipped and fell.

2.12 After Julie went to the hospital emergency room, Appellant told Ms. Christensen that they needed to do an incident report right away and advised her that their stories needed to match. Ms. Christensen was upset by what she had observed and about one-half hour after the incident, she reported what she had seen to Jennifer Bronaugh, the acting shift charge.

2.13 Ms. Bronaugh and Ms. Christensen went together to discuss the incident with Sherrie Orlob, Julie's Habilitation Plan Administrator. Ms. Orlob instructed Ms. Christensen to write an incident report. The following day, Ms. Christensen completed an incident report stating that Appellant pushed Julie.

2.14 Carol Kirk, Superintendent of Frances Haddon Morgen Center, reviewed the allegations and forwarded the information to the Washington State Patrol (WSP) for an administrative investigation. In addition, an injury report was filed with the Bremerton Police Department. The Bremerton Police Department conducted a criminal investigation but no charges were filed against Appellant. The WSP conducted an administrative investigation, which included a review of the information gathered by the Bremerton Police Department. On September 24, 1999, the WSP forwarded the results of their investigation to DSHS for administrative action.

2.15 On October 4, 1999, Respondent initiated a Personnel Conduct Report (PCR) against Appellant. A PCR investigation was conducted and on November 19, 1999, Superintendent Kirk

determined that Ms. Christensen's report of the incident was more credible than Appellant's. She concluded that Appellant physically abused Julie when she shoved her, causing her to fall and injure her head, and that physical abuse constitutes misconduct.

2.16 On February 15, 2000, Superintendent Kirk held a pre-termination hearing with Appellant. Although Appellant denied touching or pushing Julie, based on the totality of the information provided during the investigative process, Superintendent Kirk determined that Appellant had verbally abused and physically pushed Julie. Superintendent Kirk found that Appellant was trained in managing and de-escalating agitated and aggressive clients. She also found that Appellant was aware of institution Policy 801, Client Abuse/Neglect, prohibiting client abuse, yet she failed to comply with the policy. Superintendent Kirk concluded that in spite of Appellant's lack of previous disciplinary history, the serious nature of her misconduct could not be tolerated and dismissal was the appropriate disciplinary sanction.

2.17 Frances Haddon Morgen Center Policy 801, Client Abuse/Neglect, states in relevant part:

> Clients of FHMC will receive services with dignity, respect, proper care, and consideration at all times. Treatment or other programs and environments will protect individuals from neglect and abuse from employees, visitors, other clients or others . . . ABUSE: Inflicting client pain or discomfort . . . PHYSICALLY: Physical pain or injury; slapping, kicking, hitting, pinching, pushing, shaking, squeezing, blows, arm twisting, punching . . . VERBALLY: Name calling or yelling at a client . . . NEGLECT: willful or deliberate failure to respond to an accident that causes harm or injury.
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> FHMC operating principles regarding abuse/neglect are: (1) An employee who hurts a client in any way is wrong.

2.18 The FHMC Abuse/Neglect Reporting Handbook defines client abuse as, "the willful action or inaction that inflicts injury, . . . on a vulnerable adult. Willful means non-accidental action or inaction, which results in the abuse; the abuser knew of or should have known it would cause harm,

anguish, pain or injury. Physical contact that is retaliating or in response to a physical attack or verbal abuse from a client, is never justifiable and is abuse."

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that the agency has met its burden of proof that more likely than not Appellant yelled at and pushed Julie. Respondent contends that Appellant is not credible because her stories changed throughout the investigation. Respondent further contends that it was plausible for Appellant to be angry with Julie and argues that Appellant lost her temper, which is never acceptable when caring for developmentally disabled clients and that she yelled at and pushed Julie causing her to fall and sustain an injury. Respondent contends that Appellant's actions were a result of her anger toward Julie and that she let her personal feelings control her behavior. Respondent contends that Appellant failed to take steps to ensure Julie's care and safety, that she violated agency policy prohibiting abuse and neglect of clients, and that her actions negatively impacted the institution's ability to carry out its function of caring for and protecting vulnerable clients. Respondent asserts that Appellant cannot be trusted to care for clients and that dismissal is the appropriate option.

3.2 Appellant argues that she has no history of prior disciplinary actions and that she has received good performance evaluations during her employment at FHMC. Appellant argues that she used a raised voice toward Julie but she did not verbally abuse or yell at her. Appellant further argues that she did not touch or push Julie. Appellant contends that Julie was aggressive and lost her balance, which caused her to fall. Appellant further contends that she was not upset with Julie and asserts that she took defensive action to protect herself from Julie's blows. Appellant argues that Ms. Christensen was unaccustomed to dealing with Julie's behaviors, that she needed Appellant's help and that Appellant appropriately intervened to assist her. Appellant asserts that it was a stressful situation and that Ms. Christensen's perception of the events was incorrect.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

4.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

4.5 Willful violation of published employing agency or institution or Personnel Resources Board rules or regulations is established by facts showing the existence and publication of the rules or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

4.6 Respondent has met its burden of proof that Appellant neglected her duty, violated agency policy and that her actions rose to the level of gross misconduct. Respondent has proven that more likely than not, Appellant raised her arms, made physical contact with Julie, and caused Julie to fall backwards and sustain an injury to the back of her head. Respondent has also proven that more

likely than not, due to the stress of dealing with Julie's aggressive behavior, Appellant yelled at Julie. Appellant's reaction to the Julie's behavior was contrary to the training she received and to agency policy and cannot be tolerated by staff caring for developmentally disabled clients.

4.7 Under the totality of the proven facts and circumstances, and given the serious nature of Appellant's misconduct toward a developmentally disabled client, dismissal is appropriate and the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Abdulhia Ramos-Rodriguez (Dolly Yap) is denied.

DATED this _____ day of _____, 2002.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Gerald L. Morgen, Vice Chair

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