

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 14th DAY OF AUGUST, 2019

Deirdre' L. Webster Cobb

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Chairperson
Civil Service Commission

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

(CONSOLIDATED)

OAL DKT. NO. HSL 11072-18

AGENCY DKT. NO. DRA#18-012

RECORD SEALED

T.B.,

Petitioner,

v.

**DEPARTMENT OF HUMAN SERVICES,
OFFICE OF PROGRAM INTEGRITY
AND ACCOUNTABILITY,**

Respondent.

**IN THE MATTER OF T.B., ANN KLEIN
FORENSIC CENTER, DEPARTMENT OF
HEALTH**

OAL DKT. NO. CSV 12391-18

AGENCY DKT. NO. 2019-240

Tyhesha C. Marshall, Esq., for petitioner-appellant T.B. (Law Offices of Tyehsa C. Marshall, attorneys)

Caroline Gargione, Deputy Attorney General, for respondent Department of Human Services, Office of Program Integrity and Accountability (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Aaron J. Creuz, Deputy Attorney General, for respondent Ann Klein Forensic Center, Department of Health (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: June 17, 2019

Decided: July 1, 2019

BEFORE GAIL M. COOKSON, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner-appellant, T.B. appeals his placement on the Central Registry of Offenders Against Individuals with Developmental Disabilities (Central Registry), pursuant to N.J.S.A. 30:6D-73 et seq., on charges that he engaged in physical abuse of a developmentally disabled patient during the course of his employment at the Ann Klein Forensic Center (AKFC), specifically, on September 29, 2017, as substantiated by respondent Department of Human Services, Office of Program Integrity and Accountability (DHS). This matter was transmitted to the Office of Administrative Law (OAL) on August 2, 2018, for hearing as a contested case, and assigned OAL Dkt. No. HSL 11072-18.

A second matter was transmitted to the OAL on August 27, 2018, and assigned OAL Dkt. No. CSV 12391-18. Therein, appellant appeals his termination by AKFC from his position as a Senior Medical Security Officer (MSO), effective May 2, 2018, on the same grounds, that he physically abused a patient during the incident referenced in OAL Dkt. No. HSL 11072-18.

An Order to Seal, Consent Confidentiality Protective Order, and Consolidation-Predominant Interest Order have been entered previously in these matters, and are incorporated by referenced herein. The plenary hearings were conducted on March 27 and April 2, 2019. Parties were provided an opportunity to present written summations and argument. The record closed upon the receipt of same.

FINDINGS OF FACT

Accordingly, and based upon due consideration of the testimonial and

documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

Kylie Hanisak was the initial witness for DHS. Hanisak has been a Quality Assurance Specialist and Investigator for the agency since May 2017, assigned to AKFC. She holds a Bachelor of Science degree in Psychology, and worked in various positions at the Hunterdon Developmental Center for fifteen years previously. Hanisak described the two-week training she underwent as an investigator, including review of the Central Registry regulations and Administrative Orders of the agency. Hanisak does not determine when an allegation is referred for investigation. Her job is to determine if it is substantiated, meaning that the preponderance of the evidence – 51% -- supports that finding.

Hanisak watched the video of the timeframe leading up to and including the incident during which it is alleged that T.B. slapped patient A.C. She also chose which witnesses and other staff persons to interview. Typically, Hanisak would not interview persons who were not eye witnesses. She would have spoken with A.C. but he did not want to talk about it, which she respected.

Hanisak provided commentary during the playing of the video at the hearing, helping this forum with identification of the various persons seen in it, the locations, and the general overview of Unit 2A, which she explained is an intensive treatment unit. At the 3:24 p.m. mark on the video, Frankie Page, who is a Supervisor of MSOs, is seen in a checkered shirt; MSO Reed is in a dark uniform; MSO Mobley is seen putting on latex gloves; and the first MSO in a white collar is MSO Huff, followed by MSO Reed. By the 3:35:33 mark, we see petitioner, who is bald, closest to the foreground. MSO Aguirre can also be seen and MSO Rainey is putting on a paper face mask. MSO Szeles is seen in the white shirt and then we see petitioner placing his mask on his face. It appears that petitioner also has on clear protective glasses. Hanisak testified that officers put on paper face masks and protective eyewear when dealing with A.C. or any other resident with a known propensity to spit at the officers.

Next in the video, we see A.C. being escorted out of his room by MSOs Rainey and Huff. Petitioner follows them out of the room from which A.C. was extracted and returns to the foreground of the scene and to the left of A.C. being placed and strapped into the emergency restraint chair (ERC or restraint chair). Page is to his immediate right. At the 3:27:30 mark, the video shows petitioner leaning in toward A.C., "his right arm extended toward A.C. and his left arm extended back. Page immediately moves petitioner away from A.C. and has another MSO escort him off the unit.

On cross-examination, Hanisak acknowledged that she was not trained specifically on how to review videotapes during investigations. She also only received one day of interview training, thereafter shadowing a more senior investigator on just two interviews. In hindsight, Hanisak agreed that her training was not adequate but she has also learned on the job since then. Hanisak explained the process that precedes her receipt of an investigative assignment, as well as the online software system wherein the investigative report is created and edited during the investigation. The Patient Services Compliance Unit received the incident report from Page. AKFC collected the initial witness statements. Then the Critical Incident Management Unit filters the report by deciding what DOH code it should receive and whether it should be referred to an investigator. Only at that later stage did Hanisak become involved.

Hanisak was further questioned on how she took witness statements, explaining that at the time of this incident, she would type or write them out while interviewing the individual, then read them aloud or have the witness read them, thereafter having the witness sign the statement. She acknowledged there could be differences between her interview statements and the initial AKFC statements of those witnesses but did not believe the differences were significant or would undercut her recommendation that petitioner be placed on the Central Registry. Hanisak also reiterated that she reaches her recommendation on the basis of whether the totality of the evidence is at least 51% supportive of that recommendation. While she could not see petitioner slapping A.C. on the video because Page obscured that angle, other eye witnesses did.

Frankie Page is an MSO Supervisor at AKFC and has served in that capacity since April 2016, albeit in a probationary position due to the expiration of the applicable Civil Service list. Page became an MSO in January 1996 and previously served in the Army. As a Supervisor, he has oversight responsibility for MSOs on his shift including, but not limited to, assuring that standard operating protocols are followed, communications are occurring, and patients are being properly cared for.

Page described the basic care techniques utilized at AKFC and the risks faced by MSOs when caring for its residents. The patients who reside at AKFC are a higher risk population because they are ordered there by the courts as a result of incompetency rulings; they are transferred from other psychiatric hospitals because of additional security concerns; or they are transferred from the state prison system because they require forced medication. Many of the residents are classified as developmentally disabled adults.

Page described the resident who was the alleged victim of the incident in question herein. He believed that A.C. has been at AKFC for ten to fifteen years. He is a developmentally disabled adult who is known to self-injure and to spit. A.C. can be very difficult to redirect when he is unfocused, not listening, or out of control. Page feels he has a good rapport with A.C. and can often talk him into a state of calm. Nevertheless, A.C. spends more time in "seclusion and observation" rooms (S&O), and in the ERC than the average resident. S&O is only utilized on a doctor's orders. There is a standing order for A.C. such that if he bangs his head on the walls or any other surface while in S&O, an MSO is to call a nurse who will put out a radio call for a supervisor needed on the particular unit. The supervising MSO can order a Code Gray for him to be removed and placed in the ERC. That code is the signal for available MSOs to approach the area in need. It takes 4-5 MSOs to restrain a resident in the chair and ensure that the straps are secure. Once in the restraints, one MSO will stay with the resident on a one-to-one monitor assignment until ordered otherwise.

