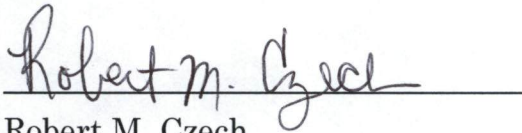


Re: David Reid

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
MAY 3, 2017

A handwritten signature in black ink, reading "Robert M. Czech", is written over a horizontal line.

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 19728-15

AGENCY DKT. NO. 2016-1804

**IN THE MATTER OF DAVID REID,
ANN KLEIN FORENSIC CENTER,
DEPARTMENT OF HUMAN SERVICES.**

David P. Schroth, Esq., appearing for appellant, David Reid

Elizabeth A. Davies, Deputy Attorney General, appearing for respondent, Ann Klein Forensic Center, Department of Human Services (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: March 10, 2017

Decided: April 4, 2017

BEFORE **DEAN BUONO**, ALJ:

STATEMENT OF THE CASE

Appellant, David Reid (Reid or appellant), a Senior Medical Security Officer (SMSO) at respondent, Ann Klein Forensic Center (Center), appeals disciplinary action seeking his removal for conduct unbecoming a public 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 4:08 C-3, and inappropriate physical contact or mistreatment of patient client, resident or employee in violation of Administrative Order 4:08 C-5. The appellant denies the allegations and contends that he acted appropriately.

PROCEDURAL HISTORY

On July 9, 2015, the Center issued a Preliminary Notice of Disciplinary Action suspending appellant without pay. On November 9, 2015, the Center issued a Final Notice of Disciplinary Action sustaining the charges and removing appellant from his position effective November 9, 2015. Appellant filed a timely Notice of Appeal.

The Division of Appeals and Regulatory Affairs of the Civil Service Commission transmitted the case to the Office of Administrative Law, where it was filed on December 3, 2015, N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on June 7 and October 25, 2016. The record remained open until March 10, 2017, for the receipt of transcripts and briefs.

FACTUAL DISCUSSION

TESTIMONY

For respondent

H.H. was an affable, forty-five-year-old male that has been a patient at the Center for nearly four years. He admitted to being self-abusive and bore the visible facial scarring and injuries to prove it.

On May 27, 2015, he admitted to "trying to hurt myself" and was banging his head on the window sill while smashing his fist on the same sill. This caused severe lacerations over his right eye and head, leading to a substantial amount of bleeding. He

recalled that "Reid had a One-to-One"¹ and never had a problem with Reid. "I don't know why he did it." Reid attempted to restrain H.H. but he was uncontrollable.

H.H. recalled that he began fighting and spitting at the security officers that were called into his room to assist Reid. At this point, the security officers were attempting to place H.H. in the Medical Safety Net (Net).² As he was being restrained by three officers, Officer Page (Page) was on his right side, Reid was on the left side, and Officer Glenn (Glenn) was up by his head, H.H. stated, "I can't breathe." This was because the outside of Reid's forearm was on H.H.'s throat. H.H. was very clear in his description that Reid's "Forearm was pushing on my throat."

H.H. passionately stated that, "I was not trying to hurt them," but "A lot of staff was beating on me" over the years. He admitted that at the time he may have yelled that "they were going to lose their jobs!" After H.H. was put in the Emergency Restraint Chair (ERC) he indicated his intention of pressing charges. The next morning his neck was sore on the left side as well as the front of his throat.

Frankie Page has been employed at the Center from 1996 to 2006 and from 2008 to the present, as a Supervisor Senior Medical Security Officer (SSMSO).

On May 27, 2015, at approximately 3:30 a.m., H.H. was acting out and had a "One-to-One." The officers were attempting a Net restraint on H.H. and Page was on the left side of H.H.'s head and was securing his left arm, but H.H. was still spitting and resisting putting his arms into the Net. Suddenly, Reid leapt across H.H.'s body and

¹ A "One-to-One" was explained by the officer that due to the aggressive/violent/unpredictable nature of a particular patient, a full-time security staff member is assigned to them for their own safety and the safety of the staff members and patients.

