A-6

STATE OF NEW JERSEY

In the Matter of Paul Williams,
Department of Human Services

CSC Docket No. 2014-252
OAL Docket No. CSV 11721-13

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

ISSUED: NOV 05 2015 (WR)

The appeal of Paul Williams, a Human Services Assistant at Greystone Park Psychiatric Hospital (Greystone), Department of Human Services, of his removal, effective July 6, 2013, on charges, was heard by Administrative Law Judge Irene Jones (ALJ), who rendered her initial decision on September 4, 2015. Exceptions were filed on behalf of the appointing authority and a reply to the exceptions was filed on behalf of the appellant.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, including a review of the DVD recording of the incident, the Civil Service Commission (Commission), at its meeting on October 21, 2015, accepted and adopted the findings of fact as contained in the initial decision. However, the Commission did not adopt the ALJ's recommendation to modify the removal to a six-month suspension. Rather, the Commission upheld the removal.

DISCUSSION

The appointing authority issued the appellant a Final Notice of Disciplinary Action (FNDA), removing him, effective July 6, 2013, on charges of physical abuse of a client; inappropriate physical contact or mistreatment of a client; conduct unbecoming a public employee; neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in danger or property and other sufficient cause. Specifically, the appointing authority asserted that the appellant violently pushed patient D.S. to the floor. It also stated that the appellant

neglected his duty by violating the one-to-one special observation policy and falsified an incident report. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In her initial decision, the ALJ found that on October 17, 2012, the appellant pushed patient D.S. to the ground. She further found that the appellant was aware that shoving and pushing a client was not allowed and was inappropriate. The ALJ also set forth the testimony of the witnesses, including Donna Morrison, a Quality Assurance Specialist, and Thomas Shaffer, Director of Staff Development and Training at Greystone. Morrison testified that she reviewed the surveillance recording of the incident and prepared an investigative report. Morrison also testified that the appellant was assigned to one-to-one duty with D.S., which is the most restrictive special observation status. Shaffer testified that all employees at Greystone receive training on dealing with physically aggressive or assaultive patients. He stated that the appellant received two days of training in June 2011. He further stated that while physical contact with a physically aggressive patient should be the last resort, it is never permissible to shove an aggressive patient.

The ALJ also set forth the testimony of the appellant and Kim Grogan, a staff nurse who testified on behalf of the appellant. Grogan testified about the appellant's good character and D.S.'s unpredictability and propensity for violence. She also stated that it is against Greystone's policy to physically abuse a patient or react violently to an agitated patient. The appellant testified that he was sitting at a desk on the day of the incident when D.S. approached him and hit him on the head, and that he had previously warned D.S. to "stop playing around with him." Nevertheless, the appellant said that D.S. threatened him and other people with a pen. Therefore, the appellant asserted that he pushed D.S. to protect himself and others from being stabbed with the pen. He testified that D.S. was not injured when he fell to the floor and was laughing after the incident. The appellant also stated that he witnessed D.S. assaulting staff and other patients in the past and was aware that D.S. had assaulted a staff member on the day before the incident. The appellant denied he was present for certain training sessions, but admitted that he was not allowed to use physical force on a client.

Based on the foregoing, the ALJ concluded that the appellant engaged in inappropriate physical contact with D.S. when he pushed him to the ground. She further concluded that such conduct was unbecoming. However, the ALJ did not uphold the abuse or neglect of duty charges, reasoning that the appellant had no intent to injure D.S. and D.S. was within the appellant's eyesight and in such close proximity to the appellant that he was able to reach over the desk and touch the appellant's head. Regarding the charge that the appellant filed a false report, the ALJ concluded that the report contained a misleading statement, but there was no audio on the video to prove that the petitioner filed a false report. In determining

the penalty, the ALJ relied on *In re Knowlden*, Docket No. A-4963-11T2 (App. Div., April 30, 2014) to state that the penalty may be reduced to something less than removal where there is a lack of prior major discipline and a lack of malicious intent. In *Knowlden,* the respondent had no major disciplinary history and struck a patient in reaction to being attacked by the patient. In this regard, the ALJ concluded that the appellant "momentarily snapped" when he pushed D.S., who was not hurt during the incident.