On September 29, 2017, Page was called because A.C. was agitated in his lock-in room (not an S&O room) and banging his head on the door with his back to it. Page

called the Code Gray. Then he removed Reed who was standing at the door because that was agitating A.C. more. Page talked to A.C. and settled him down some. MSOs Rainey and Aguirre continued the process of talking A.C. into voluntarily walking out of the room toward the ERC.

Page described the ERC, its uses, and procedures. The restraint chair has straps at the shoulders, waist, arms, wrists and ankles that buckle and secure the person into it. When being placed in the ERC, A.C. will tend to spit and thrash at the staff. At one point during the process of restraining A.C. on this particular occasion, Reed came toward A.C. who proceeded to spit in his direction. Page then told Reed to back away. It was soon thereafter that petitioner approached A.C., although his purpose in doing so was unclear. Page was directly next to A.C.'s left side and to the right of petitioner, and could see plainly that A.C. was again preparing to spit. At that moment, petitioner raised his arm and slapped A.C.'s face. Page both saw and heard it.

Page immediately told petitioner to back away and he had another MSO escort petitioner off the unit. After A.C. was finally fully strapped into the ERC with MSO Jones assigned as his one-to-one staff, Page found petitioner and advised him to obtain a union representative and meet him in the office because he was going to be relieved of his post. Petitioner was thereafter sent home and told he would not be allowed to have any patient contact during the investigation and review of the incident.

On cross-examination, Page reviewed his employment history with AKFC. In 2017, he became a Supervising MSO but in provisional status awaiting the Civil Service examination. As part of that promotional process, he was interviewed by Savage, Hector "R" and Moore, people he considers work associates but not friends outside of the job. Page took that exam in January 2019. He agreed that he did not have the highest score, nor has he been hired off the list yet.

Page explained that MSOs are not officially told which residents are at AKFC as a result of civil or penal commitment. While some would complain about not being so

advised, Page said it was often discernable from the circumstantial evidence. Page knew that A.C. was developmentally disabled and not particularly coherent in his thought processes. A.C. might think he was negotiating to get something he wanted from Page but that would not really be the case. During the incident, Page observed that A.C. was fixated on Reed and that Reed was triggering some of A.C.'s bad behavior. At the time, Page did not know why but he knew to separate Reed away from the scene.¹

Page denied that he spread the word that petitioner had slapped A.C. and thereby biased the other MSOs who were asked to write statements concerning the incident with A.C. Page stated that he merely handed out the blank statement forms. Page also denied that he and T.B. had prior altercations that predisposed him to being unfair and harsh toward petitioner on this date. Page recalled that there had been a time when petitioner and MSO Lewis, after escorting a patient to the hospital and then back to AKFC, carried their cell phones into the ward against policy. Page was working the front desk and several hours later advised the two MSOs that he would not allow them to take cell phones with them next time they had a hospital run. Page said there was no follow-up verbally or in writing.

On re-direct examination, Page explained that he became a provisional Supervisor because the prior list had expired, no new list was available, and an exam had not been scheduled. He also testified that even if an MSO knows the category of resident they are handling, it would make no difference in terms of safety and standards of abuse. Some MSOs might treat the individuals differently if they knew, which might be the rationale to the policy of not providing formal identification of the population.

Sandi Ferguson testified that she has been employed by AKFC for the past thirty years and has held the position of Director of Staff Training since 1989. As the Director of Staff Training, it is her responsibility to train and educate all facility staff members, as well as write policies and evaluate and develop training curriculums. Some of the topics

¹ Page testified that later viewing of a longer period on the video revealed that MSO Reed had pushed A.C. into the lock-in room after rehabilitation was completed and before the 4:00 p.m. medication rounds. Page stated that this unrelated incident has been addressed.

of the training courses provided are therapeutic options, advanced emergency holds, abuse and neglect, seclusion and restraint classes. In describing the therapeutic options material, Ferguson stated that it is a program made up of several components among which includes verbal redirection, de-escalation (CALM's model) as well as defensive techniques and holds.

Ferguson explained that patients like A.C. with developmental and intellectual disabilities can be aggressive, spit, and cause harm to themselves or others. She reviewed the protocols for restraining someone who is causing such harm, and stated that once fully restrained in the ERC, all MSOs should back away. Ferguson stated that the standard for determining if patient abuse has occurred in this setting is not whether there is actual physical contact, but whether the actions could generate fear in the patient; that is, whether the staff actions could cause physical or emotional harm. She acknowledged that any MSO who has to deal with and/or restrain an agitated resident who is known to spit should wear gloves, mask and a visor (eye protection).

On cross-examination, Ferguson repeated that the criteria for abuse is whether the action could objectively cause fear in a resident and not whether this particular resident was fearful.

Petitioner presented the testimony of several MSOs with whom he worked at AKFC on September 29, 2017. Darryl Lewis has been an MSO at AKFC for six years during which time he worked with petitioner regularly. He testified to an incident in late 2015 or early 2016 when petitioner and Page had an argument over carrying a cell phone onto the unit. While he was not present for the entire conversation, Lewis stated that it was a little intense.

On cross-examination, Lewis was asked to elaborate on this interaction between Page and petitioner. He explained that petitioner and he were returning to AKFC from the hospital with a patient. Page was assigned to the front desk and door at the time, which was third shift. Page's job would be to search all visitors coming through the front door for contraband, including cell phones and cigarettes. Lewis and petitioner

needed their cell phones with them on the way to the hospital, a fact that is not in dispute. However, it was late when they returned to the facility and their shift was technically over but they still needed to return the resident to his room. Rather than turn their cell phones into Page or try to place them in their personal vehicles parked outside², Lewis and petitioner kept them on their persons. Moreover, he, petitioner and the patient were re-entering the facility through the rear sally port.

At some point later, Page verbally reprimanded the two MSOs for having their cell phones on them past the contraband point. As far as Lewis was concerned, it was not a big deal and he brushed off Page's comments. Petitioner stayed to argue with Page. Lewis could not recall the exact words Page and petitioner exchanged. He also did not believe that there remained any "bad blood" between Page and petitioner after this argument.

MSO Diego Aguirre also testified for petitioner at the hearing. He has worked for AKFC for twenty years. Aguirre described A.C. as an extremely difficult patient who does not respond well to structured living or to verbal commands. He estimated that A.C. had been at the facility for approximately ten years. Aguirre was not on the unit initially on September 29, 2017, but he was one of the MSOs who responded to the Code Gray call for additional staff to report. He stated that A.C. was agitated in the room, issuing verbal threats, spitting, kicking, and refusing verbal attempts at redirection. Aguirre knows that A.C. sometimes responds to chats about rappers and songs but that was not working on this occasion.

A.C. was spitting at everybody this day. The MSOs all placed paper surgical masks on their faces but Aguirre recalled that there were no or not enough eye shields available. Aguirre and Rainey were able to deescalate A.C. enough to convince him to cooperate in leaving the room and walking to the restraint chair. Page was in and out of the room during this transition. Once A.C. was in the chair, Aguirre stepped away but he saw petitioner's hand movement. He testified that T.B. "threw what looked to be a punch."

² Lewis indicated that he did not want the patient to know which vehicle was his.

Aguirre wrote up his witness statement the same day and later was interviewed by Investigator Hanisak. He acknowledged that he could not see the end result of petitioner's arm action and that any use of the term "landed" with respect to that would be a mischaracterization. Aguirre recalled that Page told him that he had to call in the incident because petitioner hit A.C. Page asked Aguirre to come into the base office, not as a witness, but as a union representative for petitioner. Aguirre stated that other MSOs also mentioned that Page used similar language with them about why he was reporting the incident against petitioner.

