



STATE OF NEW JERSEY

In the Matter of Zachery Smith  
Ann Klein Forensic Center,  
Department of Health

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

CSC DKT. NO. 2018-3182  
OAL DKT. NO. CSV 07209-18

ISSUED: JULY 1, 2020

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The appeal of Zachery Smith, Senior Medical Security Officer, Ann Klein Forensic Center, Department of Health, removal effective November 3, 3016, on charges, was heard by Administrative Law Judge Susan L. Olgiati, who rendered her initial decision on May 28, 2020. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of July 1, 2020, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

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

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 1<sup>st</sup> DAY OF JULY, 2020



Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Christopher S. Myers  
Director  
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P. O. Box 312  
Trenton, New Jersey 08625-0312

Attachment



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSV 07209-18

AGENCY DKT. NO. 2018-3182

**IN THE MATTER OF ZACHERY SMITH,  
ANN KLEIN FORENSIC CENTER,  
DEPARTMENT OF HEALTH.**

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**Frank V. Cioffi, Esq.**, for appellant, Zachery Smith (Sciarra and Catrambone, LLC, attorneys)

**Elizabeth Davies**, Deputy Attorney General, for respondents, Ann Klein Forensic Center, Department of Health (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: March 20, 2020

Decided: May 28, 2020

**BEFORE SUSAN L. OLGATI, ALJ:**

**STATEMENT OF THE CASE**

Appellant, Zachery Smith, appeals the disciplinary action of respondent, Ann Klein Forensic Center (Ann Klein), Department of Health, removing him from his position as a senior medical security officer, 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, resident, or employee,

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

### **PROCEDURAL HISTORY**

This matter arises out of a disciplinary action seeking to remove appellant from his employment at Ann Klein. Following a departmental hearing on March 29, 2018, the respondent issued a Final Notice of Disciplinary Action, removing appellant effective November 3, 2016. Appellant timely filed an appeal with the Civil Service Commission, and the matter was transmitted to the Office of Administrative Law on May 17, 2018, for determination as a contested case. N.J.S.A. 52:14B-1 to-15 and N.J.S.A. 52:14F-1 to-13. On or about April 29, 2019, respondent filed a motion for summary decision. Oral argument on the motion for summary decision was held on August 12, 2019. An Order denying summary decision was issued on September 16, 2019. Thereafter, the hearing was held on September 23, October 25, 2019, and January 14, 2020. The record remained open to allow the parties to receive a written transcript of the proceedings and submit written summations, and thereafter closed on March 20, 2020. The deadline for issuing the Initial Decision was extended in accordance with the Governor's Executive Orders relating to the COVID-19 Pandemic.

### **FACTUAL DISCUSSION AND FINDINGS**

#### **Summary of Testimony**

The following is a summary of the relevant and material testimony given at hearing.

#### **For respondent:**

**Rahsheed Davis** is a senior medical security officer at Ann Klein. He has been employed there for fourteen years and has known appellant Smith for approximately eight years.

Davis was working the second shift, on the date of the September 8, 2016, incident involving appellant and patient, D.F. At "lock-in" time, officers flash the lights to signal patients to return to their rooms for the evening. On the date of the incident, all of the patients were in their rooms, except for D.F., who was sitting in a chair in the common area. Davis spoke to D.F. but D.F. refused to lock-in because he was waiting for another officer to return to the area.

D.F. remained seated with his feet propped up on a stool. Smith approached D.F. and tried to grab him out of the chair. D.F. swung at Smith approximately three times and hit him twice. Smith then hit D.F. several times. Davis pulled Smith away from D.F., but Smith broke away from him and continued to hit D.F. in the face. Smith also kneed D.F. Thereafter, Officer McMullen pulled Smith away from D.F.

D.F. was not combative when he was being hit by Smith. D.F. was on the ground when Smith was pulled away. Officers Tulloch and Peagler dragged D.F. to his room.

Afterwards, during his rounds, Davis saw that D.F. had a lump on his eye. The next day, D.F.'s eye was fully swollen. Davis signed the incident report [prepared by Smith, R-1] as a witness. The report was not accurate. Davis did not see D.F. being combative or banging his head [as indicated in the incident report]. Davis felt pressured into signing the report, it was a cover-up for what really happened.

Davis was interviewed about the incident on September 15, 2016. His September 15<sup>th</sup> statement [R-2] was an accurate account of what he witnessed.

Davis reviewed and testified concerning the video of the incident. He did not call a supervisor when D.F. refused to lock-in because D.F. was not hostile. He did not consider using force to get D.F. into his room because D.F. was not aggressive. He was "calmly, patiently waiting" for the other officer to return. T1 43:24-25. Officers Tulloch, Smith, and Peagler entered the area where D.F. was seated. Smith was stationed in the center control ["center"] on the date of the incident. Officers assigned to the center are not supposed to leave the area.

On cross-examination, Davis testified that he has seen patients attack officers. The patients at Ann Klein have criminal records and mental-health issues. The officers receive training on combative patients. They are taught to sidestep these patients, and to place them in side-body holds so the patients are not injured. Davis acknowledged that D.F. has a history of assaultive behavior.

Davis maintained that his statement that Smith "ran" back at D.F. was accurate.

He testified that he was not disciplined for making a false report [signing the incident report which he admitted was inaccurate].

