



STATE OF NEW JERSEY

In the Matter of Ryan Lopez
Ann Klein Forensic Center,
Department of Health

DECISION OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2017-3264
OAL DKT. NO. CSV 5963-17

ISSUED: JULY 10, 2019 BW

The appeal of Ryan Lopez, Senior Medical Security Officer, Ann Klein Forensic Center, Department of Health, removal effective April 10, 2017, on charges, was heard by Administrative Law Judge Jeffrey N. Rabin, who rendered his initial decision on June 5, 2019 reversing the removal. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions filed by both parties and reply filed by the appellant, the Civil Service Commission (Commission), at its meeting on July 9, 2019, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the charges have been dismissed, the appellant is entitled to mitigated back pay, benefits, and seniority and reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Ryan Lopez. The Commission further orders that appellant be granted back pay, benefits, and seniority from April 10, 2017 to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C. 4A:2-2.12*. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2-2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 9TH DAY OF JULY, 2019



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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and
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 5963-17

AGENCY DKT. NO. 2017-3264

**IN THE MATTER OF RYAN LOPEZ,
ANN KLEIN FORENSIC CENTER,
DEPARTMENT OF HUMAN SERVICES.**

William A. Nash, Esq., appearing for appellant, Ryan Lopez (Nash Law Firm, LLC, attorneys)

Aimee Blenner, Deputy Attorney General, appearing for respondent, Ann Klein Forensic Center (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: April 23, 2019

Decided: June 5, 2019

BEFORE **JEFFREY N. RABIN, ALJ**:

STATEMENT OF THE CASE

Appellant, Ryan Lopez, a Medical Security Officer (MSO) at the Ann Klein Forensic Center (Ann Klein), Department of Human Services, appeals the disciplinary action seeking his removal for conduct unbecoming a State employee, in violation of N.J.A.C. 4A:2-2.3(a)(6), physical or mental abuse of a patient, client or resident, in

violation of Administrative Order (A.O.) 4:08 C3, and inappropriate physical contact or mistreatment of a patient, client, resident or employee, in violation of A.O. 4:08 C5.

At issue is whether the injuries suffered by patient R.A. during an incident on February 18, 2017 (the incident), were due to violations by appellant of the above-referenced disciplinary codes, so as to require removal of appellant from his position.

PROCEDURAL HISTORY

Appellant was served with a Preliminary Notice of Disciplinary Action on April 5, 2017, suspending him without pay. Appellant did not request a departmental hearing, and on April 10, 2017, a Final Notice of Disciplinary Action was served, removing him from his position. Appellant filed an appeal, and the Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL), where it was filed on May 1, 2017. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Hearings were held on October 5, October 9 and October 15, 2018. Post-hearing briefs were received on April 23, 2019, and the record closed on that date.

FACTUAL DISCUSSION

Undisputed Facts from the Hearing:

1. R.A., currently thirty-one years of age, was a patient incarcerated at Ann Klein in 2016 and 2017.
2. An incident took place on February 18, 2017, between R.A. and appellant, Ryan Lopez. R. A., who identified himself as transgender, was in the outdoor recreation courtyard at Ann Klein. R.A. left the courtyard to remove a bustier from under his shirt, which he had been wearing in order to create the appearance of a bustline. After removing the bustier, R.A. returned to the courtyard. Shortly thereafter, Lopez, the MSO on duty in the courtyard,

canceled the remainder of fresh air (recreation) time and sent all the patients back indoors.

3. Because Ann Klein policy prohibited patients from having items covering door and wall windows in their rooms, Lopez went to R.A.'s room (room 18) after the patients returned indoors and began to remove posters that were covering the windows. This was the second time Lopez had removed posters in R.A.'s room that were covering windows. R.A. entered his room, a physical encounter between R. A. and Lopez took place, and R. A. suffered injuries.
4. Ann Klein was a secure psychiatric facility for criminals. Employees were given mental health training, and training as to defensive techniques and seclusion restraint techniques, such as advance emergency holds. Any staff member with patient contact received training on therapeutic options and restraints. Lopez had received emergency restraint training, advanced emergency holds training, training on patient care and crisis management, as well as therapeutic options such as how to deal with a patient without using restraints. Lopez was current in his training. Punching or putting your hand on a patient is a violation of Ann Klein policies. (Exhibit R-19.)

Testimony:

For respondent:

R.A. narrated a video of the courtyard prior to the incident. On camera 31, at 1:38 p.m., R.A. was in the courtyard at Ann Klein, as was Lopez. Lopez and a patient named A.J. discussed R.A.'s outfit and the fact that R.A. was attempting to create a bustline by wearing breast implants. At 1:43 p.m., R.A. became anxious and tired of Lopez and A.J. discussing and mocking him. R.A. asked Lopez to stop making derogatory comments, in such a manner so as not to be threatening towards Lopez. Lopez did not stop the derogatory comments, so R.A. left the courtyard to return to his room to take off the breast implants. R.A. then returned to the courtyard. Lopez

approached R.A., made aggressive threats against him, and then at 1:46 p.m. Lopez canceled the remainder of recreation time.

Prior to this date, Lopez had previously punched R.A., telling him to "knock this shit off," although R.A. never reported that incident.

On camera 32, at 1:46 p.m., Lopez went to R.A.'s room, and tore down the window coverings, which were mostly religious items that R.A. had made. R.A. went to his room to stop Lopez from tearing down the window coverings, and seconds later Lopez grabbed R.A. and began assaulting him. R.A. grabbed Lopez by his shirt. Lopez's uniform pin pricked R.A. Lopez threw R.A. on his back onto his bed. Lopez then punched R.A. five or six in the ribs. R.A. wrapped his legs around Lopez, but could not get Lopez off of him. Lopez punched R.A. in the face one time, above his left brow. R.A. then began to bleed. There was blood on R.A.'s shirt and his bed linens. A female security officer, Edith Gaines, heard the tussle, came to the room after Lopez's assault had ended, and saw R.A. bleeding. She called in a "code." At 1:50 p.m., Officer Tira Lewis came to R.A.'s room, but R.A. did not tell Lewis that Lopez had beaten him. The incident ended at 1:51 p.m. Gaines was not in R.A.'s room nor did she see the actual incident. Lopez lured him into his room to beat him up because he was transgender. R.A. did not punch or assault Lopez at all.

This was the second time Lopez came into R.A.'s room to remove materials from the window, but nobody had ever told R.A. before that he was not allowed to have materials on his windows.

After the incident, R.A. went to the medical unit. R.A., who had been on medication, claimed that there was a conspiracy against him. He was sent to Trenton Psychiatric Hospital and received an MRI and CAT scan.

Prior to being at Ann Klein, R.A. was in the Burlington County Jail for aggravated assault, impersonating a police officer and terroristic threats. He had a history of psychiatric incidences. He once threatened someone with a hacksaw. He spent time at Kennedy Psychiatric Hospital, Lourdes Psychiatric Hospital, and a psychiatric hospital in

Trenton as well as one other hospital. R.A. was admitted to Ann Klein on December 5, 2016. He had been diagnosed bipolar.

