

Issue: Group III Written Notice (patient abuse); Hearing Date: 09/29/09; Decision Issued: 10/07/09; Agency: DBHDS; AHO: Thomas P. Walk, Esq.; Case No. 9165; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 10/21/09; Reconsideration Decision issued 10/27/09; Outcome: Original decision affirmed.**

VIRGINIA: IN THE DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**IN RE: CASE NO.: 9165****DECISION OF HEARING OFFICER****PROCEDURAL BACKGROUND**

The filing of the grievance on June 14, 2009 commenced this matter. The Commissioner of the Department of Behavioral Health and Developmental Services (hereinafter “the agency”) qualified the matter for hearing on July 16. I was appointed as hearing officer on August 19, receiving the relevant materials on August 25.

A telephonic prehearing conference was conducted on September 2 with counsel for the agency and counsel for the grievant. For good cause shown, namely the unavailability of counsel for defendant for a hearing at earlier dates, I extended my decision deadline to October 9 and scheduled the hearing for September 29. The hearing was conducted on September 29 at the facility at which the grievant had previously been employed by the agency.

APPEARANCES

Counsel for agency

Agency Representative

Nine Witnesses for Agency

Counsel for Grievant

Grievant

Six additional witnesses for Grievant

ISSUE

Whether the agency acted appropriately in issuing a Group III Written Notice to the grievant on June 9, 2009 and terminating him from employment?

FINDINGS OF FACT

The grievant was an employee of the agency on May 15, 2009. He holds a license as a certified nursing assistant. He is continuing his education working toward becoming a licensed practical nurse. He is skilled in the martial arts. On May 15 he held the position of psychiatric aide with the agency at one of its facilities.

On June 9, 2009 the agency issued to the grievant a Group III Written Notice and terminated him from employment based on a finding of patient abuse. The subject patient was a 37-year-old male with diagnosis of psychosis and personality disorders, both being due to a brain injury. Also, the patient is at least mildly mentally retarded. He is not a large individual but is muscular and strong.

In the early morning hours of May 15, 2009 the patient had been in the bathroom of a seclusion room for a lengthy amount of time. He was required to use the bathroom in the seclusion room because of his having damaged or removed the commode in his own bathroom on more than one occasion. The grievant went to the seclusion room to check on the patient and reported that he had been masturbating. The grievant then ordered the patient to return to his room. On the way back to the room the patient began creating a disturbance by slamming doors and pounding on a glass door. When the patient arrived back at his room he continued with his disturbance. The grievant and a nurse found the patient attempting to forcibly keep the door to his room closed. A call for assistance was made to other wards (referred to as "a Code").

When other male aides or employees arrived at the room of the patient the grievant forced open the door. He grabbed the patient in a frontal hold and the two of them fell onto the bed. The other male employees proceeded to assist the grievant in restraining the patient by taking hold of his limbs. One of the other psychiatric aides grabbed and held the left leg of the patient. He saw the grievant grab the right leg. He then saw the grievant deliver one punch to the groin area of the patient. The head of the patient simultaneously snapped back. A female psychiatric aide was present in the room. She saw the grievant punch the patient in the groin multiple times in a short and quick manner. She was not actively involved in restraining the patient but was merely observing the struggle.

The grievant and other male aides proceeded, as directed, to transport the patient back to the seclusion room. They did this by carrying the patient. They did not use the “Humane Blanket”, a violation of established procedure. Someone, possibly the grievant, had determined that they did not have time to obtain the blanket from its storage place but needed to transport the patient immediately.

The patient was successfully delivered to the seclusion room without incident. The grievant then forcibly lowered the pants worn by the patient and an injection was given. The injection had the desired affect of calming the patient.

The male psychiatric aide who saw a punch to the groin reported this incident to the director of the facility at approximately 9:00 a.m., about four hours subsequent to the incident. The female aide discussed the incident with a co-worker who later reported the incident to the investigator assigned to the case. Established policy calls for the immediate reporting of any such incident of patient abuse.

ANALYSIS

The agency issued the grievant a Group III Written Notice under Policy 1.60 of the Department of Human Resource Management. Group III offenses are such acts of misconduct that a first occurrence normally should warrant termination. The policy states that the level is appropriate for offenses that “endanger others in the workplace, constitute illegal or unethical conduct...or other serious violations of policies, procedures or laws.” The grievant, as an employee covered by the Virginia Personnel Act, Chapter 29 of Title 2.2 of the Code of Virginia of 1950, as amended, is entitled to grieve his termination from employment as a result of the disciplinary action taken against him. In disciplinary actions the agency has the burden of proving the allegations and appropriateness of the action taken by the agency by a preponderance of the evidence. See Grievance Procedural Manual, Section 5.8.

My task as hearing officer is to make the following determinations:

1. Whether the alleged misconduct occurred;
2. Whether the misconduct constitutes a violation of law or policy;
3. Whether the agency acted in accordance with law and policy in issuing the disciplinary notice and taking the action that it took; and
4. Whether any mitigating or aggravating circumstances existed.

The evidence in this case was not without conflict. The grievant denied having punched the patient in the groin. He did not substantially contest the other actions attributed to him.