On cross-examination, Aguirre stated that petitioner was four to five feet away from the ERC, providing only verbal assistance. He was of the opinion that petitioner would not strike a patient and is professional with the residents. As seen on the video, Aguirre had walked away from A.C. and the other MSOs because he was turning over to a nurse something he found in A.C.'s room. It was on his way back toward the ERC that Aguirre saw petitioner's arm movement. He could not say whether he thought that was professional on petitioner's part. He concurred that patients have occasionally but not regularly escaped a restraint.

Brenda Randall was called by petitioner as a character witness and colleague but she was not an eye witness to the incident on September 29, 2017. She is a Supervising MSO with twenty-five years of employment at AKFC. Randall has supervised petitioner and finds him to be an exemplary employee who interacts professionally with the patients. She stated that he understands how to deal with patients who have mental illnesses.

Randall was questioned about the argument between petitioner and Page a couple of years ago, and whether she recalled any details from it. She stated that Page had brought the verbal dispute with petitioner about cell phones to her attention because she was the shift supervisor that day. This was standard debriefing and not just "water cooler" talk. Randall noted that neither she nor Page took it as a serious incident and there was not any write-up of the situation because it did not warrant

escalation. Later, Randall spoke with petitioner in order to hear from both sides. T.B. told her that he felt Page's approach towards him was disrespectful. Randall explained that she thought he took it the wrong way but even at one's place of employment, interpersonal reactions can be emotional.

On cross-examination, Randall explained, in a very common sense way, that people interact with each other on the job and can sometimes be emotional or defensive. Nevertheless, she could not judge what transpired between Page and petitioner on the occasion of the cell phone interaction. She listened to both sides and understood that petitioner felt that Page had been disrespectful. Yet, it was not a serious argument and Page did not take it seriously either. It was not a situation either of them saw as worthy of a write-up. Randall confirmed that she and Page had no issues with each other.

Petitioner testified on his own behalf. He was hired at AKFC in September 2012. Prior to that employment, petitioner was a case worker for DYFS, a school bus driver, EMT transport driver, and various other jobs. He stated that he enjoys taking care of patients, which is how he summed up the jobs he has had over the last almost twenty years. AKFC was the first job where petitioner had exposure to anyone with a criminal background. Petitioner maintains that he had a good rapport with A.C., having even been introduced to his family.

Petitioner described the training that MSOs receive and the annual two-day refresher course. With respect to the latter, the first day consists of classroom materials and PowerPoint presentations. The second day is a refresher in physical training and the techniques of restraints. The various techniques of physical restraints are referred to as Mechanical Advantage Control Holds (MACH) and are graded from one to five (Mach 1 – Mach 5). Petitioner testified that MSOs receive no training in how to combat patients who spit even though it is a frequent occurrence. He also described the paper blue surgical masks and plastic eye guards available to the MSOs.

Petitioner denied that he struck A.C. In reviewing the video in slow motion at the hearing, petitioner noted that A.C. was spitting indiscriminately during the ten seconds leading up to the alleged incident. Petitioner was giving verbal commands to A.C. in order to calm him down, telling him it would not take too long. He believes that the MSOs were still in the process of fixing the restraint straps. At 3:34 p.m. on the video, petitioner says he was moving in toward A.C. to make sure the restraints were fastened tight when A.C. made a face as if he was going to spit again. Petitioner instinctively put his arm up to block the spit. Petitioner stated that he never made physical contact with A.C. In response to my question as to why he did not just step back, petitioner said that it all happened so quickly that he could only react instinctually to protect himself.

Petitioner testified as to his version of events relating to the cell phone policy argument with Page almost two years prior to the incident herein. T.B. explained that he was well aware that cell phones were not to be taken on to the unit but he knew that he would be leaving anyway because his shift had ended. Yet, he then immediately stated that he had agreed to several hours of overtime that evening, so he would not be leaving directly after securing the patient. Petitioner stated that Page came down to the unit while he and Lewis were bringing the patient back to his room in order to continue the argument. Petitioner told Page to get out of his face. As Lewis earlier testified, he simply walked away. Petitioner also described an unrelated interaction at some point in 2017 when Page gave him a provocative look – “eyeballing” – to which he asked Page, “You got a problem?” Page responded, “Yea, you!” to which petitioner replied “Grow up!”

On the basis of these two verbal clashes, petitioner claims that Page was prejudiced against him. Petitioner denied that he ever slapped A.C., although he believed Page would make up the abuse accusation with A.C. to try to ruin his career. Petitioner believes himself to be dependable and trustworthy.

On cross-examination, petitioner clarified that he had never worked as a corrections officer or in an incarceration setting prior to becoming an MSO at AKFC. He finds that AKFC functions as a jail because of the presence of cells and shackles even

though it is a psychiatric hospital. He described how other patients also spit but seemed uncertain with whether A.C. had ever spit on him before. A.C. is placed in the ERC about two to three times per month, which is certainly more often than other patients. He can also become more agitated and difficult if he has been in S&O status. Petitioner described A.C. as an equal opportunity offender, lashing out at anybody and later apologizing. In general, petitioner acknowledged that he has only known of two or three times in his years as an MSO when a patient was not properly restrained in the chair and could still flail a limb. He thought he recalled A.C. doing that once.

T.B. stated that he feels disrespected by many patients and staff members, and yet he labeled himself as approachable. In another attempt at understanding what was seen on the video, petitioner said that if he put his hands up to his own face to block A.C.'s spit rather than moving his arm and hand toward A.C., then he would not have been able to see in that instant.

On continued examination, T.B. admitted that he really did not think about the fact that he still had his cell phone on his person when he and Lewis returned through the sally port. There was also the option of turning the phone into the base office that was immediately adjacent to the sally port. Nevertheless, petitioner maintained that it was Page's approach and attitude with which he disagreed, not the point of the policy being enforced by Page.

For evidence to be credible it must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Credibility, or, more specifically, credible testimony must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). I FIND that petitioner's witnesses were less credible than those presented by respondent. Credibility means the testimony as a whole hangs together and makes sense. After listening carefully to every witness, it was clear to me that this entire case turned on whether petitioner's supervisor or petitioner himself was more credible in his testimony as to what occurred.

Although petitioner raised the claim that Page was biased against him, as evidenced by two arguments over the course of their many employment interactions over the years, I **FIND** that those were very minor and attenuated in time from the incident under review herein. There was no sincere basis upon which I could find that testy interactions which did not result in petitioner being written up by Page prejudiced what Page saw on September 29, 2017.

Moreover, I had the benefit of seeing the video numerous times during the hearings. The first impression I had was that petitioner was not involved in the restraining of A.C., and he appeared to be deliberately standing to the side of the other MSOs and Page. But he took a step closer to him, while contributing nothing to securing or checking the restraints. He leaned in with his left arm raised behind him and right arm extended toward A.C. in the partly obscured visual in the video. Frankly, I found petitioner's explanation not credible as to why he stepped forward in the first instance but then did not step backwards in the moment when he observed A.C.'s agitation and spitting.

ANALYSIS AND CONCLUSIONS OF LAW

It is the policy of this State to provide for the protection of individuals with developmental disabilities. N.J.S.A. 30:6D-73(a). The Central Registry is intended to prevent caregivers who become offenders against individuals with developmental disabilities from working with individuals with developmental disabilities. N.J.S.A. 30:6D-73(d). A caregiver may be placed on the Central Registry in cases of substantiated abuse, neglect or exploitation. N.J.S.A. 30:6D-77(b). A "caregiver" is defined in N.J.A.C. 10:44D-1.2 as "a person who receives State funding, directly or indirectly, in whole or in part, or who volunteers to provide services or supports, or both, to an individual with a developmental disability."

Central Registry Action

It is undisputed that petitioner was a caregiver for A.C. and that A.C. is a service recipient with the Division of Developmental Disabilities (DDD).