On January 2, 2017, R.A. hallucinated and then began to pull tiles from his room. On January 8, 2017, R.A. accused officers of stealing from him. On February 11, 2017, R.A. had an argument with a fellow patient. On February 16, 2017, R.A. saw snakes under his bed. On April 1, 2017, R.A. threatened to remove sprinklers, which he hoped would have him moved to a different location because of threats from another patient.

R.A.'s room was an approximately 5' x 8' room with concrete walls, a metal bed and furniture. The struggle between R.A. and Lopez was in the middle of the room and moved to the bed. R.A. did not cry out for help, but only because he was too busy defending himself to yell for help.

R.A. did not recall complete details when he gave his Interview Statement dated February 18, 2017, because his memory was affected by antibiotics. R.A. also gave an Interview Statement dated February 21, 2017, which was written by someone else but signed by R.A. A few days after his Interview Statements, R.A. remembered more details because he was no longer under the influence of medication.

R.A. had grabbed Lopez's shirt and pulled off his officer pins. But R.A. did not jump Lopez. Lopez was very strong, and hit R.A. more than one time, which was very painful. However, R.A. did not complain of any bodily injuries when he was at the hospital, because he was not sore yet.

The supplemental narrative from Trenton Psychiatric Hospital (Exhibit P-3) said that R.A. did not explain how he was injured, although R.A. did in fact explain to them how he was injured. This was a lie by the hospital in order to cover up for Lopez. All of these personnel lied in order to cover up for each other.

R.A. had not hallucinated things; he saw snakes under his bed at Ann Klein. R.A. did not hear voices in his head. Although Mr. Ed McGowan had kept notes as part of his

treatment team (Exhibit P-4), McGowan's notes were wrong, McGowan was not there at the time of the incident, and Attorney Nash was lying.

Lewis Hargis had worked at Ann Klein for twenty-seven years, as an MSO, and as an admissions officer since 2011. Hargis took photos of R.A. on February 23, 2017, due to R.A.'s claim of assault. (Exhibit R-5.) There was red bruising around R.A.'s left eye and forehead and red bruises near his left ear. It was the director of Ann Klein who instructed Hargis to take photos. Hargis did not know the date of the injuries, and did not know about the incident. There had been another incident with R.A. on August 23, 2017, when another person hit R.A. in the face and R.A. went to the clinic, although Hargis was not asked to take photographs from that incident.

Sandy Ferguson was the Director of Staff Development at Ann Klein, overseeing training and staff development. Employees should never be alone with the patient. If an employee is alone with the patient, and they are physically aggressive, the employee must seek assistance, after initially taking a step away from the patient. If no assistance is available, then there are two kinds of restraints which can be employed: arm restraints or therapeutic holds. There is no form of hold for being on a bed.

There are written policies and procedures in place for employees. (Exhibit R-20.) The only therapeutic holds that can be used by an employee are the arm hold and side hold, only to be used if the patient is assaulting staff or hurting themselves.

Rochelle Spivey was a Registered Nurse with Ann Klein for twenty-four years, now working part-time only. She handled patient care and safety. She was working in Unit 2 on the day of the incident.

There had been a Code Red on the afternoon of February 18, 2017. Spivey did not respond to that code, per protocol. That code was later changed to a Code Blue, for a medical emergency. Spivey did respond to the medical emergency and went to Unit 5.

As Spivey responded to the Code Blue, she saw a lot of staff outside of R.A.'s room. She saw R.A. sitting on his bed with injuries, bleeding from the left side of his

face. R.A.'s room appeared disheveled when she first arrived. She left the room to get dressing for R.A.'s face. The only comment R.A. made to Spivey was about being transgendered. R.A. was peaceful and cooperative.

There was a laceration near R.A.'s eye which appeared to require sutures. Spivey then completed paperwork required to get R.A. to the emergency room to get sutures or whatever care was required.

It appeared that R.A. had been beaten up. R.A. had been beaten up on a few previous occasions. Lopez was not in the room when Spivey was there.

Spivey completed an Interview Statement (Exhibit R-10) and Initial Witness Statement form. (Exhibit R-11.) Spivey indicated in the Interview Statement that she saw a laceration of approximately three inches in length, swelling in R.A.'s jaw, and bleeding from a bulge behind one of his ears. Spivey also discussed photographs taken subsequent to the date of the incident which did not show any bleeding or bruising from the eye. (Exhibit R-5.) She did not recall seeing blood on the walls of R.A.'s room, but she had no reason to doubt other witnesses who saw blood on the wall.

R.A. had not only been beaten up several times previous to the February 18, 2017, incident, but had just been beaten up one or two days prior to this incident. Spivey did not minister to R.A. after the beating one or two days prior to the incident. She was unable to tell if the photographs of R.A.'s injuries were from this current incident or from the beating one or two days prior. It was possible that the injuries seen on R.A. could have been from a prior beating. She did not ask R.A. any questions. R.A. never said anything to Spivey about receiving body punches on the day of the incident, and never told Spivey that Lopez had punched him. Spivey said that R.A.'s injuries could have been from hitting his head on the wall.

When she arrived at the room, R.A.'s face was red, like someone who was upset over something that had happened. He appeared highly agitated. R.A. was always high-strung and on edge.

The doctor decided that R.A. should go to the emergency room. Spivey's only focus was on stopping the bleeding. While treating R.A., R.A. yelled, "it's because I'm transgendered." Spivey did not ask R.A. what he meant.

There was a lump behind R.A.'s left ear, from swelling. It is possible that trauma to the front of one's face could lead to swelling elsewhere, for instance in the ear. It is possible that sinus problems could lead to swelling elsewhere. There were no visible bruises to R.A.'s jaw or mouth.

Spivey discussed the Ann Klein Admission Face Sheet dated December 6, 2016, four months before the incident. (Exhibit P-5.) This listed all of R.A.'s infractions. She also discussed the Ann Klein Discharge Summary dated July 20, 2017. (Exhibit P-6.) Page DHS 265 of the Summary indicated that R.A. was psychotic, had previously hallucinated, and had previously played with feces. On January 2, 2017, R.A. had been hallucinating, and pulling out wall tiles. On January 6, 2017, R.A. was placed on "S and O," which stood for "seclusion and observation." On January 8, 2017, R.A. was back on S and O. On January 24, 2017, R.A. was attacked by another patient.

On page DHS 267 of the Ann Klein Discharge Summary, item number 2 suggested that R.A. committed improper acts and manipulated scenarios in order to remain at Ann Klein and not have to go to jail.

Lopez was a good officer. He had no reputation for assaulting patients. Lopez made sure that people followed the rules.

Margaret Connors was a "charge nurse" at Ann Klein. She provided treatment and met with doctors and pharmacists. She had been with Ann Klein for eleven years. She was working at Ann Klein on the day of the incident.