² The "Net" was described by the officer as a Medical Safety Net protective restraint device that is comprised of mesh netting with arm holes and straps. The patient's arms are placed through the arm holes and the Net is then strapped to the bed as a cocoon. The FDA defines "protective restraint" at 211 C.F.R. Section 880.6760 as: "a device, including but not limited to a wristlet, anklet, vest, mitt, straight jacket, body/limp holder, or other type of strap that is intended for medical purposes and that limits the patient's movements to the extent necessary for treatment, examination, or protection of the patient or others."

choked him with his right hand. He described the choke as Reid's thumb having been on one side of H.H.'s neck and his other fingers having been on the opposite side of H.H.'s neck.

At that time, Reid was a distraction, so Page called for a supervisor to get Reid out of the room. As soon as Reid left, H.H. calmed down and complied with all commands. After the incident, Reid confronted Page in the hallway and said, "You don't know what you're doing. We can do whatever we want." According to Page, Reid and Page do not get along.

Randolph Brown (Brown) has been employed at the Center for eight years as a SMSO. He recalled an incident on May 27, 2015, involving H.H. who suffers from a self-injurious condition. H.H. was kicking, spitting and fighting with officers after they tried to subdue him. The officers were attempting to put H.H. in a Net restraint and were not successful. At that time, someone called for the chair restraint and Reid was on top of H.H. Reid was straddling H.H., but Brown could not see his hands. Brown described "straddling" as Reid's leg having been on either side of H.H.'s body. As he was being straddled, H.H. exclaimed that he could not breathe. Both Page and Glenn were telling Reid to stop choking H.H., but Reid did not comply. It was at this point that Page grabbed Reid and physically pulled him off H.H. Page then asked for Reid to be removed from the room and then H.H. calmed down.

James Jones (Jones) has been employed as a SMSO at the Center for five years. He recalled the incident with H.H. on May 27, 2015, where he was tasked with assisting other officers who were placing H.H. in the Net. He recalled that Page told Reid to stop choking H.H., but couldn't see what happened.

Renee Maxwell (Maxwell) has been employed at the Center for thirteen years, the past five years as a SMSO. On May 27, 2016, at 3:40 a.m., she was called to Unit 2 for a call of a patient injuring himself. Upon arrival, H.H. was hurting himself and was covered in blood. The Net was needed and Reid was called in to help because H.H. was wiggling out of the restraint. H.H. was so combative, officers needed to restrain him. Reid was laying on top of H.H., chest-to-chest, in such a way that they were in the

orientation of an X. At that point, Page was yelling for Reid to get out of the room. As soon as Reid left the room, H.H. calmed down. Maxwell also recalled that Reid and Page had an altercation afterwards.

Julie Baranowski (Baranowski) is a Registered Nurse (RN) who has been a Charge Nurse (CN) at the Center for six-and-a-half years. She recalls H.H. as a forty-five-year-old male who is self-abusive and was usually on a One-to-One with staff. On May 27, 2015, she was the CN and recalled that H.H. was being put in restraints. Although she could not see what was happening, she could hear that H.H.'s voice went up several octaves and it sounded as if someone was restricting his throat, or that he was in distress. Her notes were authored contemporaneous to reflect the same. (R-6, Tab 11).

On cross-examination, she conceded that an individual's voice could have gone up several octaves for a number of reasons. For example: being excited, fighting, or being tired. She also recalled that H.H. was bleeding and bloody, but not spitting.

Sandy Ferguson (Ferguson) has been employed by the Center for thirty years as Director of Training, but is also a RN. In her capacity as a trainer she provides staff development and training to all staff members in the facility. Training is inclusive of de-escalation techniques which includes assessing patient needs and providing it to the, so they can calm down.

She described that all staff receive annual training. Reid's attendance is accounted for in the 2014 class. Also, The Policy on Control and Defense Manual is also provided to each employee and discussed in the class. (R-7, Tab 20) (R-8, Tab 26). The policy covers a crisis management continuum, including the use of verbal commands and then increasing into restraint techniques, including only two holds that are permitted to deal with an unruly patient. Holds are discussed and taught in Advanced Emergency Holds (AEH). (R-15, Tab 24). AEH are described as different techniques to restrain a patient. This involves arm locks and only one requires a leg lock. The physical skills involved in making contact with an aggressive patient involve verbal techniques and de-escalation techniques. Reid took the AEH class on

December 8, 2014. The AEH class provides there is never a reason for an officer to climb on a patient, to lay or be near the chest, (R-14, Tab 23), nor should an officer have his face near the patient's face. In fact, there is nothing that permits contact above the diaphragm so as to not restrict or obstruct the airway.