The issue here is two-fold. First, did petitioner commit an act of abuse against A.C. on September 29, 2017. Second, were petitioner's actions intentional, reckless or with careless disregard to the well-being of A.C., which could have resulted in fear or injury to him or potentially exposed him to an injurious situation.

"Abuse," defined in N.J.A.C. 10:44D-1.2, means "wrongfully inflicting or allowing to be inflicted physical abuse, sexual abuse or verbal or psychological abuse or mistreatment by a caregiver upon an individual with a developmental disability."

"Physical Abuse," defined in N.J.A.C. 10:44D-1.2, means "a physical act directed at an individual with a developmental disability by a caregiver of a type that causes one or more of the following: pain, injury, anguish or suffering. Such acts include, but are not limited to, the individual with developmental disability being kicked, pinched, bitten, punched, slapped, hit, pushed, dragged or stuck with a thrown or held object."

In order to be included on the Central Registry, it must be determined whether the caregiver acted with intent, recklessness, or careless disregard to cause or potentially cause injury to an individual with a developmental disability. N.J.S.A. 30:6D-77(b)(1), N.J.A.C. 10:44D-4.1(b). The second inquiry is whether Petitioner "acted intentionally, recklessly or with careless disregard to the well-being of the service recipient resulting in an injury to an individual with a developmental disability or by exposing the latter to a potentially injurious situation." N.J.A.C. 10:44D-4.1(b). The regulation defines each mental state:

1. Acting intentionally is the mental resolution or determination to commit an act.
2. Acting recklessly is the creation of a substantial and unjustifiable risk of harm, to others by a conscious disregard for that risk.

3. Acting with careless disregard is the lack of reasonableness and prudence in doing what a person ought not do or not doing what ought to be done.

Petitioner contends that he never slapped or intended to slap A.C. but was merely protecting himself from A.C. boildly fluids. Additionally, all of the restraint procedures utilized were in accordance with his training and acceptable practices and were effectuated with care. Given the level of perceived threat, the restraint of A.C. was proper and, as a result of his actions, petitioner argues that no one, including A.C., other patients or the officers, which included himself, were injured or could objectively have been in fear of being injured.

Respondent contends that the video speaks for itself and that petitioner's intentional contact caused A.C. pain, as witnessed by Page. Such actions were reckless and/or in careless disregard of A.C.'s well-being. As such, not only did petitioner's actions result in injury to A.C., he potentially exposed A.C. to an unreasonable amount of fear.

All witnesses were consistent in their testimony that MSO's are trained on client abuse prevention, which includes training on services and supports. One of the main responsibilities of an MSO is to provide for the safety of the patients entrusted to their care and to ensure their own safety. As part of their training and job responsibilities, MSO's need to understand each patient's needs and behavior. In situations where a patient is known for aggressive behavior and starts acting out, it is the MSO's responsibility to try to deescalate the situation. This could include talking to the patient or attempting to redirect them, among other techniques. If this is unsuccessful, physical intervention may be required, with the goal being to keep everyone safe and unharmed. Hence, the training on various "hold" techniques when physical restraint is necessary. At all times an MSO must be ready to make split second decisions as a situation unfolds, relying upon their training and experience in reading the situation and responding accordingly.

Respondent relies upon the surveillance film, asserting that it speaks for itself, but also supports its case with the eye witness testimony of Page, which I found above to have been credible. I also found both petitioner's actions that day and his testimony to not make sense in the totality of the circumstances. I **CONCLUDE** that petitioner acted intentionally, recklessly and/or with careless disregard when he stepped towards A.C. with his right arm raised at him while A.C. was in a restraint chair.

For the foregoing reasons, I **CONCLUDE** that petitioner did commit an act of abuse on A.C. I further **CONCLUDE** that petitioner's actions were taken with careless disregard to A.C.'s well-being.

Civil Service Action

Petitioner's rights and duties are also governed by the Civil Service Act and accompanying regulations. To the extent that my determination above is over-turned and petitioner is not automatically removed from employment as an MSO because of his Central Registry status, then I would still recommend his removal as an appropriate exercise of discipline.

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. 4A2-2.

The appointing authority shoulders the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Here, I **CONCLUDE** that respondent sustained the following charges against petitioner: conduct unbecoming a public employee (N.J.A.C. 4A:2-2.3(a)(6)); physical or mental abuse of a patient, client or resident (Administrative Order 4:08 C3); and inappropriate physical contact or mistreatment of a patient, client, resident or employee (Administrative Order 4:08 C5).

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 alleged conduct and its attending circumstances “be such as to offend publicly accepted standards of decency.” Karins, 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)).

There is no question that when an MSO is required to implement one of the approved holds to restrain a patient, there is going to be physical contact. It is also undisputed that nobody can train for every situation that may arise with a patient. This incident falls within that category. Given A.C.’s conduct, known propensities, location, and presence of other patients, the team called together as a result of a Code Gray properly moved to restrain A.C. Nevertheless, petitioner was not actively involved in restraining A.C. and is seen on the video standing a couple of feet in front of him. I did not find it credible that he was going to check on the restraints even while the other MSOs were still working to secure A.C. in the ERC. Nor did I find it credible that his instinct was to put his hand in front of A.C.’s face rather than take a step back, especially when considering that petitioner had on both a mask and eye wear.

For the foregoing reasons, I **CONCLUDE** that respondent has met its burden that petitioner physically abused A.C. and has met its burden with respect to the charge of conduct unbecoming a public employee, as well as the charges of violation of Administrative Order 4:08 C3 (Physical or mental abuse of a patient, client or resident) and Administrative Order 4:08 C5 (Inappropriate physical contact or mistreatment of a patient, client, resident or employee). Further, it is recommended that petitioner be terminated from his employment as an MSO at the AKFC.

ORDER

It is hereby **ORDERED** that the determination of the Office of Program Integrity and Accountability to place petitioner T.B. on the Central Registry of Offenders Against Individuals with Developmental Disabilities for the incident on September 29, 2017, is hereby and the same is **AFFIRMED**.

I hereby **FILE** this Initial Decision with the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY**.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY**, who by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering his final decision, the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY** shall forward the record, including this recommended decision and its final decision, to the **CIVIL SERVICE COMMISSION**, which may subsequently render a final decision on any

remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY** shall, pursuant to N.J.A.C. 1:1-17.8(c), request an extension to permit the rendering of a final decision by the **CIVIL SERVICE COMMISSION** within forty-five days of the predominant-agency decision. If the **CIVIL SERVICE COMMISSION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

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 OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY, 222 South Warren Street, 4th Floor, PO Box 700, Trenton, NJ 08625-0700**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 1, 2019
DATE


GAIL M. COOKSON, ALJ

Date Received at Office of Program Integrity and Accountability:

7/1/19

Date Mailed to Parties:

id

APPENDIX

LIST OF WITNESSES

For Petitioner/Appellant:

Darryl Lewis
Diego Aquirre
Brenda Randall
T.B.