A Code Red was called on the day of the incident, but Connors did not respond. Then a Code Gray was called, and Connors responded to Unit 5. She saw a man with blood on his face, shirt and hands, slouched on his bed. There was blood on the walls and bed. Many people were there, including nurses and MSOs. She noted injuries on

R.A.'s head, eyes, nose and ear. There was bleeding from R.A.'s face, and there was a large bruise above his left eye. Blood was running from his face towards his left ear. She applied pressure to stop the bleeding. The injured person was agitated. The doctor then sent R.A. to the hospital. Lopez was still in R.A.'s room while she treated R.A. She did not examine Lopez and did not recall seeing any blood on Lopez.

Connors wrote part of the Interview Statement the day of the incident and completed it on February 24, 2017. Connors also completed an Ann Klein incident Report immediately after the incident. (Exhibit R-6). An Incident Report was completed here because it was unusual to find patients in a bloody condition. Connors also completed an Initial Witness Statement on February 18, 2017. (Exhibit R-8.)

On the date of the incident, R.A.'s bed was very messy. Sheets were all over the place. There was blood on the sheets. The only thing that R.A. said to her was that Lopez assaulted him.

Connors was not the charge nurse on Unit 5. She was on Unit 6 but responded to the Code Gray. Code Blue announcements are made on the P.A. system and are for medical emergencies. A Code Gray is for a fight. Connors responded immediately to the Code Gray and arrived at R.A.'s room within five minutes. Connors wrote in one of her statements that it was a Code Red.

Connors had not met R.A. before. She had no knowledge of his past. Connors had known Lopez professionally for a few years. Lopez was a good employee. He was peaceful.

On cross-examination, Connors stated that when she entered the room, nobody was holding R.A. down. R.A. was crying and talking, but Connors did not remember what he said. She saw blood on the wall and concluded that R.A.'s bloody face hit the wall by the bed. Connors cleaned the blood from above R.A.'s left eye and from his ear, and removed his shirt, and saw no bruises on his body. It was difficult to stop the nose bleeding.

Her written reports did not state that R.A. said that Lopez had caused his injury or punched him.

Connors named six persons who were present in R.A.'s room after the incident: MSO supervisor Figueroa; nurse June Colossi; nurse J. Giovanni; Carol Gutierrez; and Ryan Lopez. Connors did not know who else might have been in the room.

The mattress in R.A.'s room was slightly askew. Lopez was in his blue uniform. Connors saw no blood on his uniform, although she was mostly focused on patient R.A.

Dr. Bonard Moise was a Board Certified psychiatrist who had worked at Ann Klein for six years. He handled mental and physical patient care. He was at Ann Klein on February 18, 2017.

There was a Code Blue, indicating a medical emergency. He went to R.A.'s room immediately upon hearing the Code Blue. He saw blood all over the patient's face. There was blood on the left side of his face. He thought that blood was coming out of both the ear and the nose. Dr. Moise provided an Interview Statement. (Exhibit R-13.) There were many people in the patient's room. He did not pay attention to the walls. He decided that the patient needed outside help, due to possible head trauma, based on the amount of blood he had seen. He sent the patient to the emergency room. The patient was upset. The patient said that an officer had punched him. Dr. Moise did not recall seeing Lopez in the room.

There was a mental status examination performed on R.A. (Exhibit R-15.) Dr. Moise was required to fill this out by the investigators. He wrote that the patient alleged that he was punched by a security officer. R.A. was generally cooperative and coherent and able to articulate the incident. Moise completed an Ann Klein transfer form. (Exhibit R-16.) He determined that R.A. needed stitches for an opening, a laceration, over R.A.'s left eye. He saw blood but was mostly concerned with head trauma. He could not tell if R.A.'s maxillary bone had been broken without having x-rays taken. It was possible that if a head hit a wall one time there could be multiple fractures.

Dr. Moise had seen R.A. before due to his various behavioral infractions. An order for an S and O had been issued on January 2, 2017. It was the second S and O order that day. It was noted on page DHS 537 that with R.A. there was a "high risk of assault . . . He can attack at any second." R.A. was described as "labile"—unpredictable, one moment calm, the next moment combative. Dr. Moise described R.A. as a threat to assault others.

Dr. Moise knew Lopez prior to the incident. He saw Lopez in R.A.'s room. Lopez was a good officer. Dr. Moise had nothing bad to say about him. Lopez had never punched anyone. Dr. Moise could not remember if R.A. had mentioned Lopez's name or not. R.A. said an officer punched him in the face. R.A. never indicated that he had been punched in the body, which is why Dr. Moise never checked R.A.'s body.

An aftercare plan was devised for after R.A.'s hospital discharge, as part of the discharge form. (Exhibit P-6.) On page 267 of the aftercare plan, item 2 indicated that R.A. displayed manipulative behavior, which made Dr. Moise doubt the truth of statements made by that patient. He noted that many patients lie as part of having manipulative behavior.

Dr. Moise did not know what actually happened during the incident.

For appellant:

Yovanda Jenkins was an MSO at Ann Klein for twelve years.¹ Her responsibility was to keep the patients and staff safe. She worked on Unit 1. There are eight units at Ann Klein. She knew about R.A., recalling him as having the alter ego of "Sara." There are a few other transgender people like Sara at Ann Klein.

Jenkins had worked with Lopez. He was a great employee, very positive, caring, honest, and professional at all times. Jenkins had seen Lopez interact with R.A. She never saw Lopez upset when R.A. was dressed as Sara. Lopez treated R.A. the same

¹ Ms. Jenkins testified last on October 9, 2018, but her testimony did not appear in the transcripts from that day.

as R.A. or Sara. There were some patients who acted offended by Sara and who wanted officers to intercede.

Loretta Williams had been employed at Ann Klein for twenty years, and was a senior MSO for Unit 5, the same as Lopez. R.A. was in Unit 5. Williams spoke with R.A. the day after the incident. R.A. told Williams that he attacked Lopez because Lopez was not paying him any attention. R.A. told Williams that he hit his head on the wall. R.A. never told Williams that Lopez punched him.

Williams had worked with Lopez for eight or nine years. He was a "by the books" employee, a fair and good officer. He treated patients with respect. He never hit any patients.

R.A. could be flirtatious as he went from being R.A. to Sara. He enjoyed antagonizing other patients. He wore a homemade skirt, then would walk in front of the other patients. Other patients would tell him to stop it. Williams never saw Lopez address R.A.'s transgender status before, or the transgender status of any other patients. Lopez was a peaceful officer.

R.A. was a liar. The day after the incident, Williams overheard R.A. speaking with another patient, who advised R.A. to lie about the incident and claim that Lopez punched him.

Carl Williams had worked as a senior MSO officer at Ann Klein for twenty-five years. He was assigned to Unit 7. Carl Williams had known Lopez for many years. He had never known Lopez to assault patients. Lopez was honest, followed policy, and was a good officer. Carl Williams had worked with Lopez. Lopez was not bothered or offended by transgender persons. Lopez's reputation is for being strict and following the rules.

Carl Williams had known R.A. for between eight and twelve months, when R.A. was in his unit. R.A. was assaultive. He was very manipulative. R.A. left Unit 5 and

moved to Unit 7. He would often appear as Sara. R.A. wanted everything his way. R.A. often lied about things, such as the people who had been in and out of his room.