On cross-examination, Ferguson demonstrated the techniques involved in restraint. It was specified that the individual who is restraining the patient must simply hold onto the limbs and allow the patient to tire out. H.H. was banging his hand and head so hard for ten minutes on the window that he was still bleeding. You are supposed to hold on to them, until they burn out. Since people eventually get tired, only four people are needed. However, Ferguson was not aware if more than four people were on the scene with Reid restraining H.H. Nevertheless, there is never a reason for someone to lie across or stretch across a person to restrain them. Nor is it permitted to control the individual's shoulders.

Doris Ballentine (Ballentine) has been employed at the Center for the last seven-and-a-half years as a RN and as an Investigator. To qualify as an investigator, she completed an investigative training course, which includes interviewing and evidence gathering. She explained that only nineteen percent of all investigations are substantiated.

In this case, after her investigation, she completed an Investigative Report. (R-17-Tab3). Her conclusion was that H.H. was harming himself and the Net was ordered because he was out of control. A number of officers went in and could not put H.H. in the Net and they needed more officers. It is her opinion that Reid had inappropriate contact with H.H., despite the fact that Lopez indicated that he did not see any abuse by Reid, and Officer Charles Glenn's (Glenn) handwritten statement also indicated no abuse witnessed by him.

However, Glenn's handwritten statement was well after the incident and it is clearly based on the evidence that there was "inappropriate contact" because of Reid's own statements. Reid indicates that his "hand was on the upper chest of H.H. to keep him from getting up." Also, Reid's statement indicates that "I pushed him back to his

mattress, my hand slides [sic] forward toward the neck” and “of course at this point it’s going to look as if I’m choking H.H.” (R-5, Tab 12).

For appellant

Officer Charles Glenn has been employed Ann Klein Forensic Center as a Medical Security Officer (MSO) for six years. On May 27, 2015, between 2:00 a.m. and 4:00 a.m., he had a “One-to-One” with H.H. who is a very unpredictable patient who would harm staff and himself. He began to act out and spit at Glenn, tried to throw urine and harm himself by banging his head against the wall. Glenn asked for a code “grey” and another officer came in. The supervisor also came in and asked for more help because H.H. was bloodied and combative. They tried to get him into the Net, but were not successful. Next, they tried to put him in the restraint chair. Again, this was not successful.

At this point, Glenn was on H.H.’s right side, up by his head, and Reid was next to Glenn on the right side of H.H., near his waist. Reid took H.H.’s right arm under control and also reached across and helped Page control H.H.’s left arm. Reid never choked H.H. nor did he do anything inappropriate. “It could have appeared that Reid was across H. H.’s body, but he wasn’t.”

Glenn was questioned about the discrepancies in his statements. When confronted with his first statement (P-3), Glenn says he misunderstood what was asked of him and the statement is incorrect. As a result, he thought about it more clearly and wrote the second statement. (P-2). Also, the (P-4) incident report “Incident Description” is his, but he did not write the statement, Patient stated, “he was choked by MSO Reid.”

On cross-examination, Glenn indicated that H.H., “tried to throw urine,” but nothing was in his original written statement about urine or spitting. Interestingly, he did note those facts in his subsequent statement. (P-2). Also, his new statement was written five months after the incident and solely to help Reid. The original Glenn interview was completed on May 28, 2015, at 12:00 a.m. (R-17, Tab 3).

Glenn specifically stated that Reid did reach over H.H. to try to control his other arm while lying across H.H. Reid was next to him the entire time, but in his first statement he indicated otherwise, that he did not know Reid's position. Again, the reason was that he "misunderstood the questions." Also, as further clarification, Reid was "not laying across H.H.," he was standing up. Finally, Glenn stated that it was not permissible to touch a patient on the chest, "but it does happen." He then testified it is not permissible but it happens when confronting a combative patient.

Officer Robert Green (Green) indicated that he had been employed at the Center as a MSO since 2001. He understands his job is ensuring the safety of patients.

Green testified that after the incident, he recalled being present when the investigator approached H.H. for the interview. He was assigned to relieve a MSO for H.H., when he pulled the covers over his head. The investigator wanted to speak with H.H. about the "choking incident."

Green recalled that the investigator asked H.H., "When Mr. Reid choked you, was it like this or this?" Green said, "You shouldn't be leading a witness. You should ask open-ended questions," an investigator would not lead a witness.