In its exceptions, the appointing authority argues that the ALJ incorrectly imposed a six-month suspension instead of upholding the removal. It asserts that the concept of progressive discipline is not appropriate in this matter as the appellant's conduct was sufficiently egregious as to justify his removal despite his lack of any disciplinary record. The appointing authority contends that D.S.'s aggressive nature and history of verbal threats does not excuse the appellant's conduct. It also observes that, despite the appellant's testimony to the contrary, the record demonstrated that the appellant received training to stop patients from acting out and becoming a risk to others. Finally, the appointing authority argues that the ALJ erred in concluding that the charges of physical abuse and neglect of duty were not sustained. In this regard, the appointing authority notes that its policy does not require intent to be found guilty of physical abuse and the video demonstrates that the appellant was sitting at a horseshoe-shaped desk and to reach D.S., the appellant had to walk through a door. Therefore, the appointing authority contends that the appellant was not within the immediate proximity, *e.g.* at arms' length, of D.S.

In his reply, the appellant argues that the ALJ correctly reduced the penalty to a six-month suspension. In this regard, the appellant states that he has over 20 years of service and has no disciplinary record. Moreover, he cites *In re Taylor*, 158 *N.J.* 644 (1999) in which the court reversed the removal of an employee who struck a patient on the grounds that the employee did not abuse the patient because there was no indication she acted with malice. Therefore, he maintains that since he did not act with malice when he pushed D.S., his removal was not appropriate.

Upon its *de novo* review of the record, including a review of the DVD recording of the incident, the Commission agrees with the ALJ's finding of facts as contained in the initial decision and her upholding of the charges of inappropriate physical contact or mistreatment of a client and conduct unbecoming a public employee. However, the Commission also upholds the charge of physical abuse. In this regard, intent or malice is not required under the appointing authority's policy to be found to have committed such an infraction. Moreover, the instant matter is completely inapposite to *In re Knowlden, supra.* In this regard, as clearly demonstrated on the recording of the incident, the appellant left his desk, walked through a doorway and approached D.S. before pushing him to the ground. Such actions cannot be considered to be reflexive. The Commission also upholds the

charge of neglect of duty. The appellant was assigned to one-to-one observation of D.S., which required him to be within the immediate proximity of D.S. The appellant neglected his duty by sitting behind a desk that was a barrier between him and D.S., as evidenced by the recording which showed the appellant having to walk around the desk and through a door to reach D.S.

With regard to the penalty, the Commission's review is also *de novo*. In addition to considering the seriousness of the underlying incident, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* 463, 465 (CSV) 1996. Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway,* 81 *N.J.* 571, 580 (1980). It is settled that the principle of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007).

In the instant matter, the ALJ concluded that removal was not appropriate. Specifically, the ALJ concluded that although the appellant had momentarily "snapped" when he pushed D.S., D.S. was not hurt as evidenced by D.S. laughing. However, regardless of D.S.'s behavior prior to being pushed or his laughter after the incident, the appellant's actions in pushing a patient warrant removal. In this regard, the ALJ failed to fully appreciate the seriousness of the appellant's conduct. The surveillance DVD clearly shows the appellant calmly getting up from his desk, walking through a door, approaching D.S., violently pushing D.S. to the ground, and then calmly walking back to his desk. As stated previously, the appellant's conduct is distinguishable from the conduct in *In re Knowlden, supra.*, as the appellant did not push D.S. reflexively. Rather, the appellant's conduct was deliberate and D.S. did not appear to be acting aggressively at the moment when the appellant pushed him. Accordingly, the appellant's assertion that he acted without malice and his reliance on *Taylor* is misplaced. Further, although the appellant claims that he was not properly trained in ways to respond to aggressive patient behaviors, even if true, there is no excuse for him violently pushing a patient to the floor under the circumstances displayed in the DVD recording. An individual in the appellant's position is entrusted with the care of psychiatric patients and his interactions with a client should be above reproach. Furthermore, intentional patient abuse destroys public respect in the delivery of governmental services. The appellant's inappropriate and abusive behavior cannot be tolerated and is worthy of severe sanction, regardless of the length of service or disciplinary history. Accordingly, the

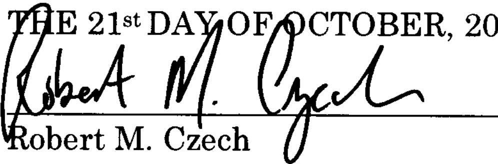
record does not evidence any reason to modify the penalty imposed by the appointing authority. Therefore, the foregoing circumstances provide a sufficient basis to uphold the removal.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission, therefore, affirms that action and dismisses the appeal of Paul Williams.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21st DAY OF OCTOBER, 2015



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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 11721-13

AGENCY DKT. NO. 2014-252

IN THE MATTER OF PAUL WILLIAMS, GREYSTONE PARK PSYCHIATRIC HOSPITAL.