Although Carl Williams worked the same days as Lopez, he did not always work the same hours as Lopez, and it is possible that he could have missed some of the interactions between Lopez and patients. Lopez always worked in the rehab unit. Aggressiveness would be out of character for Lopez.

Frank Taylor worked at Ann Klein since 1997, and was a senior MSO. He handled patient care and the safety of patients and staff. He was trained and certified by the State of New Jersey to train officers on the therapeutic options and restraint holds available. Ann Klein contained a prison and civil patients who had not been helped in other facilities, a mix of violent and peaceful patients, making Ann Klein a violent and unpredictable place.

There are policies and procedures in place for staff. (Exhibit R-20.) The therapeutic options in case of an incident are to verbalize and de-escalate an aggressive patient situation. "Verbalizing" means to call for help and verbally attempt to de-escalate the situation. Staff must try to avoid physical solutions. Therapeutic options do not always work, so you must resort to physical holds or restraints. When an MSO is attacked, the officer must protect himself as well as stop the patient.

Exhibit R-20, page 211, showed emergency measures for when verbalizing fails. You can use armed control; body control; escort; and advanced emergency holds. Trainers must be recertified twice a year. Michael Partay created these protocols, and recertified trainers when required. Training would be updated when there were new concepts or techniques. They would discuss the success of certain restraints.

MSOs get trained one time per year. The first day includes verbal and therapeutic options, and the second day covers restraints and advanced emergency holds. New hires receive a training orientation. They simulate restraining a patient in their room. Taylor worked with Sandy Ferguson, who scheduled training and ran the

verbal–therapeutic training. Certified training officers run the physical–therapeutic training.

Taylor said all patients have their own room, approximately 6' x 8' or 6' x 10' rectangle. On the left would be the toilet and a desk with a swinging chair, and on the right would be the bed, and a window on the far end of the room. The bed was not up against the wall.

It was Ann Klein policy that outside windows and door windows in a patient's room cannot be blocked. Hospital staff must be able to see into the room and see whether a patient is harming himself. MSOs have the responsibility to remove window and door window coverings.

MSOs conduct room searches. For some patients it can be one search per shift. They conduct random searches. Patients leave the room but may look in while the search takes place. It is the physicians who order room searches.

Taylor did not work on Saturdays and did not see the incident. Taylor said that it sounded like Lopez used "body control" restraint, but Taylor cannot say for sure because he was not there. Lopez used the least aggressive physical response. (Exhibit R-17.)

Momentum during a struggle is usually fast and hitting the wall could cause a serious injury. The patient rooms at Ann Klein have very hard concrete walls; hitting them could cause severe injuries.

Dr. Dariusz Chacinski was a psychiatrist at Ann Klein and had worked at Trenton Psychiatric Hospital. He has known Lopez since 2011. He never had a problem with Lopez. Lopez was a good worker. Lopez usually provided accurate information. There had been no patient complaints regarding Lopez, although patients did not like the rules that were being enforced. Lopez was not aggressive with patients and displayed no violence towards them.

R.A. was a patient of Dr. Chacinski for a couple of months. Dr. Chacinski was not there the day of the incident; Dr. Moise was on call.

R.A. had been placed on S and O (seclusion and observation), where a patient is isolated due to an assault, on many occasions. Some S and O orders were because R.A. would often appear delusional. Sometimes S and O was ordered to keep R.A. from committing an assault. (Exhibit P-7.)

In a "progress note" from R.A.'s chart dated February 21, 2017, Dr. Chacinski handwrote that, during the incident, patient R.A. hit a medical security officer and should be moved to a different unit than the MSO. There were many psychotic and paranoid incidents with R.A. Dr. Chacinski feared that another patient might someday attack R.A. Three days after the incident, R.A. told Dr. Chacinski that he hit Lopez.

Ryan Lopez, the appellant, was forty-six years of age, single, with three children. He started at Ann Klein in 2000, eventually becoming a senior MSO. Starting in 2010, he was assigned to Unit 5.

Ann Klein is for criminally charged patients with medical needs. Most clients there are violent. Some are gang members. Some have mental illness. Some committed sexual crimes.

Except for this case, there had never been charges of patient abuse against him. The good patients respected him, although many patients resented Lopez because he enforced the rules.

On the date of the incident, February 18, 2017, Lopez was working in Unit 5. Lopez knew R.A. On video camera 31, in the courtyard at 1:38:30 p.m., Lopez was facing the door to the hospital. Each unit had a courtyard, which allowed patients to get fresh air three times per day. Any patient not on an S and O order could go outdoors. R.A. was not on an S and O order on the day of the incident. At least one officer must be in the courtyard during fresh air breaks, which usually lasted between fifteen and twenty minutes. Officers were allowed to cut these breaks short.

At 1:39:04 p.m., R.A. was seen in an emerald green sweatshirt and sweatpants. He sat on a cement bench. Lopez was talking with other patients, including A.J., seen in white khaki pants at 1:39:32 p.m. They were talking about football and life, but were not talking about R.A. Lopez told the others, including A.J., to ignore R.A., in order to preclude any conflict. Nobody was mocking R.A. They knew to leave R.A. alone when they saw him dressed with fake breasts. R.A. was permitted to wear the fake breasts and had been wearing them once or twice per day for a few months. There were some patients who were bothered by R.A. wearing fake breasts. R.A. had gotten into arguments previously with other patients about wearing fake breasts, even previously that day.

Shortly after 1:40:43 p.m., tensions began to mount between R.A. and A.J.. At 1:44:24 p.m., as R.A. walked towards Lopez, A.J. told R.A. to "get outta here with that foolishness." Lopez interceded and told R.A. to remove the bustier/fake breasts if he wanted to remain outdoors, and at 1:45:27 p.m., R.A. walked inside. At 1:46:04 p.m., R.A. returned to the courtyard, having removed the bustier. R.A. walked up to Lopez and A.J., interrupted their conversation, and asked if this was all better. As A.J. was about to respond, R.A. cursed at him and told A.J. to shut up because nobody was talking to him. At that point, A.J. walked away, because he did not want to mess up his impending discharge. (Exhibit P-9 was the statement of patient A.J., in which he indicated that R.A. had been aggressive towards him.)

Lopez advised R.A. that if he didn't want another patient to hurt him he should consider not dressing up, as this upset other patients. This was not the first time Lopez said this to R.A. Lopez said this because it was his responsibility to try and prevent assaults, knowing that other patients wanted to beat R.A. up. R.A. had already been in such fights. At 1:46:51 p.m., Lopez ended the fresh air break. All the patients walked inside, and Lopez locked the door behind them.

The video then changed to the view from the inside camera, which showed rooms 16 through 20 on the left and 21 through 25 on the right. R.A.'s room was

number 18, next to the utility room. The interior courtyard between rooms was the dining area.

R.A.'s room was visible, and two posters were seen in the door window to R.A.'s room. The treatment team, including Dr. Moise, told R.A. on the Wednesday before the incident that R.A. must remove the posters. R.A. had removed the posters, then put them back up later on that day. R.A. was clearly told that no posters were allowed on windows in a patient's room.