For Respondent:

Kylie Hanisak
Frankie Page
Sandi Ferguson

EXHIBITS IN EVIDENCE

For Petitioner/Appellant:

P-1 Controlled F.O.R.C.E. 24-Hour Training Manual, Chapter 8, Lesson Two
P-2 Still Photos From Ann Klein Forensic Center Video (R-11)
P-3 Respondent's Responses to Petitioner's Requests for Admissions

For Respondent:

R-1 Final Notice of Disciplinary Action, dated July 2, 2018
R-2 Preliminary Notice of Disciplinary Action, dated May 2, 2018
R-3 Central Registry Notice, dated May 30, 2018
R-4 Investigation Report, completed April 9, 2018
R-5 Employee Evaluations for T.B., various dates
R-6 Training Records for T.B., various dates
R-7 Controlled Force Exercises [duplicate of P-1]
R-8 Personal Defensive and Control Techniques in Aggressive Patient Situations and
Emergencies

R-9 [not in evidence]

R-10 [not in evidence]

R-11 Video of Ann Klein Forensic Center, dated September 29, 2017

R-12 Department of Human Services, Administrative Order 4:08, effective January 1,
1981

R-12a Department of Human Services, Administrative Order 2:05, effective October 1,
2004



State of New Jersey

PHILIP D. MURPHY
GOVERNOR

DEPARTMENT OF HUMAN SERVICES
OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY
PO BOX 700
TRENTON, NJ 08625-0700

CAROLE JOHNSON
COMMISSIONER

SHEILA Y. OLIVER
LT. GOVERNOR

LAURI WOODWARD
DIRECTOR

FINAL AGENCY DECISION
OAL DKT. NO. HSL 11072-18
AGENCY DKT. NO. DRA#18-012
REVISED JULY 30, 2019

T.B.,
Petitioner,

v.

DEPARTMENT OF HUMAN SERVICES,
OFFICE OF PROGRAM INTEGRITY
AND ACCOUNTABILITY,
Respondent.

PROCEDURAL HISTORY

Petitioner-appellant, T.B. appealed his placement on the Central Registry of Offenders Against Individuals with Developmental Disabilities (Central Registry), pursuant to N.J.S.A. 30:6D-73 et seq., on charges that he engaged in physical abuse of a developmentally disabled patient during the course of his employment at the Ann Klein Forensic Center (AKFC). The respondent Department of Human Services, Office of Program Integrity and Accountability (DHS) investigated and substantiated the allegation of abuse that was reported on September 29, 2017. The petitioner was notified of the substantiation and his rights to appeal. This matter was transmitted to the Office of Administrative Law (OAL) on August 2, 2018, for hearing as a contested case.

A second Civil Service matter was transmitted to the OAL on August 27, 2018. In that matter, appellant appeals his termination by AKFC on the same grounds, that he physically abused a patient during the same incident.

An Order to Seal, Consent Confidentiality Protective Order, and Consolidation-Predominant Interest Order were entered prior to the hearing and incorporated in the Initial Decision. Hearings were conducted on March 27 and April 2, 2019. The parties were provided an opportunity to present written summations and argument; the record closed upon their receipt. No exceptions were received in this matter by the Office of Program Integrity and Accountability.

EXCEPTIONS

On July 3, 2019, the Office of Administrative Law (OAL) mailed the Initial Decision (dated July 1, 2019) to the parties (email from ALJ's chambers to OPIA). The last paragraph in the Initial Decision states, "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 of the Office of Program Integrity and Accountability [OPIA], 222 South Warren Street, 4th Floor, PO Box 700, Trenton, NJ 08625-0700, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties." The deadline to file written exceptions, or request an extension, by the Petitioner would have been July 16, 2019. On July 18, 2019, no exceptions or any request for an extension having been received, OPIA emailed its Final Agency Decision to the Office of Administrative Law, and the attorneys in the matter. On July 19, 2019 Petitioner's attorney emailed OPIA stating, "It does not appear that Counsel was notified by the OAL when the decision was reached on July 1, 2019. I am hereby requesting an extension of time to file an exception with the agency head." OPIA, unable to discuss the extension request with its DAG due to scheduling conflicts, reached out to Petitioner's attorney by phone on July 24, 2019. The Petitioner's attorney again denied notice of the Initial Decision from the OAL and stated that, if allowed, she would submit exceptions by email on or before July 26, 2019. OPIA agreed to consider exceptions entered by Petitioner. Petitioner's attorney emailed exceptions to OPIA on July 29, 2019. Petitioner's attorney never contacted any of the other parties mentioned in the Initial Decision, prior to the untimely submission of these exceptions.

In the Petitioner's exceptions there are four issues raised.

1. The ALJ denied subpoenaing the victim, an individual with developmental disabilities, to testify about whether or not T.B. made physical contact with the victim. The statutory definition of physical abuse does not require contact or an injury. Physical abuse is a physical act directed at an individual with developmental disabilities that causes pain. Psychological abuse is a non-verbal act that inflicts fear or intimidation. Petitioner protests that the decision was made by the ALJ after considering "AKFC and Department of Health's (sic, actually Department of Human Services') Motion to Quash and Petitioner's opposition." Having shown that Petitioner's request was deliberated by the tribunal and no errors of law or fact shown, this exception must be rejected as meritless.
2. The ALJ improperly relied upon facts not in the record.
 - a. Petitioner belatedly complains that a specific Human Services Police Department Sergeant gave a statement to a witness that was not followed up on by that witness. Petitioner's attorney did not bring the mentioned officer to give testimony at the hearing and did not mention whether or not the nature of his inquiry was criminal in nature, with its attendant burden of proof being higher than the preponderance of the evidence standard used during the OAL hearing. Any testimony not brought out at the hearing cannot now be speculated upon.
 - b. Petitioner asserted that the ALJ was mistaken about the timing and severity of an animus between the Petitioner and his supervisor. The ALJ had the opportunity to observe the testimony of witnesses (most importantly Page) and ascertain the validity of the petitioner's perceived feeling of dislike from his supervisor. Petitioner's own witnesses did not present a compelling

case that a verbal exchange could create a hatred so strong that a witness would commit perjury a year later and continue through the hearing years later. The ALJ's contemporary and trained observations must prevail over these unsupported assertions. Stated in the Initial Decision:

- i. Lewis, "who was not present for the entire conversation," stated that it was "a little intense."
 - ii. Randall "stated that Page had brought the verbal dispute with petitioner about cell phones to her attention because she was the shift supervisor that day.... Randall noted that neither she nor Page took it as a serious incident and there was not any write-up of the situation because it did not warrant escalation."
 - iii. "Petitioner claimed that Page was prejudiced against him."
- c. ALJ found the Petitioner not credible, presumably because there was no sound on the video recording. Petitioner testified that he was giving verbal direction during the incident. The allegation concerned abuse, as discussed above. The video showed "that petitioner was not involved in the restraining of A.C., and he appeared to be deliberately standing to the side of the other MSOs and Page. But he took a step closer to him, while contributing nothing to securing or checking the restraints. He leaned in with his left arm raised behind him and right arm extended toward A.C. in the partly obscured visual in the video." An eyewitness testified to seeing and hearing A.C. strike the victim. Whatever Petitioner was saying had no relevance to the question of abuse.
- d. An AKFC statement that the victim had no injuries. As stated above, a showing of abuse does not require a visible physical injury. Any testimony not brought out at the hearing cannot now be speculated upon.
3. Other AKFC employees "did not see Petitioner hit A.C." (according to what Petitioner's attorney cites as "AKFC's certified to Petitioners Request for Admissions dated 3/26/19. Accepted into evidence following the hearing but not marked as an exhibit by the ALJ.") The document basically recites the persons present in the area with a failure to recall seeing a hit, many explaining why they would not have been able to see one. Clemons did not see a slap, but did not see any spitting, either. Hardwick did not see a slap, but saw A.C. in the restraint chair (unknown timing). Hardwick later heard from Page and another AKFC employee that T.B. had hit A.C. Huff was securing A.C.'s legs during the restraint and could not see. Mobley did not see a hit due to being busy securing A.C.'s shoulder during the chair restraint. Mobley heard later from another AKFC employee that T.B. punched A.C. Rainey did not see a hit; he was busy on A.C.'s right side in the restraint. Rainey did recall hearing A.C. spit. Reed was told to let go of A.C.'s head and "get out of here" and walked away from the scene. Szeles came onto the scene and recalled T.B. being upset and yelling at A.C. He was located to the side of the restraint and did not see a hit. Ware was a few doors down from the restraint tending one-on-one to another client and did not see a hit. RN Addo was on the opposite side of the unit and did not witness the restraint. Addo's examination of A.C. did not reveal any injuries, however, injury is not necessary to prove abuse. The ALJ heard testimony from many witnesses, reviewed the video and documentary evidence, and had the opportunity to weigh the credibility and the veracity of all evidence. Petitioner could have called all of those present to testify, but the document stipulates that there were people at AKFC who, for a variety of

reasons did not – or could not – recall seeing an actual hit, which itself is not an element in abuse for Central Registry purposes. Merely because the Initial Decision does not cite the document, does not mean that it was not considered. Compared to all of the other testimony and evidence, this document is of little substance.