Raymond L. Hamlin, Esq. for Petitioner (Hunt, Hamlin & Ridley, attorney)

Christopher M. Kurek, Deputy Attorney General., for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: February 17, 2015 Decided: September 4, 2015

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Paul Williams (petitioner or Williams), appeals his removal as a human services technician effective July 6, 2013. Respondent, Greystone Park Psychiatric Hospital (respondent or Appointing Authority) removed the petitioner on charges or violation of Administrative Order (A.O.) 4:08(c)(5), physical abuse of a client; inappropriate physical contact or mistreatment of a client; conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(11); other sufficient cause, A.O. 4:08(B)(2); neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in

danger to persons or property; and violation of A.O. 4:08(E)(1) violation of rule, regulation, policy, procedure, order, or administrative decision. After the removal, petitioner timely requested a hearing. The matter was then transmitted to the Office of Administrative Law for hearing as a contested case on August 9, 2013.

A prehearing conference was held on October 8, 2013, wherein hearing dates were set for January 6, 7, 10 and 13, 2014. A discovery schedule was also set wherein initial discovery was to be completed by November 30, 2013, and follow-up discovery to be completed by December 20, 2013. At the January 6, 2014, hearing, petitioner advised that respondent did comply with the discovery schedule as set forth in the Prehearing Order. Specifically, respondent did not serve its initial discovery until December 31, well after the December 20, 2013, deadline and (2) two business days prior to the start of the hearings. Petitioner then moved to exclude all discovery. The motion was subsequently denied and new hearing dates were established.

Respondent for the first time disclosed the existence of a video surveillance tape, which it failed to provide in a timely manner, and when it did, it failed to provide the password for the disc. The motion to exclude the video was also denied, but new hearing dates were scheduled so as to allow the parties ample preparation time.

After the August 6, 2014 hearing, the respondent requested that it be allowed to call a rebuttal witness from personnel. The request was denied as the petitioner had conceded that he knew that it was inappropriate to push a client. After the denial, respondent filed for interlocutory review with the Commission on August 11, 2014.

On September 1, 2014, the Commission issued an Order reversing the denial. A hearing to take this testimony was held on January 26, 2015, which followed prior hearing dates of January 6 and August 5, 6, 2014. Post-hearing submissions were filed on February 24, 2015, at which time the record closed. At the request of the undersigned, the time for the issuance of the Initial Decision in this matter was extended to August 16, 2015.

Ruling on P-10 and P-11

At the August 5 hearing, petitioner moved to admit into evidence P-10 and P-11. I reserved my ruling on the admission of the exhibits. I have reviewed the documents and I **FIND** that they are admissible. The documents concern D.S.'s prior volatile behavior against staff and other patients. I **FIND** that the probative value of documents outweigh any prejudice.

TESTIMONY

At the hearing, respondent presented the testimony of three witnesses: Donna Morrison, Thomas Shaffer, and Khem Singh.

On October 17, 2012, the petitioner was employed by the respondent as a human service technician (HST) at Greystone Park Psychiatric Hospital. He had worked there for twenty-one (21) years. Greystone serves clients who are developmentally disabled with mental retardation and or psychiatric disorders. Consequently, the clients can be physically aggressive and therefore, the staff is trained to respond to aggressive behavior. An HST provides direct care for clients.

On October 17, 2012, petitioner was on duty and assigned as the one-to-one (1:1) supervisor of client, D.S. D.S. had a history of assaultive behavior, thus he required close supervision. It is undisputed that petitioner was often assigned to supervise or assist with the handling of assaultive patients and was considered the "go to" HST in these situations. On the day of the incident, petitioner was seated behind the Patient Information Center (PIC), which is a horseshoe-shaped desk doing paperwork. D.S. came around the desk and hit him in the head. Petitioner had previously warned D.S. to "stop playing around with him." After hitting the petitioner on the head, petitioner testified that D.S. reached over the counter and threatened to use the pen against him or others.

Petitioner further testified that on the previous day petitioner had assaulted another staff member. Consequently, petitioner stated said he came from around the PIC and pushed D.S. to the floor. D.S. was not injured when he fell to floor. Indeed, he was laughing at the incident. The incident was witnessed by all who were seated in and around the PIC.