Lopez first noticed posters improperly placed in rooms 18 and 20 when he was bringing the patients back in from the fresh air break. He chose to remove the posters at that time because R.A. had been bringing attention to himself, and because Lopez had extra time available after ending fresh air break early. Lopez decided to take the posters down himself rather than telling R.A. again to take them down. Room 20 had a poster on the door. The reason Lopez went to room 18 first to remove posters was twofold: room 18 was before room 20, so Lopez had not gotten to room 20 yet, and R.A. had brought attention to himself, so Lopez started there. Also, the poster in room 20 was just a tiny poster.

At 1:47:30 p.m., Lopez walked into R.A.'s room. R.A.'s room was approximately 6' x 10'. The bed was on the right near the back wall where the window was. On the left-hand side of the room was a metal sink and toilet, just inside the door. There was a metal desk on the left, approximately 2' x 2.5', with a swing chair that extended out.

Lopez had not yet said anything to R.A. regarding the posters. Immediately after Lopez entered R.A.'s room, R.A. arrived and Lopez told him to stay out of the room. Lopez removed the posters from the door window, then cleaned a spot on the desk, and placed the posters there. Just then, R.A. walked in, and Lopez told him to get out of the room. Rather than leave, R.A. rushed at Lopez with his hand raised. All of this happened in a split second. R.A. then punched Lopez with his right hand. Lopez deflected the punch and it only grazed him. R.A. stepped towards the back of the room. As Lopez tried to grab a hold of R.A.'s hand, R.A. climbed onto Lopez's back and tried to choke Lopez with his right hand around Lopez's neck. Lopez was still on the back

wall of the room, but had moved closer to the desk, and then attempted to use a bearhug hold. This hold served to move Lopez off of the wall and towards the bed. Lopez held R.A. down on his back. R.A. was still fighting, and with the momentum of R.A. trying to pull away from Lopez, both R.A. and Lopez hit the edge of the bed, then fell towards the wall. Lopez kept his head behind R.A., per protocol. R.A. hit the wall hard and started bleeding from his eye. Blood was on the wall. After hitting the wall, R.A. fell on the floor and Lopez held him down on his back.

Lopez held R.A. down for approximately three minutes. R.A. still had a grip on Lopez. Lopez did not punch or hit R.A. Lopez held his hands up as he walked out of R.A.'s room, to show that there was no blood or bruises on his hands.

The incident happened very quickly, so there was no time to call for help. Lopez did not have his radio on him, because he had not been expecting any problems, although he usually has it with him at all times. Even with a radio, Lopez had no free hands to use it. There was no panic button in the room. Lopez yelled to a patient in room 21 to get him help, and that patient told a nurse.

Lopez gave an Interview Statement, with Robert Hutchinson watching; Hutchinson was the man who investigated the incident. (Exhibit R-17.) This Interview Statement was completed on March 3, 2017, because it took two weeks to start the investigation. Page DHS 081 of the Interview Statement was completed in Hutchinson's handwriting. In the Interview Statement, Lopez indicated that he had been removing items from the windows in R.A.'s room when R.A. stated, "fuck you, Lopez," then punched Lopez. Lopez did not punch R.A. or assault him. On page DHS 083 it was written that R.A. punched Lopez. Page DHS 084 indicated that momentum took R.A. and Lopez to R.A.'s bed and then to the back wall, where R.A. hit his head against the wall.

Lopez had dealt with R.A. many times before. Lopez was unaffected by R.A.'s transgender issues or the fact that there were many gay men on the floor.

Lopez reiterated that he did not punch R.A. He tried to use his training, although the training was not perfect. There was no training specific for defending yourself in a bedroom. Lopez had attempted to use a headlock hold and had tried to grab R.A.'s right hand. He did grab the right hand for a moment, but R.A. was wiry thin and the hand got loose.

Officer Edith Gaines approached the room. She was a rookie. She yelled to the center because Lopez told her to call for a Code Gray. Lopez still had R.A. on his back, and Gaines did not enter the room to help, probably because she saw that Lopez had control of the situation. Lopez considered R.A. under control at that point, even though R.A.'s legs were still wrapped around him. Finally, at 1:52:34 p.m., Lopez walked outside R.A.'s room, and spoke with Director Figueroa. Lopez raised his hands to show Figueroa that there were no bruising or blood on his hands, and Figueroa told him to walk to the center and start his report.

Lopez suffered a few scratches on his neck from the incident. He had not been bleeding, and there is no injury worth reporting. He had been attacked five times previously by patients. In those other incidents, both he and the patients required medical attention, although none of those patients ever had to go to the emergency room.

Credibility:

In evaluating evidence, it is necessary to assess the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness' story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

A fact finder “is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth.” Id. at 521–22; See D’Amato by McPherson v. D’Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as “inherently incredible” when “it is inconsistent with other testimony or with common experience” or “overborne” by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Further, “[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.” State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep’t of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

R.A. was not a credible witness. His behavior was at times defensive, at times paranoid, and at times unruly. His testimony was filled with contradictions and unsupported statements.

R.A. claimed a past history of Lopez assaulting him physically and verbally, but there was no independent proof of such claims, and no record that any such alleged incidents had ever occurred. R.A. stated that he did not report these incidents. During the February 18, 2017, incident, R.A. never cried out for help or yelled out that an MSO was beating him.

R.A. testified that Lopez punched him five or six times in the ribs. However, Dr. Moises did not testify as to any injury to R.A.’s chest or torso. R.A. did not complain of any bodily injuries when he was at the hospital. Dr. Moises’ diagnosis was that R.A. needed stitches for a laceration over R.A.’s left eye, and his primary concern was possible head trauma from R.A. hitting his head against the wall. Photographs of R.A. were taken by Hargis on February 23, 2017; they showed bruises on R.A.’s body, but

no evidence was offered to indicate whether the bruises were from the incident of February 18, 2017, or from the incident where R.A. had been physically assaulted one or two days prior to the February 18, 2017, incident. No medical testimony was offered as to when the bruises in the photographs might have happened.

R.A. testified that he had never been told that the posters covering the windows in his room were prohibited, or that there was a policy against having posters covering windows in a patient's room. However, R.A. had been told about the Ann Klein policy just one week before the date of the incident, and admitted that Lopez had previously removed posters in his room.

R.A. stated that at 1:50 p.m., Officer Tira Lewis came to his room, just after he suffered his injuries. However, R.A. did not tell Lewis that Lopez had beaten him. Officer Edith Gaines went to R.A.'s room after the incident, and R.A. claimed he told Gaines that Lopez lured him into his room to beat him up because he was transgender. However, nothing on the videos nor any other evidence indicated that Lopez had done anything to lure R.A., or to show that Lopez had done anything in room 18 other than remove posters. Gaines was not called by the respondent to testify.

Rochelle Spivey spoke with R.A. in his room after the incident. R.A. never told Spivey that he was subjected to body punches during the incident, and never told her that Lopez had punched him or attacked him. Nurse Spivey said that R.A.'s injuries could have been from hitting his head on the wall.