4. The Petitioner asserts that the respondent has failed to meet its burden of proof. The Petitioner does not even mention what that burden of proof is – the preponderance of the evidence. Without a definition of the standard, any claim of insufficiency is baseless.

The Office of Program Integrity and Accountability has considered the Petitioner's exceptions and compared them to the records and testimony of the hearing. For the reasons noted above, the Office of Program Integrity and Accountability rejects and dismisses the Petitioner's exceptions as meritless and contrary to the evidence presented and adjudicated during the hearing. The Final Agency Decision, as was issued on July 18, 2019 and sent to all parties, shall remain unchanged except for this inclusion of a discussion of the exceptions.

Testimony at the Hearing

Kylie Hanisak was the initial witness for DHS. She is a Quality Assurance Specialist and Investigator, assigned to AKFC. Her job is to determine if an allegation is substantiated, meaning that the preponderance of the evidence – 51% -- supports that finding.

Hanisak watched the video of the timeframe leading up to and including the incident during which it is alleged that T.B. slapped patient A.C. She also chose which witnesses and other staff persons to interview. She would have spoken with A.C. but he did not want to talk about it, which she respected.

Hanisak provided commentary during the playing of the video at the hearing. At the 3:24 p.m. mark on the video, Frankie Page, who is a Supervisor of MSOs; MSO Reed, MSO Mobley, and MSO Huff are in the video. By the 3:35:33 mark, petitioner is visible, closest to the foreground. MSO Aguirre can also be seen, as well as MSO Rainey and MSO Szeles. Petitioner can be seen placing a mask on his face. It appears that petitioner also has on clear protective glasses. Hanisak testified that officers put on paper face masks and protective eyewear when dealing with A.C. or any other resident with a known propensity to spit at the officers.

Next in the video, we see A.C. being escorted out of his room by MSOs Rainey and Huff. Petitioner follows them out of the room from which A.C. was extracted and returns to the foreground of the scene and to the left of A.C. A.C. is being placed and strapped into the emergency restraint chair (ERC or restraint chair). Page is to his immediate right. At the 3:27:30 mark, the video shows petitioner leaning in toward A.C., his right arm extended toward A.C. and his left arm extended back. Page immediately moves petitioner away from A.C. and has another MSO escort him off the unit.

The Patient Services Compliance Unit received the incident report from Page. AKFC collected the initial witness statements. Then the Critical Incident Management Unit filters the report by deciding what code it should receive and whether it should be referred to an investigator. Only at this later stage did Hanisak become involved.

Hanisak acknowledged there could be differences between her interview statements and the initial AKFC statements of those witnesses, but did not believe the differences were significant or would undercut her recommendation that petitioner be placed on the Central Registry. Hanisak also reiterated that she reaches her recommendation on the basis of whether the totality of the

evidence is at least 51% supportive of that recommendation. While she could not see petitioner slapping A.C. on the video because Page obscured that angle, other eye witnesses did.

Frankie Page is an MSO Supervisor at AKFC and has served in that capacity since April, 2016. Page became an MSO in January 1996. As a Supervisor, he has oversight responsibility for MSOs on his shift including, but not limited to, assuring that standard operating protocols are followed, communications are occurring, and patients are being properly cared for.

Page described the basic care techniques utilized at AKFC and the risks faced by MSOs when caring for its residents. The patients who reside at AKFC are a higher risk population because they are ordered there by the courts as a result of incompetency rulings; they are transferred from other psychiatric hospitals because of additional security concerns; or they are transferred from the state prison system because they require forced medication. Many of the residents are classified as developmentally disabled adults.

Page described the resident who was the alleged victim. He believed that A.C. has been at AKFC for ten to fifteen years. He is a developmentally disabled adult who is known to self-injure and to spit. A.C. can be very difficult to redirect when he is unfocused, not listening, or out of control. There is a standing order for A.C. such that if he bangs his head on the walls or any other surface while in S&O, an MSO is to call a nurse who will put out a radio call for a supervisor needed on the particular unit. The supervising MSO can order a Code Gray for him to be removed and placed in the ERC. That code is the signal for available MSOs to approach the area in need. It takes 4-5 MSOs to restrain a resident in the chair and ensure that the straps are secure. Once in the restraints, one MSO will stay with the resident on a one-to-one monitor assignment until ordered otherwise.

On September 29, 2017, Page was called because A.C. was agitated in his lock-in room (not an S&O room) and banging his head on the door with his back to it. Page called the Code Gray. Then he removed Reed who was standing at the door because that was agitating A.C. more. Page talked to A.C. and settled him down some. MSOs Rainey and Aguirre continued the process of talking A.C. into voluntarily walking out of the room toward the ERC.

At one point during the process of restraining A.C. on this particular occasion, Reed came toward A.C. who proceeded to spit in his direction. Page then told Reed to back away. It was soon thereafter that petitioner approached A.C., although his purpose in doing so was unclear. Page was directly next to A.C.'s left side and to the right of petitioner and could see plainly that A.C. was again preparing to spit. At that moment, petitioner raised his arm and slapped A.C.'s face. Page both saw and heard it.

Page immediately told petitioner to back away and he had another MSO escort petitioner off the unit. After A.C. was finally fully strapped into the ERC with MSO Jones assigned as his one-to-one staff, Page found petitioner and advised him to obtain a union representative and meet him in the office because he was going to be relieved of his post. Petitioner was thereafter sent home and told he would not be allowed to have any patient contact during the investigation and review of the incident.

On cross-examination, Page reviewed his employment history with AKFC. In 2017, he became a Supervising MSO but in provisional status awaiting the Civil Service examination. During the incident, Page observed that A.C. was fixated on Reed and that Reed was triggering some of A.C.'s bad behavior.

Page denied that he spread the word that petitioner had slapped A.C. and thereby biased the other MSOs who were asked to write statements concerning the incident. Page stated that he merely handed out the blank statement forms. Page also denied that he and T.B. had prior altercations that predisposed him to being unfair and harsh toward petitioner on this date. Page recalled that there had been a time when petitioner and another MSO, Lewis, carried their cell

phones into the ward against policy. Page was working the front desk and several hours later advised the two MSOs that he would not allow them to take cell phones with them next time they had a hospital run. Page said there was no follow-up verbally or in writing.

On re-direct examination, Page explained that he became a provisional Supervisor because the prior list had expired, no new list was available, and an exam had not been scheduled. He also testified that even if an MSO knows the category of resident they are handling, it would make no difference in terms of safety and standards of abuse. Some MSOs might treat the individuals differently if they knew, which might be the rationale to the policy of not providing formal identification of the population.