Petitioner testified that he has been employed at Greystone for twenty-three years and was disciplined once, in 1995, for insubordination for failure to transport a highly assaultive patient by himself. He successfully appealed the charges. He was required to deal with various acute patients, assaultive patients, and bi-polar patients. D.S. was a very assaultive client and he had witnessed him assaulting staff and other patients.

Petitioner acknowledges that there were different types of 1:1 policies. Specifically, he stated that if a patient were in view, an HST was to remain within five feet of the client. Petitioner admits that he is aware that he is not allowed to use physical force on a client, but denies being present for certain training sessions. He maintained that he pushed D.S. to protect him from stabbing himself or someone else with the pen. He felt the best way to get the pen back from D.S. was to push him, although he knew he was not supposed to push clients.

Thomas Shaffer (Shaffer), Director of Staff Development and Training at Greystone, testified that all employees receive training on dealing with patients who become physical aggressive or assaultive toward staff or other patients. Petitioner had received two days of training in Therapeutic Options in June, 2011. (R-10.) He noted that physical contact with a physically aggressive patient should be the last resort. Furthermore, any time physical contact is necessary, the employee is to call in for extra help to deal with the patient. In case physical contact is required, the staff should use the "side-hug" method which is a way of restraining the patient. Physically shoving or taking a patient down is never permitted when dealing with an aggressive patient.

Donna Morrison, a Quality Assurance Specialist, also testified on behalf of respondent. She reviewed the surveillance video of the incident and also prepared an investigative report. (R-6.) During her investigation, the Special Observation Monitoring Form for D.S. provided that petitioner was assigned as a 1:1 with patient D.S. (R-4.) She noted that a "one-to-one" observation is defined in Greystone's Special Observation and Treatment Policy (CL-PC-0277). There, it is noted that:

> This is the most restrictive special observation status. The patient's clinical condition requires that one staff member is assigned to one patient only. The assigned staff shall not perform any activity which may impede or delay his/her response to the patient.
>
> [There must be] immediate proximity to the patient, e.g. at arms' length in order to control untoward behaviors.
>
> [R-11.]

The Patient Abuse/Neglect policy provides as an example of neglect as "leaving a patient who requires supervision unattended." (R-14.)

Kim Grogan (Grogan) testified on behalf of the petitioner. Grogan has been employed at Greystone for nineteen years. She knew the petitioner and had worked as a nurse on the same unit and had been his supervisor. Grogan testified that petitioner was an excellent employee and in the past, he helped prevent incidents of violence. She also knew D.S. He was unpredictable and could become violent without notice and had a past history of assaultive behavior. Grogan admitted that she had a personal relationship with Williams outside the workplace.

Grogan was also cross-examined about enhanced supervision procedures (1:1 and 2:1 observation) as well as the various training that the staff received in dealing with assaultive or aggressive patients. These trainings methodologies include: Handle with Care, MANDT, and Therapeutic Options. Grogan acknowledged that it is against Greystone's policy to physically abuse a patient or react violently to an agitated patient.

ARGUMENT

Respondent asserts removal is the only appropriate penalty where a human services technician physically abuses a patient. Here, the petitioner admitted that he pushed D.S. to the ground on October 17, 2012. Pursuant to Administrative Order 4:08, the only sanction listed for C-3 charge is removal. Furthermore, petitioner's conduct and admission supports that C-5 charge for inappropriate physical contact or mistreatment of a patient is warranted. Respondent argues that intrinsic to the operation Greystone is the trust the public places in those who work and care for mentally ill individuals. Consequently, the DHS has a zero tolerance policy for physical abuse of patients. Physical abuse is defined in Department of Human Resources Administrative Order 4:08:

> Physical abuse is a physical act directed at an individual 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 individual, patient or resident being kicked, pinched, bitten, punched, slapped, hit, pushed, dragged, and/or struck with a thrown or held object.
>
> [R-17.]

Respondent admits that D.S. was a physically aggressive patient subject to making verbal threats in. It asserts, however, that this fact does not excuse the petitioner's conduct as physically aggressive patients are a part and parcel of his job. In support, it cites Berberian v. Lynn, 179 N.J. 290 (2004), where the Supreme Court held that, "like a fireman who chooses his or her profession and accepts the risks engendered by another's negligence in starting fires, the professional caregiver chooses his or her profession and willingly accepts the risk engendered by another's poor mental health." Id. at 303 (citations omitted). Further, "just as a fireman has an obligation to deal with the hazards of another's burning building, the professional caregiver has the obligation to deal with the hazards of a patient's uncontrollable conduct." Ibid. (Internal citations omitted). Here, petitioner worked at Greystone for twenty-three years and was well aware of the hazards attendant with working in a psychiatric hospital. Petitioner's actions of pushing D.S. to the ground were entirely

inconsistent with his training and the behavior expected of him. Petitioner received extensive training precisely because of the unpredictable and sometimes assaultive nature of psychiatric patients. His training provided him with techniques to stop patients from acting out and becoming a risk to others. He ignored what he was taught and resorted to prohibited actions. His actions clearly constitute physical abuse and therefore was conduct unbecoming a public employee.