R.A. told Dr. Moise that an MSO had assaulted him, but did not say that the MSO was Lopez. R.A.'s description of the incident—that Lopez lured him into his own room then punched him between five and seven times—was unsubstantiated and therefore not credible, and it seemed more likely that it was R.A. who was the perpetrator, in light of Dr. Moise's testimony that with R.A. there is a "high risk of assault . . . He can attack at any second." R.A. was described as "labile"—unpredictable one moment, calm the next moment, combative the next moment. Dr. Moise described R.A. as a danger to others, as a threat to assault others. Dr. Moise had seen R.A. before due to his poor behavior, and testified as to an order for S and O being issued on January 2, 2017, the

second S and O order that day. As it further concerned Dr. Moise, on page 267 of R.A.'s aftercare plan, item 2 indicated that R.A. displayed "manipulative behavior," which made Dr. Moise doubt the truth of statements made by R.A. Dr. Moise noted that many patients lie as part of having manipulative behavior.

Further, Loretta Williams spoke with R.A. the day after the incident, and R.A. told her that it was he who attacked Lopez. R.A. told her that his injuries resulted from hitting his head on a wall. R.A. never told Loretta Williams that Lopez punched him. The day after the incident, Loretta Williams overheard R.A. speaking with another patient, who advised R.A. to lie about the incident and claim that Lopez punched him. Loretta Williams characterized R.A. as "a liar."

Additionally, in a "progress note" from R.A.'s chart dated February 21, 2017, Dr. Chacinski handwrote of the incident that R.A. had hit a medical security officer, and should be moved to a different unit than the MSO. Dr. Chacinski wrote that there were many psychotic and paranoid incidences with R.A. Most importantly, three days after the incident, R.A. told Dr. Chacinski that he hit Lopez.

Prior to being at Ann Klein, R.A. had been in the Burlington County Jail for aggravated assault, impersonating a police officer and terroristic threats. R.A. testified that he had a history of psychiatric incidents. R.A. admitted he once threatened a person with a hacksaw. He spent time at three different psychiatric hospitals. R.A. admitted that he had once hallucinated and then began to pull tiles from the wall of his room. He had been accused of suffering hallucinations on February 16, 2017, when he claimed to have seen snakes under his bed. However, R.A. denied these were hallucinations and claimed that he saw snakes under his hospital bed. There was no evidence offered that snakes were seen or removed from any hospital room of R.A.

There was extensive testimony that R.A. created incidents at Ann Klein, to allow him to be moved to more favorable sections of the hospital, or to remain in a psychiatric hospital rather than return to jail. R.A. admitted to this behavior.

Finally, R.A. stated on re-cross examination that he only remembered 75 percent of what happened during the incident, and several times blamed lapses in his memory on being on medications.

Accordingly, due to R.A.'s lack of credibility, I cannot accept his version of the incident.

Lewis Hargis testified clearly, and accurately described the photographs he took of R.A. on February 23, 2017. Accordingly, his testimony is accepted as truthful and credible, and it is accepted as **FACT** that there was red bruising around R.A.'s left eye and forehead, and red bruises near his left ear.

Sandy Ferguson spoke authoritatively and displayed a great deal of experience and knowledge as to issues regarding employee training. Her testimony is accepted as truthful and credible, and therefore it is accepted as **FACT** that Ann Klein employees should never be alone with the patient and, if an employee is alone with the patient and they are physically aggressive, the employee must seek assistance, after initially taking a step away from the patient; if no assistance is available, then the worker must employ one of the approved restraints: arm restraints or therapeutic holds; there is no form of hold specifically for a struggle taking place on a bed.

Rochelle Spivey testified in great detail about her role on the day of the incident, and her testimony is accepted as truthful and credible. Therefore, it is accepted as **FACT** that: R.A. had been beaten up several times previous to the incident, and had just been beaten up one or two days prior to the February 18, 2017 incident; it was possible that the injuries seen on R.A. could have been from a prior beating; Spivey spoke with R.A. after the incident; R.A. never said anything about receiving body punches on the day of the incident, and never indicated that Lopez had punched him; R.A.'s injuries could have been from hitting his head on the wall; R.A. was a psychotic patient, who had previously hallucinated; R.A. committed improper acts and manipulated scenarios in order to remain at Ann Klein and not have to go to jail; Ryan Lopez was a good officer and had no reputation for assaulting patients.

Margaret Connors was not a credible witness. She referred to the Code she responded to in one of her written statements as a "Code Red," but testified that she responded to a "Code Gray." She was unable to recall the date of the incident. She could not recall the name of patient R.A. She was a nervous witness who had difficulty recalling many details of the incident. She had brain surgery since the time of the incident, and it was intimated that it might have affected her memory. She testified that R.A. told her that Lopez hit him, but on cross-examination she stated that she did not remember anything that R.A. said to her after the incident. Neither of the reports written by Connors indicated that R.A. had said that Lopez had caused his injury or had ever punched him.

Connors named persons who were present in R.A.'s room after the incident: MSO supervisor Figueroa; nurse June Colossi; nurse J. Giovanni; Carol Gutierrez; and Ryan Lopez. She stated she did not know who else might have been in the room. However, she said that she knew Carol Spivey and saw that she was a witness in this hearing, but admitted that she failed to list Spivey as being present.

Accordingly, due to Connors' lack of credibility, I cannot accept her version of the incident.

Dr. Bonard Moise testified in a thoughtful, authoritative manner. He acknowledged when he remembered things clearly and when his recollections were not clear. He handled patient care, both mental and physical, and was at Ann Klein on February 18, 2017. His testimony is accepted as truthful and credible.

Therefore, it is accepted as **FACT** that: R.A. told Moise that a security officer punched him in the face, but did not identify the name of the officer; R.A. never indicated that he had been punched in the body; if a head hits a wall one time there could be multiple injuries; an order for an S and O (seclusion and observation) had been issued on January 2, 2017, the second S and O order that day, in which it was noted that with R.A. there is a "high risk of assault . . . He can attack at any second"; R.A. was unpredictable--one moment calm, the next moment combative; R.A. was a threat to assault others; an aftercare plan was devised for R.A.'s hospital discharge, which

indicated that R.A. displayed "manipulative behavior;" many patients lie as part of having manipulative behavior.

Yovanda Jenkins was a straightforward, direct witness. As such, her testimony is accepted as truthful and credible. Therefore, it is accepted as **FACT** that: there are other transgender people like R.A. at Ann Klein; Lopez was a positive, caring, honest, and professional employee; Lopez did not get upset at those times when R.A. was dressed as Sara, and treated him the same when dressed as R.A. or Sara; some patients were offended by Sara and wanted officers to intercede.

Loretta Williams answered questions succinctly but thoroughly and, as such, her testimony is accepted as truthful and credible. However, proper weight must be given to those portions of her testimony based on hearsay statements. Therefore, it is accepted as **FACT** that: the day after the incident, R.A. admitted to Williams that he attacked Lopez; R.A. told Williams that he hit his head on the wall; R.A. never told Williams that Lopez punched him; Lopez was a "by the books," good officer who treated patients with respect; Lopez never hit any patients; R.A. enjoyed antagonizing other patients, who would tell him to stop; the day after the incident, Williams overheard R.A. speaking with another patient, who advised R.A. to lie about the incident and claim that Lopez punched him.

