State of New Hampshire

PERSONNEL APPEALS BOARD
State House Annex
Concord, New Hampshire 03301
Telephone **(603) 271-3261**

APPEAL OF RICHARD TINKER
Docket 89-D-5
Response to Request for Reconsideration

The New Hampshire Personnel Appeals Board (McNicholas and .Johnson) met Wednesday, November 8, 1989, to consider an October 2, 1989 Motion for Reconsideration filed by SEA Field Representative Stephen McCormack in the above-captioned appeal. In that motion, appellant requested that the Board reconsider its decision of September 13, 1989, denying Mr. Tinker's appeal of a one-week suspension without pay. The Board also considered the response filed by Department of Corrections Staff Attorney Michael K. Brown dated October 11, 1989.

After careful consideration of Appellant's Motion for Reconsideration and the State's objection, the Board voted unanimously to affirm its original decision, granting the State's request that the Motion for Reconsideration be denied.

THE PERSONNEL APPEALS BOARD

Patrick J. McNicholas, Esq., Chairman

Robert J. Johnson, Member

DATED: November 15, 1989

cc: Stephen J. McCormack, SEA Field Representative
Michael K. Brown, Staff Attorney, Department of Corrections
Virginia A. Vogel, Director of Personnel
David S. Peck, Assistant Attorney General

State of New Hampshire

PERSONNEL APPEALS BOARD
State House Annex
Concord, New Hampshire 03301
Telephone (603) **271-3261**

APPEAL OF RICHARD TINKER
Department of Corrections
89-D-5

The Personnel Appeals Board (McNicholas, Johnson and Scott) met Wednesday, August 23, 1989 at 9:15 a.m. to consider the appeal of Richard Tinker, an employee of the New Hampshire Department of Corrections, Secure Psychiatric Unit. Mr. Tinker, through his representative the State Employees' Association, by letter dated March 3, 1989, had filed a timely appeal of a one-week suspension without pay. Stephen J. McCormack, SEA Field Representative appeared on behalf of the appellant. Michael K. Brown, Staff Attorney, represented the Department of Corrections.

At the outset of the hearing, Attorney Brown submitted a file containing exhibits which the State asked to have entered into evidence. These documents were entered without objection from the appellant. Mr. McCormack asked that it be noted for the record that the appellant would only admit that the photograph of "William T." submitted among the exhibits is William T., but made no other admissions concerning that photograph. Appellant had submitted exhibits prior to the hearing, which were entered into evidence without objection by the State.

The State and Appellant entered for the record a Stipulation by the parties dated August 17, 1989:

1. For the purpose of the hearing...the alleged victim will be referred to as William T. and all statements regarding him and signed by him will be blackened to reflect only William T.

2. That William T. is prone to violence and at times in unpredictable in his behavior.

3. Prior to and after the incident in question William T. did demonstrate his propensity for violent behavior.

4. The only issues before the Board [are] whether or not the use of force exercised by the appellant, Richard Tinker, was reasonable given the circumstances and whether or not the personnel action taken by the Department of Corrections against Mr. Tinker was appropriate."

The incident for which Officer Tinker was suspended involved his hitting a patient, William T., with a closed fist. Earlier that same day, January 31, 1989, Officer Tinker had reported an incident which occurred when he had gone to William T.'s room to awaken him. He told the patient it was time to get up. The patient attacked Officer Tinker, putting his hands around Tinker's neck and choking him. Officer Tinker reacted by pushing the patient back into his room and backing away from him.

Later that same day, Officer Tinker, Corporal Tom Sheridan and Jane Sarabia, H.N., entered William T.'s room in the Secure Psychiatric Unit to take the patient's blood pressure. When the three employees entered the room, William T. was lying on his back at the far end of the room, with his left arm by his side and his other behind his head. R.N. Sarabia placed the blood pressure cuff and stethoscope on William T.'s left arm and began to take his blood pressure. William T. swung at R.N. Sarabia with the hand which had been behind his head, hitting her on the side of the face and head, knocking her glasses off.

During the incident, Officer Tinker had been stationed at the patient's feet. He testified that after seeing R.N. Sarabia struck by the patient, and concluding that he would be unable, with the assistance of Corporal Sheridan, to restrain the patient by holding him or by lying across him, Officer Tinker struck the patient once with his left fist. Neither R.N. Sarabia nor Corporal Sheridan saw Officer Tinker strike William T. The patient was reported to have calmed down immediately thereafter, and R.N. Sarabia completed taking the patient's blood pressure.

During the hearing, R. N. Mary Loughee offered expert testimony concerning S.O. L. V, E. training (Strategies of Limiting Violent Episodes), a required course of training for mental health workers at New Hampshire Hospital and the Secure Psychiatric Unit. Ms. Loughee stated that Officer Tinker had taken the training in 1984. During that twenty hour course, employees are instructed in use of the least restrictive physical control alternatives when dealing with physically violent clients. According to Ms. Loughee, the only time that an individual should resort to striking a patient with a closed fist would be in the event that the episode became life threatening. When asked by Appellant's representative for her opinion of the seriousness of the episode involving William T., and whether that situation might have been life threatening, the Board sustained Attorney Brown's objection to the question, ruling that without actually witnessing the incident, or being part of the incident, no clear-cut conclusion could be drawn.

In describing the S.O.L.V.E. techniques, R.N. Loughee said that the first step is monitoring, or observing the patient for verbal or physical clues that the patient may become violent or aggressive. While the end result might be least restrictive restraint, the first course of action should be redirection to remove the individual from that setting. She also indicated that employees

taking the course are taught that if they should use physical restraint or force, they will be required to prove that the degree of force used was the minimum force required to regain control of the situation. In the case of striking a patient with a closed fist, an employee would be required to substantiate that the situation was life threatening and that no lesser degree of force could have decreased the risk or controlled the situation.