Respondent further asserts that the imposition of a penalty up to and including removal is appropriate, regardless of an individual's past disciplinary history, when the underlying nature of the conduct is sufficiently egregious. In re Carter, 191 N.J. 474 (2007); Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). Here, petitioner's conduct is sufficiently egregious to warrant removal: removal and is the only appropriate penalty so as to maintain public confidence in the Department of Human Services.

Petitioner contends that the penalty of removal is much too harsh and does not consider his lack disciplinary history and that he was the appointing authority's "go to" person in dealing with aggressive patients. In support, petitioner cites Carter, supra, 191 N.J. at 483, which holds that an employee's prior disciplinary record [is] inherently relevant to determining the appropriate penalty. There, the Court held that a review of administrative sanctions is limited to determining "'whether such punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness.'" In re Polk, 90 N.J. 550, 578 (1982) (quoting, Pell v. Bd. of Educ. 313 N.E.2d 321, 327 (N.Y. 1974). "The threshold of 'shocking' the court's sense of fairness is a difficult one, not met whenever the court would have reached a different result." Ibid.

Here, there is no basis to conclude that pushing a patient (who responds to it with laughter) justifies the removal of a twenty-plus year employee with no prior of discipline and where there was no testimony that the actions of that employee were malicious. Petitioner further relies on In re Taylor, 158 N.J. 644 (1999), where the Supreme Court addressed the issue of physical abuse pursuant to Administrative Order

4:08-C.3, which is the same Order that the petitioner is charged under. In Taylor, the petitioner therein had been employed for more than fifteen years at the Greystone Hospital. During the time of her employment and up to the incident which resulted in her initial removal, she had never been subjected to discipline. In November 1995, she was suspended without pay for physically abusing a patient and ultimately removed in 1996. She allegedly assaulted a patient by striking the patient. She denied the allegation. Some of the eyewitnesses' testimony was consistent with her testimony and some was not. However, it appeared as though the majority of the testimony was consistent with Taylor's version that she did not actually strike the patient, but merely held her back.

The Supreme Court stated the following with respect to the penalty imposed upon Taylor and the rationale behind it:

> The ALJ found Taylor committed patient abuse in violation of Administrative Order 4:08-C.3 . . . that provision defines physical abuse as "a malicious act directed toward a patient, resident, client, or employee with the intent to cause pain, injury suffering or anguish." The mandatory sanction for such an infraction is removal.
>
> However, the ALJ did not consider whether Taylor's conduct was more properly characterized as "inappropriate physical conduct" as defined by Administrative Order 4:08-C.5, which provides that "[inappropriate physical contact or mistreatment of a patient," for which there is no intent requirement, carries a mandatory sanction of an oral reprimand or removal.
>
> [Id. at 660-61.]

The Court went on to state:

> The ALJ made no finding that Taylor acted maliciously toward B.M., nor did he conclude that Taylor intended to cause B.M. pain, injury, or anguish. The evidence established that B.M. did not suffer any physical injury and that she did not recall being hit by Taylor. We do not sustain the ALJ's legal conclusion that Taylor engaged in physical abuse of a patient as defined by Administrative Order 4:08-C.3. On this record, we are satisfied that Taylor's conduct

> constituted "inappropriate physical contact" within the meaning of an Administrative Order 4:08-C.5 and that removal would be an excessive sanction. Accord Harcum v. New Lisbon Dev. Ctr, 96 N.J.A.R.2d (CSV) 324, 1996 WL 433210 (1996) reducing physical abuse charge to charge of inappropriate physical contact because employee did not act with malice and patient was not injured); Lyon v. Morris View Nursing Home, 93 N.J.A.R.2d (CSV) 673, 1993 WL 470770, aff'd, 94 N.J.A.R.3d (CSV) 718, 1994 WL 757555 (App. Div. 1994) (holding that sanction of removal for nursing home attendant who was found to have hit patient suffering from dementia, should be reduced to penalty of six-month suspension because act of hitting patient was "isolated instance" in which patient was aggressor).
>
> [Taylor, supra, 158 N.J. at 661.]