Carl Williams answered questions directly and thoroughly, and as such his testimony is accepted as truthful and credible. Therefore, it is accepted as **FACT** that: Lopez followed policy, and was a good, honest officer; Lopez was not bothered or offended by transgender persons; R.A. was assaultive and very manipulative; R.A. often lied about things, such as the people who had been in and out of his room.

Frank Taylor was a well-prepared, thorough witness. His testimony is accepted as truthful and credible, and therefore it is accepted as **FACT** that: the therapeutic options in case of an incident with a patient are to verbalize (call for help) and de-escalate an aggressive patient situation; therapeutic options do not always work, so one must resort to physical holds or restraints; some holds cannot work in a small space; patients' rooms are approximately 6' x 8' or 6' x 10' rectangle, with a toilet, desk and

swinging chair on the left side, and a bed on the right, with a window on the far wall; when there is a struggling patient, one should use a hold, and then put your own head behind the patient, in order to protect your own head; it was Ann Klein policy that outside windows and door windows in a patient's room cannot be blocked, because hospital staff must be able to see into the room to see whether a patient is harming himself; MSO's have the responsibility to remove window and door window coverings in patients' rooms.

Dr. Dariusz Chacinski was a thorough, detail-oriented witness, who answered when he could and would state clearly when he did not know something. As such, his testimony is accepted as truthful and credible. Therefore, it is accepted as **FACT** that: there had been no patient complaints regarding Lopez, although patients did not always like the rules that were being enforced; Lopez was not aggressive with patients, and displayed no violence towards them; there were many S and O orders against R.A., some due to R.A. appearing delusional; some S and O's were ordered to keep R.A. from committing assaults; there were many psychotic and paranoid incidents with R.A.; Dr. Chacinski feared that another patient might someday attack R.A.; three days after the incident, R.A. told Dr. Chacinski that he hit Lopez.

Ryan Lopez, the appellant, was a straightforward, knowledgeable witness, who spoke clearly and calmly. He seemed somewhat evasive only when he was discussing the timing of his decision to remove the posters from the windows in R.A.'s room. But I accept his explanation that he chose that time to take down the posters because R.A. had brought himself to Lopez's attention and because Lopez had extra time available to do this because he ended fresh air break early on the day of the incident. Lopez obviously stood to benefit by giving testimony exonerating himself of any misdeeds, which could result in him keeping his job, but he testified in a seemingly unbiased and believable manner.

Accordingly, his testimony is accepted as truthful and credible, and it is accepted as **FACT** that:

Ann Klein is for criminally charged patients with medical needs; except for this case, there had never been charges of patient abuse against him; shortly after 1:40:43 p.m. on the day of the incident, words were exchanged between R.A. and patient A.J., resulting in Lopez telling R.A. to remove his bustier/fake breasts if he wanted to remain outdoors; at 1:46:04 p.m., R.A. returned to the courtyard after removing his bustier, and again exchanged words with A.J.; Lopez told R.A. that if he didn't want another patient to hurt him he should stop dressing up, because this made other patients upset; Lopez had told this to R.A. before because it was his responsibility to try and prevent assaults, knowing that other patients wanted to beat R.A. up and that R.A. had already been in such fights; at 1:46:51 p.m., Lopez ended the fresh air break and all the patients returned indoors.

The Ann Klein treatment team, including Dr. Moise, told R.A. on the Wednesday before the incident that no posters were allowed on windows in a patient's room and that he must remove them; R.A. removed the posters, then put them back up later that day; Lopez first noticed posters back up in R.A.'s room as he was bringing the patients back in from the shortened fresh air break on the day of the incident; Lopez chose to remove the posters at that time because R.A. had drawn attention to himself, and because Lopez had extra time available after ending fresh air break early.

Just after 1:47:30 p.m., Lopez walked to R.A.'s room. R.A. arrived, and Lopez told him to remain outside the room; Lopez removed the posters from the door window, cleaned some room on the desk, and placed the posters there; R.A. entered his room, cursed at Lopez, rushed at Lopez with his hand raised, then punched Lopez with his right hand; Lopez did not punch R.A. or assault him; as Lopez tried to grab hold of R.A.'s hand, R.A. climbed onto Lopez's back and tried to choke Lopez with his right hand around Lopez's neck; Lopez attempted to use a bearhug hold, which moved R.A. towards his bed; with the momentum of R.A. trying to pull away from Lopez, both R.A. and Lopez hit the edge of the bed, then fell towards the wall; Lopez kept his head behind R.A., per protocol; R.A. hit the wall and started bleeding from his eye; after hitting the wall, R.A. fell on the floor and Lopez held him down on his back; Lopez yelled to a patient in room 21 to get him help, and that patient told a nurse; Lopez had dealt with R.A. many times before, and was unaffected by R.A.'s transgender issues.

LEGAL ARGUMENT AND CONCLUSION

The issue is whether the injuries suffered by patient R.A. during an incident on February 18, 2017, were due to the following violations by appellant so as to require removal of appellant from his position: conduct unbecoming a state employee, in violation of N.J.A.C. 4A:2-2.3(a)(6), physical or mental abuse of a patient, client or resident, in violation of Administrative Order (A.O.) 4:08 C3, and inappropriate physical contact or mistreatment of a patient, client, resident or employee, in violation of A.O. 4:08 C5.

Appellant's rights and duties are governed by the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.

Respondent, Ann Klein, had both the burden of persuasion and the burden of production, and was required to demonstrate by a preponderance of the competent, relevant and credible evidence that appellant committed the charged infractions listed in the Final Notice of Discipline. See generally Coleman v. E. Jersey State Prison, CSV 1571-03, Initial Decision (February 25, 2004); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J. Super. 454, 458 (App.Div. 1971).

Appellant submitted that a preponderance of the evidence had been defined as that which "generates belief that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City Police Dept., CSV 7553-02, Initial Decision (October 27, 2003) (quoting Loew v. Union Beach, 56 N.J. Super. 93, 104 (App.Div. 1959)).

I. Conduct unbecoming a public employee

One of the grounds for discipline of public employees is "conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee"

encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); See also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, Id. at 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Respondent failed to meet its burden to show that appellant committed any actions which could be deemed conduct unbecoming a public employee. There was no video available from inside R.A.'s room that captured the incident. There were no eyewitness accounts of the incident; the only evidence pertaining to the struggle in R.A.'s room was the testimony of Lopez and R.A. As R.A.'s testimony was not credible, and Lopez's testimony was credible, it is the testimony of appellant Ryan Lopez that must be relied on for what happened during the incident.

The incident was set into motion by the behavior of R.A. R.A. attacked appellant, starting the physical altercation. R.A. suffered injuries when their momentum caused them to fall and caused R.A. to hit his head against a hard cement wall in his room. Lopez did not punch R.A., and the multiple injuries suffered by R.A. belie any argument that there had been injury from a single punch to the face caused by Lopez. R.A. told Program Coordinator Edward McGowan (Exhibit P-4) that he became upset when he saw Lopez removing his posters and proceeded to jump on Lopez and wrap his legs around him. There was blood on the wall near R.A.'s bed. Dr. Moise indicated that the presence of blood on the wall was consistent with R.A.'s face hitting the wall. There were bruises on R.A.'s body, but these could have been caused by the physical encounter R.A. was involved in one or two days before the February 18, 2017 incident.

