

Issue: Group III Written Notice with termination (patient abuse); Hearing Date: 10/02/07; Decision Issued: 10/03/07; Agency: DMHMRSAS; AHO: Frank G. Aschmann, Esq.; Case No. 8659; Outcome: No Relief, Agency Upheld In Full.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case No. 8659

Hearing Date: October 2, 2007
Decision Issued: October 3, 2007

PROCEDURAL ISSUE

No procedural issues raised.

APPEARANCES

Grievant
One Grievant Witness
Agency Presenter
Agency Representative
Agency Recorder Operator
Six Agency Witnesses

ISSUE

Did the Grievant violate Agency policy by using excessive force to restrain a patient on April 25, 2007 such as to warrant the issuance of a Group III Written Notice and termination of employment as disciplinary action by the Agency?

FINDINGS OF FACT

The Grievant was employed by the Agency as a Psychiatric Technician. Grievant has received extensive training in Therapeutic Options Of Virginia (hereafter TOVA) methods for responding to patients in emergency situations. Grievant has received excellent performance evaluations and demonstrated a caring attitude towards people and enthusiasm in his work.

On April 25, 2007, a patient in Grievant's unit was displaying aggressive behavior. Grievant was on duty at the time. The patient's aggressive behavior continued on and off throughout the day. Various interventions were used by staff.

In the afternoon the patient became anxious and agitated over the issue of a "smoke break". The patient became physically aggressive, kicking and hitting staff. The Grievant was one of the staff hit by the patient.

During the incident the Grievant held the patient by her wrists to try and protect himself, other staff and control the patient. While holding the patient by the wrists the Grievant commanded the patient to "cut it out" and behave. A Registered Nurse (hereafter RN) arrived on the scene and directed the Grievant to release the patient.

The RN reported the incident to a supervisor. An investigation was conducted resulting

in a finding of excessive force used by the Grievant on the patient. A Group III Written Notice was issued and the Grievant's employment was terminated. Grievant's employment termination and Group III Written Notice are the subject of the hearing.

APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards 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. A Group III Written Notice includes conduct of such a serious nature that a first occurrence normally results in termination of employment.

The Agency has adopted written policies in regard to patient abuse and neglect. Departmental Instruction 201(RTS)03 lays out in great detail the policy and procedure of the Agency for handling patient abuse. Listed in the definitions of abuse in section 201-3 is "use of excessive force when placing a person in physical or mechanical restraint".

The Agency has created an employee handbook which includes a system of discipline which conforms to the Department of Human Resource Management policy number 1.60, Standards of Conduct. Chapter 13 of the employee handbook defines standards of conduct in regard to client abuse. Client abuse is listed as a Group III violation in the employee handbook.

The Agency presented witness testimony from seven people familiar with TOVA methods. All of the witnesses stated that holding a person by the wrists was not an approved TOVA hold for restraining a patient. TOVA approved holds require grasping a person in areas of the body which have "padding" away from joints which are subject to injury during a struggle. The Grievant concedes that holding a patient by the wrists is not an appropriate TOVA hold.

Grievant argues that he was unable to use the approved TOVA hold because the patient was against a wall and striking out. Grievant notes that his action was necessary to protect himself and others. TOVA also provides direction that staff should withdraw until sufficient personnel can assist to avoid injury. Grievant did not withdraw but rather engaged the patient

with an improper hold.

The Grievant was faced with a physically dangerous situation which required a rapid response, however, Grievant failed to respond to the emergency with the techniques in which he had received extensive training. While the Grievant's argument that he intended no harm and no injury actually occurred is easily accepted the method used was not therapeutic and could have resulted in injury and greater agitation of the patient.

The Grievant's failure to use the approved methods for physical restraint of a patient meets the Agency's criteria for use of excessive force.

Termination of employment is a particularly harsh sanction for an employee who is caring, dedicated and enthusiastic about his job, as is the Grievant. While the policy of the Agency is harsh, it is clearly stated and made known to the employees. The Agency has notified all employees that no patient abuse will be tolerated and findings of client abuse are treated with a Group III Written Notice.

Grievant argues that Psychiatric Technicians are discriminated against in the application of discipline. Psychiatric Technician is not a protected class so discrimination is not really at issue. Knowing that a Psychiatric Technician is more likely to be disciplined than other employees is all the more reason for the Grievant to have followed the policy of the Agency to the letter.

The Agency considered mitigation. Grievant has excellent performance evaluations but also has a Group I Written Notice in his file involving a prior behavioral emergency. The Grievant has demonstrated difficulty in accepting the patients inability to control their actions. This issue was present in the current action when directing the patient to change behavior. The Agency's decision to terminate the employment of the Grievant was appropriate when considering the event and the Grievant's overall record with the Agency.

While the Hearing Officer is sympathetic to the Grievant's desire to help people in need, the evidence reveals a failure to use the accepted TOVA methods for patient restraint. This constitutes use of excessive force under Agency policy and warrants the issuance of a Group III Written Notice. A Group III Written Notice permits immediate employment termination. The circumstances of the event combined with the Grievant's overall record with the Agency fails to provide sufficient mitigation to warrant reversal of this sanction.

DECISION

The disciplinary action of the Agency is affirmed.

APPEAL RIGHTS

As the Grievance Procedure Manual 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.

ADMINISTRATIVE REVIEW: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer.

This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should 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.

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main Street, Suite 400, Richmond, VA 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests 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. (Note: the 15-day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original 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.

JUDICIAL REVIEW OF FINAL HEARING DECISION: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contrary to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Frank G. Aschmann
Hearing Officer