Likewise, in the instant matter, the record is devoid of any testimony that the petitioner's actions were in any way done with malice. In fact, the petitioner's undisputed testimony was that he was acting to defend himself and others. There was no testimony offered that the petitioner's conduct was malicious. In fact, on cross-examination the petitioner was not even challenged on the issue of his testimony that he was defending himself and other patients and employees. Given the fact that there was no challenge to that assertion, the petitioner's testimony should be given every favorable inference and adjudged sufficient for purposes of his actions. If the Court is of the belief that the conduct of the petitioner was not appropriate, the sanction should not be removal.

The Supreme Court in Taylor also stated the following:

> We acknowledge the responsibility of DHS to ensure that vulnerable patients in their care shielded from any form of abuse by their caretakers. Balanced against that concern, however, we also must ensure that the rights of public employees who work under extremely difficult conditions also are protected. Accordingly, we reject the ALJ's legal conclusion, and the Merit System Board's adoption thereof, that Taylor committed patient abuse and that she must be removed from her position at Greystone. We find that the evidence established that Taylor committed "inappropriate physical contact or mistreatment of a patient" as set forth in Administrative Order 4:08-C.5. . . .

[Id. at 661-62.]

FINDINGS

1. I **FIND** that D.S. was an assaultive patient with a known history of assaulting staff.
2. I **FIND** that D.S. had assaulted a staff member on the previous day; indeed, P-4 reveals that on March 29, 2012, D.S. assaulted another HST by smacking him on the head when the HST was at PIC (Patient Information Center) finishing paperwork. D.S. then began to verbally assault the HST.
3. I **FIND** the petitioner pushed D.S. to the ground on October 17, 2012.
4. On June 25, 2012, D.S. pushed another patient to the floor. (P-6.)
5. On July 3, 2012, D.S. struck another HST on her head when he was on a 1:1 observation with him. He then proceeded to throw a garbage can into the PIC. (P-7.)
6. On July 11, 2012, D.S. threw toner on the floor; spat at an HST and caused damage to the hallway. (P-8.)
7. D.S. aggressive assaultive behavior continued after the instant incident (P-9, P-10 and P-11).
8. I **FIND** that the petitioner was frequently called on to assist with the handling of assaultive, aggressive patients.
9. I **FIND** that staff is trained to handle assaultive clients.
10. I **FIND** that the petitioner was well aware that shoving and pushing a client was not allowed and was inappropriate.
11. I **FIND** that the petitioner has 23 years of tenure as a HST.
12. I **FIND** that petitioner has no prior disciplinary history.

DISCUSSION AND CONCLUSIONS

The Appointing Authority seeks the petitioner's removal on grounds of mental abuse of a patient (first infraction) mistreatment of a patient (first infraction); mistreatment of a patient (first infraction); violation of N.J.A.C. 4A:2-2.3(a)(6) – conduct

unbecoming a public employee (first infraction); violation of N.J.A.C. 4A:2-2.3(a)(11) other sufficient cause (first infraction); B-2 neglect of duty, loafing idleness or willful failure to devote attention to tasks which could result in danger to persons or property (first infraction); and violation of hospital policy and procedure (second infraction). The issue is not whether the petitioner pushed D.S. as it is undisputed that he did so. A fact that he admits. Petitioner's argument is that he did not act with malice, but was simply attempting to prevent D.S. from hurting himself or others.

In Taylor, the Court reversed the removal of the petitioner therein who had engaged in an act of physical restraint against a patient. In reversing the removal, the Court found that the Administrative Order 4:08 defined physical abuse as a malicious act directed toward a patient, resident . . . with the intent to cause pain, injury suffering or anguish. Taylor, supra, 158 N.J. 660. Subsequent to Taylor the Administrative Order (A.O.) was revised. A.O. 4:08 now defines physical abuse as:

> a physical act directed at an individual, patient . . . of a type that could tend to cause pain, injury . . . and/or suffering. Such act includes . . . the individual patient . . . being kicked, pinched . . . pushed . . . .

Thus, the definition eliminated both the need for a "malicious act" and "an intent" to cause pain or suffering. Consequently, the petitioner's reliance on Taylor is misplaced as the regulation was revised to eliminate any mens rea. Thus, the mere infliction of a push or a shove or slap or punch is sufficient under the revised A.O. to constitute physical abuse.