Respondent offered no evidence or testimony as to when the bruises on R.A.'s body might have been incurred.

Lopez attempted to follow the protocols set out in his training, but was unsuccessful because of the actions and behavior of R.A. and the small size of the room. Lopez displayed no conduct which would offend any publicly accepted standards of decency. Lopez did not violate any rule or regulation. Although respondent argued that Lopez was rude towards R.A. and made derogatory comments regarding his wearing fake breasts, the comments made by Lopez did not appear derogatory. Rather, Lopez knew that R.A. had been beaten up several times before due to dressing up as a female and took action to try and prevent this from happening again.

Accordingly, I **FIND** that appellant's actions on February 18, 2017, did not constitute conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(6).

II. Physical or Mental abuse of a patient, client or resident

Respondent has asserted that "physical abuse" is defined by the Disciplinary Act Program as "a physical act directed at a client, patient, or resident of a type that could tend to cause pain, injury, anguish, and/or suffering. Such acts include but are not limited to the client, patient, or resident being kicked, pinched, bitten, punched, slapped, hit, pushed, dragged, and/or struck with a thrown or held object." Respondent correctly set out that conduct which constitutes physical abuse is inherently wrongful conduct. Peters v. North Princeton Developmental Center, 92 N.J.A.R. 2d (CSV) 149 (1991).

The same arguments pertinent to conduct unbecoming a public employee are applicable to whether the appellant committed the physical or mental abuse of a patient, client or resident. Respondent failed to provide any evidence that Lopez committed any physical abuse of patient R.A. There was no credible evidence that Lopez attacked R.A., and in fact the credible testimony was that it was R.A. who attacked Lopez when he saw him removing posters in his room. Lopez attempted to use his training to restrain R.A. but was limited by the small size of the room, and by R.A.'s continued

attempts to free himself from any holds employed by Lopez. There was no evidence that Lopez ever punched R.A.

No claims or evidence of mental abuse by Lopez were asserted by respondent. Lopez had no issue with transgender male patients wearing women's clothing, but was aware that R.A. had been assaulted by other patients previously due to his being transgender, and only addressed the issue directly with R.A. in order to prevent further assaults against him. Lopez did not get upset at those times when R.A. was dressed as Sara, and treated him the same when dressed as R.A. or Sara.

Accordingly, I **FIND** that appellant's actions on February 18, 2017, did not constitute the physical or mental abuse of a patient, client or resident, as set out in A.O. 4:08 C3.

III. Inappropriate physical contact or mistreatment of a patient, client, resident or employee

The same arguments applicable to the first two charges are applicable to the charge that appellant committed the inappropriate physical contact or mistreatment of a patient, client, resident or employee. Respondent failed to provide any evidence that Lopez committed any inappropriate contact or mistreatment of patient R.A. There was no credible evidence that Lopez attacked or punched R.A., and in fact the credible testimony was that it was R.A. who attacked Lopez when he saw him removing posters in his room. Lopez attempted to use his training to restrain R.A. but was limited by the small size of the room, and by R.A.'s continued attempts to free himself from any holds employed by Lopez.

Although respondent argued that Lopez was rude towards R.A. and made derogatory comments regarding his wearing fake breasts, the comments made by Lopez did not appear derogatory. Rather, Lopez knew that R.A. had been assaulted several times before due to dressing up as a female, and took action to try and prevent this from happening again.

Accordingly, I **FIND** that appellant's actions on February 18, 2017, did not constitute the inappropriate physical contact or mistreatment of a patient, client, resident or employee, as set out in A.O. 4:08 C5.

Therefore, I **CONCLUDE** that respondent failed to meet its burden of proof and burden of production, by failing to show that appellant's actions on February 18, 2017, constituted conduct unbecoming a State employee; physical or mental abuse of a patient, client or resident; or inappropriate physical contact or mistreatment of a patient, client, resident or employee.

ORDER

I **ORDER** that the disciplinary action of the respondent, Ann Klein Forensic Center, Department of Human Services, in removing appellant Lopez from his position as a Senior Medical Security Officer is **REVERSED**, and that the appeal is hereby **GRANTED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION** pursuant to N.J.A.C. 1:1-18.6., by which law it is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 5, 2019

DATE



JEFFREY N. RABIN, ALJ

Date Received at Agency:

6/5/19

Date Mailed to Parties:

6/5/19

JNR/dw

APPENDIX

WITNESSES

For appellant:

Yovanda Jenkins, MSO at Ann Klein
Loretta Williams, Senior MSO at Ann Klein
Carl Williams, Senior MSO at Ann Klein
Frank Taylor, Senior MSO at Ann Klein
Dr. Dariusz Chacinski, Psychiatrist at Ann Klein
Ryan Lopez, appellant

For respondent:

R.A., patient-victim
Louis Hargis, MSO at Ann Klein
Sandy Ferguson, Director of Staff Development Ann Klein
Rochelle Spivey, Registered Nurse at Ann Klein
Margaret Connors, Registered Nurse at Ann Klein
Dr. Bonard Moise, Psychiatrist at Ann Klein

EXHIBITS

Joint:

J-1² Final Notice of Disciplinary Action dated April 10, 2017

For appellant:

P-1 R.A. Interview Statement, February 18, 2017

² The parties accepted this as a joint exhibit. The remainder of respondent's exhibits were not agreed to as joint exhibits, and therefore continue to be referred to as "R" exhibits.

- P-2 R.A. Interview Statement, February 21, 2017
- P-3 Trenton Psychiatric Hospital Officer Supplement Narrative, March 10, 2018
- P-4 McGowan Statement, March 2, 2017
- P-5 Ann Klein Admission Face Sheet, December 6, 2016
- P-6 Ann Klein Discharge Summary, July 20, 2017
- P-7 Ann Klein Seclusion/Restraint Order Form and Progress Note, December 29, 2016
- P-8 Interdisciplinary Progress Notes, February 21, 2017 (top portion only)
- P-9 R.A. Interview Statement, March 16, 2017 (front only)

For respondent:

- R-2 New Jersey Department of Human Services Disciplinary Action Program
- R-5 Photographs, February 23, 2017
- R-6 Ann Klein incident Report, February 18, 2017
- R-7 Connors Interview Statement, February 24, 2017
- R-8 Connors Initial Witness Statement Form, February 28, 2017
- R-10 Spivey Interview Statement, February 24, 2017
- R-11 Spivey Initial Witness Statement Form, February 28, 2017
- R-12 Spivey Interview Statement, March 10, 2017
- R-13 Moise Interview Statement, March 2, 2017
- R-15 Ann Klein Examination/Evaluation for R.A.
- R-19 Learning Transcript for Lopez
- R-20 Ann Klein personal defensive and control techniques and aggressive patient situations and emergencies