On cross-examination, Green conceded that he was not witness to any other interview of H.H. He did not know if H.H. was the one who described the incident, and Reid as choking him. Also, despite being previously charged with abuse of a patient, he found Reid's reputation to be, "pretty sound."

David Reid is currently employed at Volunteers of America as an Employment Coordinator. He took a civil service test in 2009, and worked until 2011, when he became a part-time staff member. In 2012, he became a full-time MSO at the Center.

Pointedly, Reid was asked if he knew H.H. His response was, "we know the patients better than anyone. H.H. and I are buddies and I would never hurt him. I ordered a soft mattress for him. He intimidates staff; his one hand is his main weapon."

On May 27, 2015, he had been on the job for six years and was assigned to patient V.A., when he could hear H.H. yelling and screaming two doors away. He left V.A. to peer in the hallway to see Glenn, while H.H. was banging his head and arm on the window sill. Soon after he went back to V.A.'s side, he was called to H.H.'s room at approximately 2:00 a.m.

Reid went into H.H.'s room and could see a doctor and others, "shaking their heads." He entered the room and saw H.H. battered and bloody. H.H.'s feet were being secured by two other officers and Page was on H.H.'s left arm. So, "I excused myself and tippy-toed" around the officers and took a position near H.H.'s head, next to Glenn. Reid was on the right and Glenn was on the left of H.H. Then he took five seconds to assess the situation.

Reid could see that Page's glasses fell off and he was foaming at the mouth. Reid claims that because Page is a smoker, he looked like he was in distress. Page was flustered and had his difficulties with the situation. In Reid's mind, it was clear that Page was the trigger mechanism for H.H.

At this point, H.H.'s hands were crossed at the wrist and Reid leaned over H.H. and grabbed both arms and spread them apart. Reid's had slipped up to H.H.'s neck. H.H. was still using abdominal sit-ups to head-butt people and spit on people. Reid then reached across and grabbed H.H.'s left arm with both hands and slipped it in the restraint sleeve. Reid placed his right hand on H.H.'s chest and did not hurt him because, "H.H. is my boy. Me and H.H. are boys. Everything I'm doing is to be honest," and "I'm being honest." Reid testified that Glenn's testimony was not correct chronologically.

It was at this point that "Page punched me." He reached across, hit and punched Reid and told him to leave the patient's room. Reid told Page that he is a dictator. At 3:30 a.m., Page started arguing with Reid that, "I don't like you" and you "brushed up against me." Reid testified about a prior history with Page and described an incident where he was "proactive" and Page was smoking and "maybe drinking." Smoking on the premises was not allowed and a supervisor thought it was Reid. He also testified

that Page comes in drunk and curses at people. Reid has smelled alcohol on him on several occasions, but never reported it. He felt that he can say that in court without getting in trouble.

Finally, Reid testified that there was nothing in any manual that addresses restraining a patient in the prone position. "You can lay across a patient and place your hands on the chest" to restrain or subdue the patient.

On cross-examination, Reid reiterated that it was permissible for a MSO to place their hands on a patient's chest or lay on the person, as long as they were not harming a person. He stated that Ferguson gave the wrong testimony and did not testify about the restraint techniques correctly. These were "discrepancies in her testimony that should be brought out."

Reid claims that he never laid chest-on-chest with H.H. Instead, he demonstrated that he leaned over him, without any contact and with one leg up in the air, all while holding H.H.'s flailing arms, while H.H. was doing sit-ups to head-butt and spit on staff. However, the bed is only two feet off the ground. He acknowledged that H.H. exclaimed, "I can't breathe," and Reid immediately got up. Reid said he only controlled H.H.'s upper body. "I was never choking [H.H.] intentionally. It would seem that I did it."

Reid also claimed that Page was a "drunk" but was promoted after this incident, despite being a "drunk." He also claimed that he never testified about "tip-toeing" upon entering H.H.'s room, or that Page's mouth was "ashy" and not "foaming." This happened because Page was "passing out and dehydrated." Reid disputes that the restraint chair came in at 3:19:17 a.m. because the video was never provided to counsel. In fact, Reid claims that he did not enter H.H.'s room at 3:18:49 a.m. He says the whole incident happened at 2:00 a.m., "an hour earlier." Reid claimed that he has a "razor-sharp memory."

