

CSEA v New York State Dept. of Mental Retardation
2007 NY Slip Op 32891(U)
September 10, 2007
Supreme Court, New York County
Docket Number: 0112012/2007
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN BRANSTEN PART 6
Justice

CSEA,
Petitioner,
- against -

INDEX NO. 112012/07
MOTION DATE 9-10-07
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

NYS DEPT. OF MENTAL RETARDATION,
Respondent.

The following papers, numbered 1 to 2 were presented for production of documents.
Notice of Motion/ (Petition) — Affidavits
Answering Affidavits — Exhibits
Repeating Affidavits

UNFILED DOCUMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Cross-Motion: Yes No

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Upon the foregoing papers, it is ORDERED and ADJUDGED that this petition is GRANTED IN LIMITED PART.

By Notice of Discipline dated October 6, 2006, Aristidez Perez ("Mr. Perez"), a Developmental Disabilities Secure Treatment Care Aide 1, Sg-11 employed by the Brooklyn DDSO, was charged with two counts of "Misconduct" related to incidents on August 23, 2006 when he accompanied consumer T.Q. to a medical center. Mr. Perez stands administratively accused of, among other things, hitting T.Q. in the head, kicking him in the back and attempting to hit him on two occasions that day. Petition, Ex. 1. The State is seeking to terminate Mr. Perez as a result of the incidents. Petition, at ¶ 3. Pursuant to the collective bargaining agreement between petitioner Civil Service Employees Association, Inc. ("CSEA") and the State of New York, Mr. Perez filed a timely appeal to arbitration. An arbitration hearing is scheduled to commence on September 11, 2007. *Id.*, at ¶ 4.

In this petition commenced against respondent-employer New York State Office of Mental Retardation & Developmental Disabilities ("OMRDD") (Brooklyn DDSO), CSEA, on behalf of Mr. Perez, seeks to compel "production of the resident records of those consumers or former consumers whom the State may call to testify against [Mr. Perez], as well as the resident records of T.Q. * * * whether or not this individual is called to testify." Petition, at ¶ 5.

Dated: September 10, 2007

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EILEEN BRANSTEN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

J.S.C.

CSEA argues that the records are necessary because if any consumers are called as witnesses “their competency and credibility may be challenged through use of clinical records, [which may reveal, among other things,] whether they lack the capacity to perceive, remember and relate events accurately; whether they can distinguish between fact and fantasy; whether they have a documented history of bringing false charges against staff members; and whether they have a documented history of lying.” Petition, at ¶ 6(a). CSEA further seeks T.Q.’s records, regardless of whether he will testify, because the records may establish “this individual’s behavior (specifically, his propensity to be violent), as well as [his] physical and mental condition before and after any alleged misconduct or endangerment.” *Id.*, at ¶ 6(b). CSEA more particularly alleges, on information and belief, that “T.Q. has been court ordered to the Brooklyn Developmental Disabilities Services Office, in lieu of incarceration in State prison, due to prior violent offenses, allegedly including attempted murder. Moreover, [his] records may identify any alleged harm experienced by T.Q. in relation to the Notice of Discipline (dated: October 6, 2006). *Id.*

Additionally, at oral argument, CSEA’s attorney indicated that on the day of the incident Mr. Perez was chasing T.Q. who had been attempting an escape. In order to prepare a defense, CSEA points out, T.Q.’s records related to prior escape attempts should be produced. CSEA also discussed a report provided to Mr. Perez in anticipation of the arbitration, which described a conversation between a psychiatrist and T.Q. related to the August 2006 incident.

CSEA seeks to have the records produced to arbitrator Jay Nadelbach, who would review them *in camera* and make informed determinations as to what should be turned over to Mr. Perez for use in the arbitration hearing alone.

Brooklyn DDSO has no opposition to the petition provided that the Court, consistent with the Mental Hygiene Law, finds that the interests of justice outweigh the need for

confidentiality in this case. Petition, Ex. 2, at ¶ 2. Specifically, “OMRDD and Brooklyn DDSO have no objection to the issuance of the proposed so-ordered subpoena provided that any copies made of the clinical records be either destroyed or returned to the New York State OMRDD at the conclusion of either the arbitration proceeding, or any Court proceeding concerning the arbitrator’s award, whichever is later.” Petition, Ex. 2, at ¶ 4.

T.Q., through Mental Hygiene Legal Service (“MHLS”), opposes the petition. T.Q. objects to release of the confidential records. T.Q. contends that there has been no showing that any consumers will be called at the arbitration proceeding (there were other non-consumer witnesses to the incident and a videotape), and therefore, disclosure is entirely inappropriate. Affirmation in Opposition to Motion (“Opp.”), at ¶ 13. T.Q. relies on a case where the parties stipulated that the consumer would not be called to testify and disclosure was therefore denied. He also relies on a case that did not involve an employee assault and thus the consumer’s history was not relevant to the disciplinary determination.

T.Q. further points out that he was handcuffed at the time of the incident, and therefore, any violent propensities are irrelevant and the defenses of justification and self-defense are not implicated. *Id.*, at ¶ 16.