Officer Tinker, as an employee of the Department of Corrections, had been required to take 40 hours of training annually to maintain certification for his position at the Secure Psychiatric Unit. After his first training in S.O.L.V.E. through New Hampshire Hospital, he had not been required to repeat the training until after his suspension. The training which he was required to attend was offered through Police Standards and Training, and included a module in Defensive Tactics, which he took in 1984, 1986 and again in 1988.

Jerry Smith-Pearson, Commandant at the New Hampshire Police Academy, offered expert testimony concerning his experience in teaching the course in defensive tactics. He testified that Defensive Tactics, like S.O.L.V.E., concentrates on teaching the use of least or minimum force as defined by a 5 step continuum of force. This State approved training for police and correctional officers does not include S.O.L.V.E.

In defensive tactics, students are taught to use the minimum amount of control to effectuate an arrest or prevent an escape. At the lowest level, %he officer would attempt to control the situation by officer presence or voice command, moving then through the continuum of force to such "soft techniques" as joint manipulation and pressure points. Students are taught, however, that they are authorized to use the degree of force they deem necessary to effectuate an arrest or prevent an escape. Mr. Smith-Pearson said that the decision may need to be made in a split second, and an officer might move immediately from voice control to deadly force if he perceives that such force is warranted.

When asked by Appellant's representative if striking William T. under the circumstances described would have been an acceptable alternative, Attorney Brown again objected. The Chair sustained his objection, again noting that without witnessing or participating in the altercation, Mr. Smith-Pearson could not necessarily give an accurate assessment. Mr. Smith-Pearson did say, however, had he seen one of his co-workers "down", or struck in the manner that William T. was said to strike R.N. Sarabia, he believed he would have reacted in the same fashion as Officer Tinker.

In describing the full range of the force continuum, Mr. Smith-Pearson listed the five steps as Officer Presence, Voice Command, Empty Hand, Intermediate Weapons (i.e., kubaton, hand-cuffs), and Deadly Force. He said it was not inappropriate for an officer to respond to aggression with the same level of force used by the aggressor.

Officer Tinker was asked if the amount of force utilized was excessive, had been administered in retaliation for an incident which had occurred earlier that day, or was intended to punish the patient for striking the nurse. He stated that the force used was, in his estimation, appropriate in light of the incident. He said that the action could only have been considered punishing or retaliatory if he had hit the patient again after he had calmed down. When asked if, in retrospect, he believed that some lesser degree of force might have sufficed, Officer Tinker replied that the three Corrections personnel might have backed out of the room, but that would have been the only other alternative. He did note, however, that because of the size and configuration of the room, there was very little room in which to move or to try to control the situation without striking the patient.

Before ruling on the level of discipline imposed by the Department of Corrections, the Board considered the issue of "multiple" disciplines for one action. Early in the hearing, Mr. McCormack had contended that Officer Tinker was penalized with both a letter of warning and a disciplinary suspension. The Board does not agree. Per 308.01 Suspension states, at (a): "An appointing authority may, at his discretion suspend an employee without pay for disciplinary reasons or for other cause. ..." (Emphasis added) The letter of warning issued to Officer Tinker was served as notice of disciplinary suspension.

Obviously, the disciplinary action taken by the Department of Corrections was in response to a single incident of alleged, excessive force. In the event of further disciplinary action, the Department of Corrections could not reasonably cite that letter of warning and suspension as two separate disciplinary actions leading to discharge when the warning of disciplinary suspension relates to a single, isolated incident. Therefore, the Board ruled that the letter of warning dated February 23, 1989, notifying Corrections Officer Richard Tinker of his one-week suspension without pay, was a single disciplinary action taken within the scope of the Rules of the Division of Personnel.

The greatest difficulty the Board had in reaching its decision concerned the training requirements imposed by the Department of Corrections upon its employees. Although the Department of Corrections has adopted the standards of the S.O.L.V.E. training for its employees through its Policy and Procedures Directives, and will discipline its employees under those standards, the Board must question why Defensive Tactics and not S.O.L.V.E. is a required course in the annual recertification process.

The Board would strongly recommend that the Department of Corrections carefully review its training requirements. If the Department believes that S.O.L.V.E. techniques are sufficient for dealing with the patient population in the Secure Psychiatric Unit, then it would appear to the Board that the Department should mandate review and refresher courses, rather than simply notifying its employees that such courses are available.

The Board's concerns about the training, however, did not outweigh the seriousness of the incident, or the potential for repetition of similar incidents should it have decided to grant the appeal. The Board does not believe that officers within the confines of an institution, with other staff available to give them assistance, should have the degree of latitude described by Mr. Smith-Pearson in determining an acceptable level of force for the purposes of controlling the patient population.

Upon review of the evidence and testimony, the Board voted to uphold the suspension without pay, thereby denying Mr. Tinker's appeal. In so doing, the Board found that the degree of force utilized by Mr. Tinker was understandable in light of the circumstances, but excessive in terms of the least force required to regain control of the situation. The Board believes that Mr. Tinker's reaction was instinctive rather than punitive or retaliatory. That alone, however, is insufficient to justify over-turning the decision of the Department of Corrections to suspend Mr. Tinker without pay for one week.

THE PERSONNEL APPEALS BOARD

Patrick J. McNicholas, Chairman

Robert J. Johnson, Member

Peter C. Scott, Alternate

cc: Stephen J. McCormack, SEA Field Representative
Michael K. Brown, Staff Attorney, Department of Corrections
Virginia A. Vogel, Director of Personnel

DATED: September 13, 1989