Rebuttal Witness

Page acknowledged that he restarted smoking but has no troubles with physical ability to perform the job. "I'm good." He disagreed that he ever came to work intoxicated and that the statement by Reid about Page's glasses falling off is also untrue. In fact, he was not wearing glasses because they are only used for reading.

Page agreed that H.H.'s arm was loose and he was having difficulty restraining him, but then Reid came in and landed on top of him. This happened when H.H. was in a forty-five degree crunch position and Reid landed on H.H.'s torso and went "splat."

FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, 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). Also, "[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).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

After hearing the testimony and reviewing the evidence, I make the following findings of fact:

On May 27, 2015, the appellant was engaged in the restraint of patient, H.H. H.H. was known to be a difficult patient. He was aggressive and unpredictable, and had engaged in behaviors that presented a danger to himself and others. He was self-abusive. The appellant was charged with restraining him and keeping him safe. However, consistent with Brown, Page and Reid's testimony, Reid was on top of H.H.'s body and his hand slipped near H.H.'s neck.

The testimony of respondent's witnesses was especially credible and persuasive. Despite the varying degrees of observation on the position of Reid when it came to H.H., their testimony as a whole was more convincing in that Reid had inappropriate contact and had abused H.H.

Conversely, Reid's testimony was both credible in terms of his factual recitation of the case, but not credible with the manner in which it was given. Reid's own testimony assisted the respondent in proving the facts of the case by a preponderance of the evidence. His testimony that H.H.'s hands were crossed at the wrist and Reid leaned over H.H., grabbing both arms and spreading them apart, was believable in concert with the testimony from the respondent's witnesses. Also believable with the testimony from the respondent's witnesses was Reid's testimony that his hand slipped up to H.H.'s neck but "I was never choking [H.H.] intentionally." Furthermore, when he stated that, "it would seem that I did it," was particularly poignant.

It was obvious that Reid attempted to "sell" his version of the facts to the undersigned. Particularly, not only was his recitation and demonstration of the contact with H.H. not credible, but also not realistic to believe that Reid could have performed that maneuver in that setting under those circumstances. Reid's claim that he never laid chest-on-chest with H.H. was not believed because it defies logic. The mechanics of the maneuver described by Reid are simply not possible. Also, when Reid testified that upon entering H.H.'s room, "I excused myself and tippy-toed" around officers, was not realistic under the circumstances. Furthermore, the fact that Reid constantly had to reassure the undersigned that he and H.H. were "boys" and that everything he said was "truthful" and "honest" because he has a "razor-sharp memory" detracted from any modicum of credibility. Coupled with the fact that, he discounted the testimony of Page

because he was a “drunk,” Ferguson because her testimony had “discrepancies” and his own witness, Glenn, who’s testimony was “chronologically” incorrect, undermined the believability of his testimony.

LEGAL ANALYSIS AND CONCLUSION

Civil service employees’ rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobarrista v. Essex Cnty. Park Comm’n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a). A civil-service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline, including removal. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a).

This matter involves a major disciplinary action brought by the respondent appointing authority against the appellant. An appeal to the Merit System Board requires the OAL to conduct a hearing de novo to determine the appellant’s guilt or innocence as well as the appropriate penalty, if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent has the burden of proof and must establish by a fair preponderance of the credible evidence that appellant was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

The Center has charged the appellant with conduct unbecoming a public 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 4:08 C-3, and inappropriate physical contact or mistreatment of a patient, client, resident or employee in violation of Administrative Order 4:08 C-5.

Respondent sustained charges against appellant for Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which 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 (1988); 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 publically accepted standards of decency." Karins, supra, 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)). Suspension of removal may be justified where the misconduct occurred while the employee was off duty. Emmons, supra, 63 N.J. Super. At 140.

It is difficult to contemplate a more basic example of conduct which could destroy public respect in the delivery of governmental services than the image of a public employee laying on top of and choking a mentally or emotionally disadvantaged patient. I **CONCLUDE** that appellant's actions constitute unbecoming conduct, and the charge of such is hereby **SUSTAINED**.

As to the charges of violation of section C-3 of the DAP, "Physical or mental abuse of a patient," the DAP at Supplement 3 defines physical abuse 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.