Thus, I **CONCLUDE** that the petitioner engaged in an act of inappropriate physical contact when he pushed D.S. causing him to fall, but not causing an injury to him.

I further **CONCLUDE** that petitioner's conduct was unbecoming of an HST. While D.S. had provoked the petitioner, I am persuaded that his response was nonetheless unbecoming. I am also persuaded that petitioner was more aggravated

with D.S. than he was hostile to him. There was no slap or punch, but it is clear that petitioner had enough of D.S. aggressive behavior both for the day and the day before.

Petitioner is also charged with neglect of duty, loafing idleness. I **CONCLUDE** that respondent has failed to sustain these charges. Neglect of duty is defined as leaving a patient who requires supervision, unattended. (R-14.) In this case, D.S. was within the petitioner's eye sight and in such close proximity that D.S. reached over the PIC and "popped" petitioner in the head.

I further **CONCLUDE** that petitioner's incident report contains a misleading statement (R-3) while the incident report correctly states that D.S. plucked Williams in the head, it incorrectly states that he made a second attempt to hit Williams. The video indicates that D.S. continued to confront Williams it does not show him attempting to hit him. However, there is no audio on the video to prove that petitioner filed a false report on this incident.

The next issue is whether the penalty of removal is the appropriate penalty. The Court, in In re Wilkinson, A-2355-11T1 (App. Div. February 24, 2014), http://njlaw/collections/courts/, affirms that even in cases such as the instant one, the doctrine of progressive discipline still attaches. Indeed, it cited to In re Stallworth, 208 N.J. 182, 199 (2011), wherein our Supreme Court discusses what should be considered when conducting a progressive discipline analysis:

> To assure proper "progressive discipline," and a resulting penalty based on the totality of the work history, an employee's past record with emphasis on the "reasonably recent past" should be considered. Bock, supra, 38 N.J. at 524. This includes consideration of the totality of the employee's work performance, including all prior infractions. See Carter, supra, 191 N.J. at 484. . . . progressive discipline is a flexible concept, and its application depends on the totality and remoteness of the individual instances of misconduct that comprise the disciplinary record. The number and remoteness of timing of the offenses and their comparative seriousness, together with an analysis of the present conduct, must inform the evaluation of the appropriate penalty. Even where . . . the present conduct

> alone would not warrant termination, a history of discipline in the reasonably recent past may justify a greater penalty; the number, timing or seriousness of the previous offenses may make termination the appropriate penalty. Stallworth, supra, 208 N.J. at 199.
>
> [Wilkinson, supra, A-2355-11.]

In imposing the penalty of removal, the Court noted that the petitioner therein had a record of disciplinary actions:

> Wilkinson's actions are sufficiently egregious and warrant his removal even without consideration of his prior employment record. Nevertheless, in this case [his] employment record also reveals two major disciplinary actions (a 30-day suspension in 2002 for engaging in a verbal and physical altercation with a co-worker and a 53 day suspension in 2004 for . . . leaving his assigned work area without permission, falsification and negligence and several minor disciplines [sic] since his employment commenced in 1999. Finally, as noted above, even if the Commission found that Wilkinson's conduct did not rise to the level of patient abuse and was rather, inappropriate physical contact, his actions, coupled with this disciplinary history, justify his removal.
>
> [Ibid.]

Likewise, the Court most recently affirmed this analysis in In re Knowlden, A-4963-11 (App. Div. April 30, 2014), http://njlaw.rutgers.edu/collections/courts/, where the petitioner, an HST, was charged with physical abuse of a patient, inappropriate physical contact or mistreatment of a patient, falsification, conduct unbecoming a public employee, and violation of DHS policy and procedures with regard to reporting an incident where the petitioner was found to a punched a patient after being attacked. The ALJ found petitioner guilty of the charges and removed him his position finding that the conduct so egregious as to warrant removal in spite of mitigating circumstances and a diminimus disciplinary history.

On review, the Civil Service Commission modified the finding and the penalty. The Commissioner found that the punch was a reflective act in response to the attack

by the patient and that there was no intent to harm him. The Commission found the petitioner guilty of inappropriate physical contact of a patient, conduct unbecoming a public employee, and reduced the penalty to a six-month suspension.

