

Issue: Group III Written Notice with Termination (client abuse); Hearing Date: 02/15/13; Decision Issued: 03/05/13; Agency: DBHDS; AHO: Jane E. Schroeder, Esq.; Case No. 10021; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF THE HEARING OFFICER

In the matter of Case Number 10021

Case Heard: February 15, 2013

Decision Issued: March 5, 2013

PROCEDURAL HISTORY

The Grievant was employed as a Psychiatric Technician (“Psych Tech”) at the agency. On November 28, 2012, the Grievant received a Group III Written Notice for Offense #81: Patient/inmate/client abuse, and his employment was terminated. The Grievant initiated the Employee Grievance Procedure on December 28, 2012 by completing Grievance Form A - Dismissal Grievance. The Grievant is requesting reinstatement to his old position and his work record cleared. The grievance was subsequently qualified for hearing. On January 22, 2013, the hearing officer was assigned to hear the case.

Telephonic pre-hearing conferences were held on January 25, and February 7, 2013. The hearing was on February 15, 2013. Seven witnesses, including the grievant, testified.. The agency’s exhibits were entered into evidence without objection. The Grievant had no exhibits. The Agency’s exhibits are identified as Agency Exhibits A-K. The three and one-half hour hearing was recorded on a digital recorder and stored on a compact disk.

APPEARANCES

Grievant
Agency Representative

Witnesses for Agency:
#1 Agency Facility Investigator
#2 TOVA Instructor
#3 Chief Nurse Executive

Witness for Grievant:

- #4 First Psych Tech
- #5 Second Psych Tech
- #6 Third Psych Tech
- #7 Grievant

ISSUE

Whether to uphold, reduce, or rescind the Group III Written Notice issued to the Grievant on November 28, 2012, alleging that on October 26, 2012 the Grievant was in violation the Departmental Instruction 201 (RTS) 03, Reporting and Investigating Abuse and Neglect of Clients, as defined in Section 201-3 for substantiated allegation use of excessive force.

BURDEN OF PROOF

In disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and the burden of proof is on the Agency to show by a preponderance of the evidence that its action against the Grievant was warranted and appropriate under the circumstances. In all other actions, the employee must present his evidence first and the burden of proof is on the employee to prove his claim by a preponderance of the evidence. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. (Grievance Procedure Manual). This case is a disciplinary action. The burden of proof is on the agency.

FINDINGS OF FACT

1. On October 26, 2012, the Grievant was at work at the agency in his role as Psychiatric Technician. While he was walking down the hall, he was punched in face by a female patient. The Grievant placed the patient in a physical restraint, holding her arms to her side. The patient tried to break free. Both of ended up on the floor. The patient hit her chin on the floor, causing lacerations that required sutures.¹
2. Another Psychiatric Technician who in the hall saw the Grievant being struck and saw the Grievant placing the patient in a restraint hold. That Technician turned and went into the nurses' station to press the alarm to alert staff that there was an emergency.²
3. A nurse who was a nearby doorway also observed the incident, but did not testify.³

¹Agency Exhibit H, pp. 5-7, Testimony of Witness #5, Testimony of Grievant.

²Testimony of Witness #5.

³Agency Exhibit H, p. 5.

4. Staff came into the hallway to assist. The Grievant was told to leave the unit where he was working. The patient was taken to the hospital. In addition to the cut on the chin, the patient had bruises on her right elbow and to the right of her chest about four inches below the shoulder blade.⁴
5. The patient alleged that the Grievant attacked her.⁵ When an allegation of abuse is made, an investigation by the agency is conducted in accordance with Departmental Instruction 201 (RTS)03, "Reporting and Investigating Abuse and Neglect of Individuals Receiving Services in Department Facilities."⁶
6. An investigation of the incident was conducted the Agency's Facility Investigator. According to her written report, she did not find sufficient evidence to show that the Grievant acted knowingly, recklessly or intentionally to cause harm to the patient, and she concluded that the allegation of physical abuse was unsubstantiated.⁷ She testified that, based on her investigation, she found that the Grievant used excessive force when placing the patient in a physical restraint. She found that the Grievant could have called for staff and maneuvered away from the patient until staff could be called to assist so that a physical hold would not have been necessary.⁸
7. On November 9, 2012, the Grievant was given a letter from the Acting Facility Director stating the Director's intent of issuing a Group III Written Notice and offering the Grievant a chance to give a written response.⁹
8. In his written response and in his testimony, the Grievant admitted that he restrained the patient. He stated that he did not back away from the patient because there was another patient standing next to him. He stated that he did not call for staff because there was another staff member down the hallway who witnessed the event.¹⁰
9. On November 28, 2012, the Grievant was given a Group III Written Notice (Offense Code 81: Patient abuse) alleging he violated the Departmental Instruction 201 (RTS) 03, Reporting and Investigating Abuse and Neglect of Clients, as defined in Section 201-3 for substantiated allegation use of excessive force. His employment was terminated on that date.