The actions of appellant do fit directly within the definition of physical abuse as set forth in the DAP. Appellant directed an act of retaliation at H.H. by laying on him that would tend to cause pain, injury, anguish, and/or suffering. Therefore, I **CONCLUDE** that the appointing authority has met its burden of proof that appellant did physically or mentally abuse patient H.H. pursuant to DAP section C-3.1 and that this charge is **SUSTAINED**.

With regard to the charge of a violation of section C-5.1 of the DAP, "Inappropriate physical contact or mistreatment of a patient," the appointing authority has proven that appellant did act inappropriately by laying on to of H.H. and I **CONCLUDE** that the appointing authority has met its burden of proof on this issue and that this charge is also **SUSTAINED**.

PENALTY

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. West New York v. Bock, supra, 38 N.J. 523-24. Factors determining the degree of discipline include the employee's prior disciplinary record and the gravity of the instant misconduct.

However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See, Henry v. Rahway State Prison, 81 N.J. 571 (1980). It is well settled that the theory 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).

The record reflects that appellant has a fairly unremarkable disciplinary record. It is noted that a single charge of Incompetency, Inefficiency or Failure to Perform Duties by itself, can be sufficient grounds for termination in the absence of any other disciplinary history. Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See, In re Herrmann, 192, N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App.Div. 1998). (NOTE: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law).

"In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a county treasurer who could not balance the books, after the auditors tried three times to show him how).

In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that Klusaritz's prior record is "of no moment" because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.

[In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

Considering the foregoing, and the record in the present matter including the appellant's disciplinary record, the nature of the job duties and the nature of the charges, I **CONCLUDE** that the respondent's action terminating appellant were justified.

ORDER

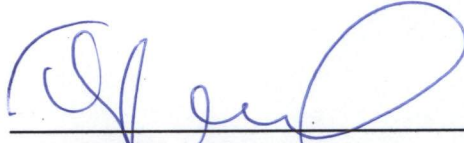
I **ORDER** that the charges of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), physical or mental abuse of a patient, client or resident in violation of Administrative Order 4:08 C-3, and inappropriate physical contact or mistreatment of a patient, client, resident or employee in violation of Administrative Order 4:08 C-5 be **SUSTAINED**. I further **ORDER** respondent's action terminating the appellant be **AFFIRMED**.

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**, 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, 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.

April 4, 2017
DATE



DEAN J. BUONO, ALJ

Date Received at Agency:

4/4/17

Date Mailed to Parties:

4/4/17

/vj

APPENDIX
LIST OF WITNESSES

For appellant:

Charles Glenn, MSO
Robert Green, MSO
David Reid, appellant
Rebuttal Witness, Frankie Page, SSMSO

For respondent:

H.H., patient
Frankie Page, SSMSO
Randolph Brown, SMSO
James Jones, SMSO
Renee Maxwell, SMSO
Julie Baranowski, RN
Sandy Ferguson, RN and Director of Training
Doris Ballentine, RN and Investigator

LIST OF EXHIBITS

For appellant:

P-1	Lopez Interview Statement, dated May 28, 2015
P-2	Hand-written statement from Glenn, dated October 20, 2015
P-3	Glenn Interview Statement, dated May 28, 2015
P-4	Incident Report, dated May 27, 2015
P-5	Reid Interview Statement, dated June 3, 2015

For respondent:

R-1, Tab 9	Page Statement, dated May 28, 2015
R-2, Tab 10	Special Report, dated May 27, 2015
R-3, Tab 8	Brown Statement, dated May 28, 2015
R-4, Tab 5	Jones Statement, dated May 27, 2015
R-5, Tab 4	Report of Renee Maxwell, dated May 27, 2015
R-6, Tab 11	Baranowski's Notes, dated May 28, 2015
R-7, Tab 20	Attendance
R-8, Tab 26	Policy on Defense and Control
R-9, Tab 27	Manual Policy and Procedure
R-10, Tab 28	Emergency Procedures
R-11, Tab 29	Instructor Manual
R-12, Tab 21	Therapeutic Options Roster
R-13, Tab 22	Therapeutic Options Quiz
R-14, Tab 23	Advanced Emergency Holds
R-15, Tab 24	Advanced Emergency Holds
R-16, Tab 25	Emergency Restraint Chair (ERC)
R-17, Tab 3	Investigative Report
R-18, Tab 31	Disciplinary Action Program
R-19, Tab 2	Final Notice of Disciplinary Action
R-20, Tab 19	Prior Disciplines