Sandi Ferguson testified that she has been employed by AKFC for the past thirty years and has held the position of Director of Staff Training since 1989. Ferguson explained that patients like A.C. with developmental and intellectual disabilities can be aggressive, spit, and cause harm to themselves or others. She reviewed the protocols for restraining someone who is causing such harm and stated that once fully restrained in the ERC, all MSOs should back away. Ferguson stated that the standard for determining if patient abuse has occurred in this setting is not whether there is actual physical contact, but whether the actions could generate fear in the patient; that is, whether the staff actions could cause physical or emotional harm. She acknowledged that any MSO who has to deal with and/or restrain an agitated resident who is known to spit should wear gloves, mask and a visor (eye protection).

On cross-examination, Ferguson repeated that the criteria for abuse is whether the action could objectively cause fear in a resident and not whether this particular resident was fearful.

Darryl Lewis presented testimony for the petitioner. Lewis is one of several MSOs with whom T.B. worked at AKFC on September 29, 2017. Lewis has been an MSO at AKFC for six years during which time he worked with petitioner regularly. He testified to an incident in late 2015 or early 2016 when petitioner and Page had an argument over carrying a cell phone onto the unit.

On cross-examination, Lewis explained that petitioner and he were returning to AKFC from the hospital with a patient. Page was assigned to the front desk and door. Page's job would be to search all visitors coming through the front door for contraband, including cell phones and cigarettes. Although Lewis and petitioner needed their cell phones with them on the way to the hospital, it was late and they still needed to return the resident to his room. Rather than turn their cell phones into Page or try to place them in their personal vehicles parked outside, Lewis and petitioner kept them on their persons.

At some point later, Page verbally reprimanded the two MSOs for having their cell phones on them past the contraband point. As far as Lewis was concerned, it was not a big deal and he brushed off Page's comments. Petitioner stayed to argue with Page. Lewis could not recall the exact words Page and petitioner exchanged. He also did not believe that there remained any "bad blood" between Page and petitioner after this argument.

MSO Diego Aguirre also testified for petitioner at the hearing. He has worked for AKFC for twenty years. Aguirre was not on the unit initially on September 29, 2017, but he was one of the MSOs who responded to the Code Gray call for additional staff to report. He stated that A.C. was agitated in the room, issuing verbal threats, spitting, kicking, and refusing verbal attempts at redirection. A.C. was spitting at everybody this day. The MSOs all placed paper surgical masks on their faces, but Aguirre recalled that there were no or not enough eye shields available. Aguirre and Rainey were able to deescalate A.C. enough to convince him to cooperate in leaving the room and walking to the restraint chair. Page was in and out of the room during this transition. Once

A.C. was in the chair, Aguirre stepped away but he saw petitioner's hand movement. He testified that T.B. "threw what looked to be a punch."

Aguirre wrote up his witness statement the same day and later was interviewed by Investigator Hanisak. He acknowledged that he could not see the end result of petitioner's arm action and that any use of the term "landed" with respect to that would be a mischaracterization. Aguirre recalled that Page told him that he had to call in the incident because petitioner hit A.C. Page asked Aguirre to come into the base office, not as a witness, but as a union representative for petitioner.

On cross-examination, Aguirre stated that petitioner was four to five feet away from the ERC, providing only verbal assistance. He was of the opinion that petitioner would not strike a patient and is professional with the residents. As seen on the video, Aguirre had walked away from A.C. and the other MSOs because he was turning over to a nurse something he found in A.C.'s room. It was on his way back toward the ERC that Aguirre saw petitioner's arm movement. He could not say whether he thought that was professional on petitioner's part. He concurred that patients have occasionally but not regularly escaped a restraint.

Brenda Randall was called by petitioner as a character witness and colleague but she was not an eye witness to the incident on September 29, 2017. Randall was questioned about the argument between petitioner and Page a couple of years earlier. She stated that Page had brought the verbal dispute with petitioner about cell phones to her attention because she was the shift supervisor that day. This was standard debriefing and not just "water cooler" talk. Randall noted that neither she nor Page took it as a serious incident and there was not any write-up of the situation because it did not warrant escalation. Later, Randall spoke with petitioner, who told her that he felt Page's approach towards him was disrespectful. Randall explained that she thought he took it the wrong way but even at one's place of employment, interpersonal reactions can be emotional.

On cross-examination, Randall explained that people interact with each other on the job and can sometimes be emotional or defensive. She could not judge what transpired between Page and petitioner during the cell phone interaction. She listened to both sides and understood that petitioner felt that Page had been disrespectful. Yet, it was not a serious argument and Page did not take it seriously either. It was not a situation either of them saw as worthy of a write-up. Randall confirmed that she and Page had no issues with each other.

Petitioner, T.B., testified on his own behalf. He was hired at AKFC in September, 2012. Petitioner described the training that MSOs receive and the annual two-day refresher courses. Petitioner testified that MSOs receive no training in how to combat patients who spit even though it is a frequent occurrence. He also described the paper blue surgical masks and plastic eye guards available to the MSOs.

Petitioner denied that he struck A.C. In reviewing the video in slow motion at the hearing, petitioner noted that A.C. was spitting indiscriminately during the ten seconds leading up to the alleged incident. Petitioner was giving verbal commands to A.C. in order to calm him down. He believes that the MSOs were still in the process of fixing the restraint straps. At 3:34 p.m. on the video, petitioner says he was moving in toward A.C. to make sure the restraints were fastened tight when A.C. made a face as if he was going to spit again. Petitioner instinctively put his arm up to block the spit. Petitioner stated that he never made physical contact with A.C. In response to my question as to why he did not just step back, petitioner said that it all happened so quickly that he could only react instinctually to protect himself.

Petitioner testified as to his version of events relating to the cell phone policy argument with Page almost two years prior to the incident herein. Petitioner also described an unrelated interaction at some point in 2017 when Page gave him a provocative look – "eyeballing" – to

which he asked Page, "You got a problem?" Page responded, "Yea, you!" to which petitioner replied "Grow up!"

On the basis of these two verbal clashes, petitioner claims that Page was prejudiced against him. Petitioner denied that he ever slapped A.C., although he believed Page would make up the abuse accusation with A.C. to try to ruin his career. Petitioner believes himself to be dependable and trustworthy.

On cross-examination, petitioner described how other patients also spit but seemed uncertain with whether A.C. had ever spit on him before. A.C. is placed in the ERC about two to three times per month, which is certainly more often than other patients. He can also become more agitated and difficult if he has been in S&O status. In general, petitioner acknowledged that he has only known of two or three times in his years as an MSO when a patient was not properly restrained in the chair and could still flail a limb. He thought he recalled A.C. doing that once.

T.B. stated that he feels disrespected by many patients and staff members, and yet he labeled himself as approachable. In another attempt at understanding what was seen on the video, petitioner said that if he put his hands up to his own face to block A.C.'s spit rather than moving his arm and hand toward A.C., then he would not have been able to see in that instant.

On continued examination, T.B. admitted that he really did not think about the fact that he still had his cell phone on his person when he and Lewis returned to AKFC. There was an option of turning the phone into the base office that was immediately adjacent to the sally port. Nevertheless, petitioner maintained that it was Page's approach and attitude with which he disagreed, not the point of the policy being enforced by Page.

The Initial Decision next cited that evidence to be credible must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Credibility, or more specifically, credible testimony must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). The Administrative Law Judge (ALJ) **FOUND** that petitioner's witnesses were less credible than those presented by respondent. Credibility means that the testimony, as a whole, makes sense. After listening carefully to every witness, the ALJ stated that the entire case turned on whether petitioner's supervisor or petitioner himself was more credible in his testimony as to what occurred.

Although petitioner raised the claim that Page was biased against him, as evidenced by two arguments over the course of their many employment interactions over the years, The ALJ **FOUND** that those were very minor and attenuated in time from the incident under review herein. The ALJ could find no sincere basis upon which testy interactions, which did not result in petitioner being written up by Page, prejudiced what Page saw on September 29, 2017.