On reconsideration, the Commission acknowledged that A.O. 4:08 was amended to eliminate malicious intent, thus Taylor was not applicable. The Commissioner further acknowledged that Knowlden's action satisfied the DHS definition of physical abuse. However, the Commissioner explained:

> [T]he deletion of the language from DHS's policy does not preclude the Commission from considering the intention of an employee in situations involving physical abuse allegations. In other words, while malicious intent is not necessary to sustain a finding of physical abuse, the employee's intent is certainly relevant to the penalty to be imposed. In the present case, Knowlden's conduct was clearly a reaction to being punched himself and he did not act maliciously nor did he have the intent to harm the patient, given that all of his preceding attempts to defuse the situation were appropriate. Moreover, Knowlden did not have any major discipline in his [ten] years of employment. Therefore, removal was too harsh a penalty and modification of the penalty to a six-month suspension was appropriate.

On appeal, the Appellate Court affirmed the Commission and held that their review would consist of a three prong analysis. The first prong, the agency review test, is whether there was an express or implied violation of legislative policies – whether the decision "was not premised upon a consideration of all relevant factor [or conversely] a consideration of irrelevant or inappropriate factors." Knowlden, supra, A-4963-11 (citing In re Warren, 117 N.J. 295, 297 (1989) (citations omitted)). The Court concluded that one relevant factor was the employee's disciplinary history. Thus, a reviewing court may intervene in an agency's modification of a penalty when the agency fails to consider the significance of the employee's prior record. See Stallworth, supra, 208 N.J. at 200 (remanding where Commission reduced penalty without fully addressing employee's extensive record of misconduct).

The Court further held that another relevant factor is the severity of the conduct finding that "A reviewing court may intervene when the agency fails to consider the seriousness of the misconduct within the overall context of the work environment as it relates to public safety and the safety of other employees." Ibid. (citations omitted).

The Knowlden case also makes clear that although the DHS removed malicious intent from the A.O. the Court found that Commission could reasonably reduce the penalty to something less than termination where there is a lack of prior major discipline and a lack of malicious intent.

In this matter, the record reflects that the petitioner does not have a prior disciplinary history.[1] His conduct in this instance was isolated and aberrational. Indeed, it was not disputed that petitioner was the "go to" HST when confronted with violent, unruly patients. On the day of this incident, D.S. plucked petitioner in the head, and threatened him or others. While there is no doubt that petitioner's conduct was inappropriate, I **CONCLUDE** that petitioner momentarily "snapped" when he pushed D.S. who was not hurt and indeed got up laughing.

I **CONCLUDE** that after considering all of the aforementioned factors that a six-month penalty suspension is the appropriate penalty herein. Respondent's removal penalty totally ignores petitioner's lack of a disciplinary history and his exemplary service to the Department as their "go to" HST.

ORDER

Therefore, I hereby **REVERSE** the action of the respondent that terminated petitioner from his position, effective July 6, 2013.

It is **ORDERED** that petitioner is hereby suspended for six months, effective from his date of separation.

It is **ORDERED** that petitioner be returned to his position with back pay, seniority and all other emoluments.

It is further **ORDERED** that petitioner is not entitled to attorney fees since he is deemed to be guilty of engaging in an act of inappropriate physical contact with a client and conduct unbecoming an HST.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

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[1] There was some indication that petitioner was charged with insubordination for refusing to transport a violent patient without any back-up. Petitioner successfully appealed the charges and was exonerated.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law 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, P.O. 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.

September 4, 2015	
DATE	**IRENE JONES**, ALJ
Date Received at Agency:	September 4, 2015
Date Mailed to Parties:	September 4, 2015

sej

APPENDIX

WITNESSES

For Petitioner:

Kim Grogan

Paul Williams

For Respondent:

Donna Morrison

Thomas Shaffer

Khem Singh

EXHIBITS

For Petitioner:

P-1 UIRMS Report

P-2 UIRMS Report

P-3 UIRMS 4/10/12

P-4 UIRMS 3/29/12

P-5 UIRMS 6/12/12

P-6 UIRMS 6/25/12

P-7 UIRMS 7/3/12

P-8 UIRMS 7/11/12

P-9 UIRMS 10/16/12

P-10 UIRMS 10/31/12

P-11 UIRMS 11/13/12

For Respondent:

R-1 Final Notice of Disciplinary Action

R-2 Preliminary Notice of Disciplinary Action

R-3 Unusual Incident Report

R-4 10/17/12 monitoring Log
RR-6 Morrison Investigation Report
R-11 Special Observation Policy
R-14 GPPH Patient Abuse Policy
R-17 Administrative Order 4:08
R-18 Videotape of Incident
R-19 DVR of Incident
R-20 Paperwork for P.D. with DVD
R-21 DVD Copy #2
R-22 Unusual Incident Form