T.Q. asserts that even if some portions of his records are deemed relevant, there should not be blanket disclosure of all of his clinical records as they contain information wholly unrelated to this matter (such as admission information).

T.Q. also requests that if production of the records is authorized, the Court Order should “(1) prohibit the release of the disclosed materials to any and all non-parties to the proceeding; and (2) direct that, at the close of the disciplinary proceeding, all copies of the materials shall be returned to the Brooklyn DDSO.” *Opp.*, at ¶ 18.

Analysis

Mental Hygiene Law § 33.13 (“Clinical Records; confidentiality”) provides:

“A clinical record for each patient or client shall be maintained at each facility licensed or operated by the office of mental health or the office of mental retardation and developmental disabilities * * * . Such information about patients or clients reported to the offices, including the identification of patients or clients, clinical records or clinical information tending to identify patients or clients * * * shall not be a public record and shall not be released by the offices or its facilities to any person or agency outside of the offices except * * * [among other things] pursuant to an order of the court of record requiring disclosure upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality, provided, however, that nothing herein shall be construed to affect the existing rights of employees in disciplinary proceedings.”

Because the “interests of justice significantly outweigh the needs for confidentiality,” T.Q.’s clinical records must be released to the arbitrator for an *in camera* inspection and a determination of which portions of the records should be disclosed to the parties for purposes of this arbitration alone.

In *Matter of State of New York Office of Mental Retardation and Developmental Disabilities v. Mastracci*, 77 A.D.2d 473, 476-479 (4th Dept. 1980), the Appellate Division acknowledged the importance of permitting disclosure of patients’ clinical records in the context of a disciplinary arbitration proceeding in a case that also involved physical assault and the potential termination of the employee.

The *Mastracci* court explained:

“The need for maintaining the confidentiality of the patients’ records must be balanced against the concern for [the employee’s] rights and any adverse impact on his reputation, livelihood and future employment. Clearly, confidentiality, on these facts [where termination was the proposed sanction], must yield to [the employee’s] right to conduct an effective defense to the disciplinary action.”

Id., at 476.

The Court further emphasized:

“Certainly, if the patient is called as a witness his credibility may be challenged through use of his records. Further, regardless of whether the patient is called as a witness, his records may be relevant and material to show his behavior, any propensity for violence, as well as his physical condition before and after any alleged assault.”

Matter of State of New York Office of Mental Retardation and Developmental Disabilities v. Mastracci, 77 A.D.2d, at 476 (citations omitted); *See also, Matter of Goohya v. Walsh-Tozer*, 292 A.D.2d 384, 385 (2d Dept. 2002) (confidentiality of mental patients’ hospital records is “not absolute” and records of patients called as witnesses should have been provided), *lv. denied* 99 N.Y.2d 551 (2002).

The *Mastracci* Court concluded that a determination of which portions of the clinical records should be admissible at the hearing was properly left to the arbitrator. *Id.*, at 477-478.

Here, there is no indication that consumers other than T.Q. have any connection whatsoever to the arbitration proceeding or that any will testify. Thus, this Court will not authorize production of their records and will only consider whether T.Q.’s records should be produced for inspection by the arbitrator.

Termination is a very serious sanction with significant repercussions for Mr. Perez. Although confidentiality is important it must be relaxed--not entirely disregarded--to enable Mr. Perez to mount a defense. Mr. Perez is entitled to offer evidence of T.Q.’s prior attempted escapes, if any, in order to establish his defense. If T.Q. testifies at the arbitration, moreover, or if any psychiatrist or other Brooklyn DDSO employee testifies as to information provided by T.Q. related to the incidents, then Mr. Perez must be afforded an opportunity to cross-examine the witnesses using information contained in T.Q.’s records that the arbitrator deems relevant.

The medical portions of T.Q.'s records, of course, should be treated "differently from the remainder of the record because such parts are privileged communications." *Matter of State of New York v. Mastracci*, 77 A.D.2d, at 476.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted in limited part and T.Q.'s clinical records are to be produced to the arbitrator for *in camera* inspection; it is further

ORDERED and ADJUDGED that any records related to attempted escapes and plans to protect against escapes are to be turned over to the parties; it is further

ORDERED and ADJUDGED that if T.Q. testifies or if any psychiatrist or other Brooklyn DDSO employee testifies as to information provided by T.Q. related to the August 2006 incidents, then Mr. Perez must be afforded an opportunity to cross-examine the witnesses using information that the arbitrator deems relevant that is contained in T.Q.'s clinical record; it is further

ORDERED and ADJUDGED that if the arbitrator decides to permit the parties access to portions of T.Q.'s clinical records, 24-hours notice and a copy of the records to be given to the parties must be provided to Felicia B. Rosen, Esq. of MHLS; and it is further

ORDERED and ADJUDGED that the clinical records and any information therein shall not be released or disclosed to any non-parties to the proceeding (except MHLS in accordance with the above directive); and at the close of the disciplinary proceeding, all copies of the clinical materials shall be returned to the Brooklyn DDSO.

This constitutes the Decision and Judgment of the Court.

Dated: New York, New York
September 10, 2007

ENTER


Hon. Eileen Bransten

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419)