⁴Agency Exhibit H, p. 3, Testimony of Witness #1.

⁵Agency Exhibit H, p. 2.

⁶Agency Exhibit G.

⁷Agency Exhibit H., p. 7.

⁸Agency Exhibit H, p. 7, Testimony of Witness #1.

⁹Agency Exhibit I.

¹⁰Agency Exhibit H, p. 24-26.

10. The Grievant worked for the agency as a psychiatric technician for fourteen years.¹¹ As a Psychiatric Technician II, he attended periodic training sessions, including yearly TOVA training. The Grievant attend the latest TOVA Recertification Class and Seclusion and Restraint Class on June 19, 2012.¹²
11. Therapeutic Options of Virginia (TOVA) is a humane approach to preventing and managing behavioral emergencies, including physical techniques and physical restraint techniques.¹³

The TOVA training manual specifically addresses what to do when punched or slapped:
“The first option for responding to a punch or slap is to move back and to give the person space. ... It may be that by moving back out of his attack zone and by re-establishing communication we can resolve the situation without further aggression. Perhaps that was the only punch he would throw and wouldn’t have the motivation to strike out again if we do not overreact. If he delivers a punch or slap, raise your cupped hands in front of you, and using the Pivot Maneuver, move off the line of attack, allowing the person to continue forward.”¹⁴
12. The TOVA instructor testified that testified that the TOVA training in which the Grievant participated in June, 2012 teaches the participants to move out of the line of attack, pivot and deflect, and call out, “STAFF, STAFF.” Only if those actions are ineffective to stop the attack should the staff member being attack restrain the attacker.¹⁵
13. In the TOVA manual section for Physical Skills for Managing Aggression, there is this warning: “**CAUTION! Never put your hands on someone to control them unless their behavior is so dangerous that it would be negligent if you didn’t.**”¹⁶
14. Three other psych techs testified. The first psych tech testified that in the yearly TOVA training, the techs are taught to distance themselves from an attacker and call for staff to intervene.¹⁷ The second psych tech, who saw the patient strike the Grievant, testified that he saw the Grievant put the patient in a restraint hold. The tech then turned and ran about ten feet to the blue light to alert the staff of an attack. When the tech turned back, the Grievant and the patient were both on the floor. Other staff immediately intervened: attending to the bleeding patient and directing the Grievant to leave the unit.¹⁸ The third

¹¹Agency Exhibit K, p. 2.

¹²Agency Exhibit E, p. 1

¹³Agency Exhibit C, p. 9.

¹⁴Agency Exhibit C, p. 93.

¹⁵Testimony of Witness #2.

¹⁶Agency Exhibit C, p. 103.

¹⁷Testimony of Witness #4.

¹⁸Testimony of Witness #5.

psych testified that in the TOVA training, the techs are told that, if you are struck by a patient, you do not strike the patient. He testified that one should try to confrontation. If one is attacked, one should put up hands to prevent attack and call for staff.¹⁹

15. The Grievant testified that he believed that putting the patient in a physical restraint hold was appropriate under the circumstances, and was not excessive force. She had attacked him, hitting him on his forehead. He did not call out for staff because there was a staff member who witnessed the attack. He could not get away because a male patient was standing next to him. He put the attacker in a standing restraint hold. She got away. He approached her a second time, and put her in another hold. It was after this second hold that she fell to the ground and sustained the cut to her chin.²⁰
16. In his written statement attached to Grievance form A, the Grievant stated that he has seen other personnel using physical restraint on patients. He stated that he does not agree that using physical restraints on a patient is excessive force.²¹

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code § 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia. It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions 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 government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

Policy Number 1.60: Standards of Conduct.

Policy 1.60: Standards of Conduct provides a set of rules governing the professional conduct and acceptable standards for work performance of employees. The Standards 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.