The ALJ remarked on the benefit of seeing the video numerous times during the hearings. The first impression was that petitioner was not involved in the restraining of A.C., and he appeared to be deliberately standing to the side of the other MSOs and Page. The Petitioner took a step closer to A.C., while contributing nothing to securing or checking the restraints. He leaned in with his left arm raised behind him and right arm extended toward A.C. in the partly obscured visual in the video. The ALJ found petitioner's explanation incredible as to why he stepped forward in the first instance but then did not step backwards when he observed A.C.'s agitation and spitting.

ANALYSIS AND CONCLUSIONS OF LAW

It is the policy of this State to provide for the protection of individuals with developmental disabilities. N.J.S.A. 30:6D-73(a). The Central Registry is intended to prevent caregivers who become offenders against individuals with developmental disabilities from working with individuals with developmental disabilities. N.J.S.A. 30:6D-73(d). A caregiver may be placed on the Central Registry in cases of substantiated abuse, neglect or exploitation. N.J.S.A. 30:6D-77(b). A "caregiver" is defined in N.J.A.C. 10:44D-1.2 as "a person who receives State funding, directly or indirectly, in whole or in part, or who volunteers to provide services or supports, or both, to an individual with a developmental disability."

It is undisputed that petitioner was a caregiver for A.C. and that A.C. is a service recipient with the Division of Developmental Disabilities (DDD). The issue of placement on the Central Registry is two-fold. First, did petitioner commit an act of abuse against A.C. on September 29, 2017. Second, were petitioner's actions intentional, reckless or with careless disregard to the well-being of A.C., which could have resulted in fear or injury to him or potentially exposed him to an injurious situation.

The relevant abuse definitions in the Central Registry rules are:

"Abuse," defined in N.J.A.C. 10:44D-1.2, means "wrongfully inflicting or allowing to be inflicted physical abuse, sexual abuse or verbal or psychological abuse or mistreatment by a caregiver upon an individual with a developmental disability."

"Physical Abuse," defined in N.J.A.C. 10:44D-1.2, means "a physical act directed at an individual with a developmental disability by a caregiver of a type that causes one or more of the following: pain, injury, anguish or suffering. Such acts include, but are not limited to, the individual with developmental disability being kicked, pinched, bitten, punched, slapped, hit, pushed, dragged or stuck with a thrown or held object."

In order to be included on the Central Registry, it must be determined whether the caregiver acted with intent, recklessness, or careless disregard to cause or potentially cause injury to an individual with a developmental disability. N.J.S.A. 30:6D-77(b)(1), N.J.A.C. 10:44D-4.1(b). The regulation defines each mental state:

1. Acting intentionally is the mental resolution or determination to commit an act.
2. Acting recklessly is the creation of a substantial and unjustifiable risk of harm, to others by a conscious disregard for that risk.
3. Acting with careless disregard is the lack of reasonableness and prudence in doing what a person ought not do or not doing what ought to be done.

Petitioner contends that he never slapped or intended to slap A.C. but was protecting himself from A.C. Additionally, all of the restraint procedures were proper and effectuated with care. Petitioner argues that given the level of perceived threat, the restraint of A.C. was correct and, as a result of his actions, no one, including A.C., other patients, or MSOs, were injured or could objectively have been in fear of being injured.

Respondent contends that the video speaks for itself and that petitioner's intentional contact, as witnessed by Page, caused A.C. pain. Petitioner's actions were reckless and/or in

careless disregard of A.C.'s well-being. As such, not only did petitioner's actions result in injury to A.C., he potentially exposed A.C. to an unreasonable amount of fear.

All witnesses were consistent in their testimony that MSOs are trained on client abuse prevention. One of the main responsibilities of an MSO is to provide for the safety of the patients entrusted to their care and to ensure their own safety. As part of their training and job responsibilities, MSOs need to understand each patient's needs and behavior. In situations where a patient is known for aggressive behavior and starts acting out, it is the MSO's responsibility to try to deescalate the situation. This could include talking to the individual or attempting to redirect them, among other techniques. If this is unsuccessful, physical intervention may be required, with the goal being to keep everyone safe and unharmed. Consequently, MSOs are trained on various "hold" techniques when physical restraint is necessary. At all times an MSO must be ready to make split second decisions as a situation unfolds, relying upon their training in reading the situation to respond accordingly.

Respondent relied upon the surveillance film, asserting that it speaks for itself. The video supports the eye witness testimony of Page, who the ALJ found to have been credible. The ALJ found both petitioner's actions that day and his testimony to not make sense in the totality of the circumstances. Having considered the testimony, the applicable law, and witness credibility, the initial decision **CONCLUDED** that petitioner acted intentionally, recklessly and/or with careless disregard when he stepped towards A.C. with his right arm raised at him while A.C. was in a restraint chair. In particular, the ALJ **CONCLUDED** that petitioner did commit an act of abuse on A.C. and, further **CONCLUDED** that petitioner's actions were taken with careless disregard to A.C.'s well-being.

The initial decision **ORDERED** that the determination of the Office of Program Integrity and Accountability to place petitioner T.B. on the Central Registry of Offenders against Individuals with Developmental Disabilities for the incident on September 29, 2017, was **AFFIRMED**. The ALJ then filed the Initial Decision with the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY** for consideration. The ALJ's recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY**, who by law is authorized to make the final decision on all issues within the scope of its predominant interest.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering the final decision, the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY** shall forward the record, including the initial decision and its final decision, to the **CIVIL SERVICE COMMISSION**, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

FINAL AGENCY DECISION:

Pursuant to N.J.A.C. 1:1-18.1(f) and based upon a review of the ALJ's initial decision and the entirety of the OAL file, I concur with the Administrative Law Judge's findings and conclusions. The ALJ had the opportunity to assess the credibility and veracity of the witnesses; I defer to her opinions concerning these matters, based upon the observations described in the initial decision. I **CONCLUDE and AFFIRM** that the Department has met its burden of proving, by the preponderance of the evidence, that T.B. committed an act of physical abuse against an individual with developmental disabilities. I **CONCLUDE and AFFIRM** that T.B. acted with

careless disregard to the well-being of that individual, and that T.B.'s placement on the Central Registry is appropriate.

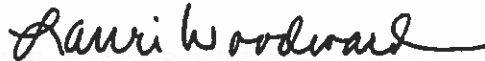
Therefore, pursuant to N.J.A.C 1:1-18.6(d), it is the Final Decision of the Department of Human Services that I **ORDER** the placement of T.B.'s name on the Central Registry of Offenders against Individuals with Developmental Disabilities.

Although a Consent Confidentiality Protective Order was signed by all parties and the ALJ on or about October 26, 2018, an Order to Seal was signed by the ALJ and entered in this case on October 30, 2018. The Department of Human Services maintains that initial decisions and final-agency decisions involving the Central Registry Act, N.J.S.A. 30:6D-77 to -82, were never intended to be sealed from the public. Where, as is stipulated in the protective order, initials as opposed to full names are used, that practice suffices to safeguard the identities of victims and petitioners. Making initial and final-agency decisions available in Central Registry cases promotes transparency in the adjudicatory process, educates the public and members of the bar on this developing area of the law, and provides an invaluable precedential resource for use in the Office of Administrative Law.

Therefore, it is **ORDERED** that the order to seal is removed and all parties privy to this case shall abide by the protective order and continue to refer to the Petitioner and the victim in this case by their initials in all public documents concerning this case.

Having affirmed the Final Agency Decision to place T.B.'s name on the Central Registry of Offenders against Individuals with Developmental Disabilities, I submit this decision to the Civil Service Commission for their deliberation of whatever matters, within their purview, may be left unresolved.

Date: July 30, 2019



Lauri Woodward, Director
Office of Program Integrity and Accountability