Contradicting the testimony of the grievant is the testimony of the female psychiatric aide and one male psychiatric aide (the one who had hold of one of the legs of the patient). I have resolved this conflict in the testimony against the grievant for several reasons. The evidence did not show either of these witnesses to be biased against the grievant. No reason was shown for

them to have stated that the grievant punched the patient in the groin if such did not actually occur.

Each of these witnesses was in a position to observe the actions of the grievant. The female aide, in particular, was not involved in the actual physical restraint of the patient. If she had been, her attention likely would have been understandably focused on one specific area of the body rather than the scene as a whole. The evidence did not establish that her view was obstructed such that she could not have seen what occurred. The male aide who testified to the single punch was in position to see a punch if delivered. The fact that he only saw one punch as opposed to the multiple strikes noted by the female aide may be explained by his attention being focused on the one leg of the patient.

In my observing these witnesses as they testified I saw nothing in their demeanor or manner of answering the questions to cause me to reject their testimony in favor of that of the grievant. The fact that other individuals in the room did not see any punches as described can be explained by the general confusion and chaos in a volatile situation.

The grievant argued that the patient did not respond verbally or physically in the manner that might be expected from someone struck in the groin area. The patient, in general, is a non-verbal individual due to his brain injuries. At or about the time of the incident he was grunting and puffing. The evidence showed that he did respond physically upon the blow by jerking his head significantly. Whether any blow landed directly on his testicles is problematic. The blow or blows not hitting an intended target directly may explain the absence of a more express physical or verbal reaction. Also, his being restrained would have the natural effect of hindering any physical response. I do find it curious, however, that in light of the allegations no physical

examination of the patient was conducted after the incident to detect any possible bruising or other injury.

Counsel for the grievant conceded that the punching, if proven, would constitute abuse. Agency Instruction 201 (RTS) 03 includes under the definition of abuse as any act, which might have caused physical harm. Examples of abuse include the use of excessive force when restraining a person. The punching of a patient in the groin area as part of an effort to subdue the patient clearing qualifies under this definition of abuse.

I find that the agency did not abuse its considerable discretion in issuing the Group III Written Notice to the grievant. I also find the agency acted appropriately in terminating the grievant from employment because of this act. I do not find that the grievant should have been subject to discipline for the improper carrying of the patient back to the seclusion room or in partially removing his pants so that an injection could be administered. I do not find that the grievant acted either knowingly or recklessly or intentionally under the immediacy of those circumstances.

As stated above, the grievant has argued that he did not improperly strike the patient. He has proffered no evidence or argument in mitigation of his alleged actions. I find no evidence to support mitigation elsewhere in the record.

DECISION

For the reasons stated above, I hereby uphold the actions of the agency in issuing a Group III Written Notice to the grievant and terminating him from employment.

APPEAL RIGHTS

As the Grievant 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** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director=s authority is limited to ordering the hearing officer to review the decision to conform it to written policy. Requests should be sent to the Director of Human Resources Management, 101 N. 14th St., 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, Main Street Centre, 600 East Main St., Suite 301, 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**. 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 contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The court shall award reasonable attorneys' fees and costs to the employee if the employee substantially prevails on the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code ' 17.1-405.

ENTERED this 7th day of October 2009.

/s/ Thomas P. Walk
Thomas P. Walk, Hearing Officer

VIRGINIA: IN THE DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: CASE NO.: 9165

RULING UPON MOTION FOR RECONSIDERATION

I rendered my decision in this case on October 7, 2009, upholding the termination of the grievant upon his being issued a Group III Written Notice. By letter dated October 20, 2009 the grievant, through his counsel, requested that I reconsider my decision. He assigned five arguments in support of the request. For the following reasons, I hereby deny the request.

The first argument given by the grievant is that he had no action taking against his certificate to practice as a nurse aide by the Virginia Board of Nursing after an informal fact finding conference. He has presented no evidence to me of the exact nature of the charges before that Board or the evidence presented to the Board. In short, the grievant is asking me to substitute the judgment of the Board of Nursing for my independent review of the evidence. I am aware of no statutory mandate for this step and I find no reason to take it otherwise in this situation.

Three additional grounds given by the grievant deal with my interpretation of the evidence. I find the arguments that I erred to be unpersuasive. My determination to the credibility of the witnesses is founded on my observation of their demeanor and their testimony. The agency presented two independent witnesses who saw, to a certain extent, the same action of the grievant. The likelihood that both of these witnesses were mistaken is slim. No evidence showed that they were colluding in their testimony.

The fifth ground given is that the grievant is not likely to have abused the subject patient because he had never been found to have abused any other patient. It is undisputed that the subject patient was a difficult one. To the extent that the grievant may be correct in his assertion that “experience teaches that individuals who engage in this type of abusive behavior have a history of doing so” the argument ignores the possibilities that

this incident may have been the first such incident, the first such at which the grievant was observed in abusive behavior or that a patient reported it. I find the argument weak.

The motion for reconsideration is denied.

ENTERED this October 27, 2009.

/s/ Thomas P. Walk
Thomas P. Walk, Hearing Officer