Section B.2.c. provides that Group III offenses include acts of misconduct of such a severe nature that a first occurrence would normally warrant termination. This level is

¹⁹Testimony of Witness #6.

²⁰Testimony of Grievant.

²¹Exhibit K, p. 2.

appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws.

In the present case, the Grievant was given a Group III Written Notice for violating agency policy and procedures by use of excessive force when putting a patient in a restraint hold. The Grievant's employment was terminated. The Grievant filed Grievance Form A - Dismissal Grievance with the Office of Employment Dispute Resolution, and a hearing was scheduled and conducted to determine whether the Group III Written Notice should be upheld.

In the Rules for Conducting Grievance Hearings, Section VI., Scope of Relief, B. Disciplinary Actions, section "Framework for Determining Whether Discipline was Warranted and Appropriate" states as follows:

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determinations had yet been made) to determine (I) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with the law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).²²

Using this framework, this Hearing Officer will analyze this case.

(I) Whether the employee engaged in the behavior described in the Written Notice

In this case, the Grievant did place the patient in a restraint hold twice. When the patient tried to get out of the hold she fell and was injured. The Grievant did not follow the TOVA training protocol of calling out for staff, moving out of the line of attack, or any action short of restraint. I find that the preponderance of the evidence shows that the Grievant's immediate use of physical restraint twice on the patient was against the policy established by the agency and was excessive force.

(ii) Whether the behavior constituted misconduct

The definition of abuse from the Code of Virginia includes any act by an employee that was performed knowingly, recklessly, or intentionally, and that caused or might have caused physical or psychological harm injury or death to a person receiving care or treatment for mental

²²Rules for Conducting Grievance Hearings, VI.B1., Effective Date 7/1/2012.

illness including ... use of excessive force when placing a person in physical restraint.²³

The Grievant in this case is charged with patient abuse by using excessive force. The investigator concluded there was not abuse because she did not find sufficient evidence that the Grievant acted knowingly, recklessly or intentionally **to cause** physical harm (emphasis added). I find that is a misreading of the definition of abuse. The actions of the Grievant were performed intentionally. That is to say, he intended to place the patient in a physical restraint. AND that caused or might have caused injury. I find that the actions by the Grievant are within the definition of abuse.

The use of physical restraint on a patient is not, in itself, necessarily excessive force. The staff is trained to use physical restraints. They are also taught the correct time and circumstances to use physical restraints. There is a protocol to follow. Just as police officers are trained to use fire arms, the training does not give license to the fire arms (or physical restraints) unless certain conditions apply.

In this case, I find that the Grievant did not follow the agency policy and procedures for use of physical restraint. He used excessive force which comes under the definition of patient abuse. Such abuse is misconduct.

(iii) Whether the disciplinary action taken by the agency was consistent with the law and policy

The Grievant was given an Written Notice of a Group III Offense. This level of discipline is appropriate in this case due to the serious violation of the policy and procedures, which resulted in the injury of a patient. The Grievant's employment was terminated. This Hearing Officer finds that the agency's disciplinary action is consistent with law and policy.

Mitigating Circumstances

Because the Grievant's employment was terminated, the hearing officer must consider evidence of mitigation or aggravation of the offense charged by the agency. The grievant offered for mitigation the fact that he was an employee of the agency for fourteen years, and that he had no previous written notices.

According to 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. This, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness."²⁴

²³Code of Virginia §37.2-100; Agency Exhibit G, p. 1.

²⁴Rules for Conducting Grievance Hearings, p. 17, Effective Date: 7/1/1012

The agency knew of these mitigating factors when giving the Written Notice. In Section IV of the Written Notice, there is a written record that the mitigating factors were considered.²⁵ This Hearing officer finds that the agency properly considered mitigating circumstances in this case.

DECISION

The Grievant's Group III Written Notice is upheld. The Grievant's termination of employment is upheld.

APPEAL RIGHTS

You may file an administrative review request within 15 calendar days from the date the decision was issued, 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. Please address your request to:

Director
Department of Human Resource Management 101 North 14th St, 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution Department of Human Resource
Management 101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing

²⁵Agency Exhibit J.

officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. 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.²⁶

[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].

March 5, 2013

Jane E. Schroeder, Hearing Officer

²⁶Agencies must request and receive prior approval from EDR before filing a notice of appeal.