**Ronald McMullen** has worked at Ann Klein for twenty-one years. He is a senior medical security officer and the union president. He testified that he was working the first shift on the date of the incident. McMullen reviewed and testified concerning the video of the incident. Officer Hargis alerted McMullen to the incident and told him to get Smith. McMullen put his arm on Smith's shoulder and got him to move to the side. He told Smith to go back to the center. The other officers had a good hold on D.F. McMullen saw Smith trying to restrain the patient. McMullen gave a witness statement concerning the incident [R-13, page 13]. The statement was an accurate account of what occurred. McMullen saw Smith's arms moving. He did not see contact "but it looked like Smith was punching [D.F.]" in the upper area of his body. T1 80:12-13,18.

McMullen saw D.F. again when he was back in his room. He was yelling and had swelling above his eye. McMullen told the other officers to get the nurse.

McMullen testified that officers are trained in therapeutic options. They are trained to first attempt to de-escalate a situation.

On cross-examination, McMullen testified that he was in the common area at the time of the incident. He was approximately fifty to sixty feet away. He didn't see D.F.'s first interaction with Smith. McMullen did not respond to the incident with a sense of urgency because D.F. appeared to be elderly and because four to five other officers were also responding.

**Sandi Ferguson** has been employed at Ann Klein for thirty years. She is the training director and is a registered nurse. She testified that lock-ins occur at approximately 9:00 PM. If patients are not compliant, supervisors are to be contacted. Staffing numbers are decreased at lock-in time, so patients need to be in their rooms.

Upon review of the video of the incident, Ferguson did not see any of the instructed holds being employed. If a patient is not cooperative, staff should first try to speak with them. If that doesn't work, staff can contact the supervisor. Backup should be called if a patient attempts to hit an officer. Someone should have called the supervisor in this instance.

Ferguson is familiar with patient D.F. He has an aggressive and psychotic personality, which is not uncommon at Ann Klein. Knowing that a patient is likely to be aggressive, officers need to take measures to avoid being injured. They need to de-escalate situations and remain an arm's length away from aggressive patients.

Ann Klein has a policy regarding defensive control techniques. These maneuvers are to be used once de-escalation fails. Staff receive initial training at orientation and annual refresher training.

Staff are taught defensive techniques to block hits from patients and are taught holds that can be used to contain patients. Officers are not permitted to hit patients.

Staff receive annual training on Therapeutic Options. Smith's training transcript shows that he received this training in 2014, 2015, and 2016. The "CALMS model" is the technique used to help de-escalate patients. Staff are taught to assess the situation to see if they can handle on their own or if they need help.

Ann Klein also has a policy against patient abuse and neglect. Punching and kicking patients is never acceptable.

On cross-examination, Ferguson testified that she conducts the verbal de-escalation training. She has no knowledge of any problems with Smith prior to the 2016 incident with D.F.

She testified that the majority of the patients at Ann Klein have committed crimes including assault and murder. Patients regularly strike officers. Staff know that patients can be assaultive. Staff are never permitted to strike a patient.

**Hector Figueroa** has been employed by Ann Klein for twenty-five years. He has been the director of medical security for the past three years. He directed Officer Robinson to photograph D.F.'s injuries in connection with the investigation of alleged patient abuse.

Figueroa also testified that officers assigned to the center are not permitted to leave the area.

On cross-examination, Figueroa explained that officers don't need to leave the center when a code is called, or an incident occurs. When an officer is assigned to the center they are not assigned to assist with patients.

**For appellant:**

**Zachery Smith** was employed as a senior medical security officer at Ann Klein for approximately fifteen years.

In 2010, Smith was assaulted by a patient. The patient hit Smith in the face approximately four times. During that incident, Smith fell and hit his ribs on the corner of a table. He was taken out of the facility on a stretcher and received stitches on his face. He was out of work for approximately forty days when he was returned to work at Ann Klein. He was still in pain, so he went back out on leave. Smith was treated by both a psychologist, Dr. Alexander, and a psychiatrist, and he also received physical therapy for approximately one year. Thereafter, he did not return to work for approximately two and



half years. During that time, Smith received additional treatment from Dr. Alexander. He was diagnosed by both doctors as having Post Traumatic Stress Disorder (PTSD).

On September 6, 2016, Smith was working the second shift. There were several other incidents that day involving "code grays"<sup>1</sup> to which he responded. No one else responded to the codes.

Prior to the incident, Smith was assigned to the center. The lights signaled for lock-in and he noticed that one of the doors was not locked. D.F. was not in his room. Also, in the center with Smith were officers Tulloch, Peagler, and Cunningham. Davis had been trying for several minutes to get D.F. into his room. Smith decided to assist with the situation because he had a good rapport with D.F. D.F. had helped Smith when he was assaulted by another patient. Additionally, there were several other situations where Smith assisted D.F., and all went smoothly.

Smith asked D.F. why he had not locked in. When he leaned down to hear DF's response, D.F. became assaultive. He grabbed Smith's neck, locked in with his nails, and punched him twice. Smith's neck felt like it was "on fire because of the scratching." T2 17:15-16. Smith then "struck the patient to get himself released..." T216:16-17. Striking D.F. was reasonable because he had his nails in Smith's neck and was not letting go. He saw little help of getting D.F. off him. He struck D.F. in self-defense. At the time of the incident, Smith was aware of D.F.'s violent history.

Smith did not seek treatment immediately after the incident. He began receiving treatment approximately one month after the altercation.

Smith believes he is capable of returning to employment at Ann Klein.

On cross-examination, Smith testified that during his employment he received training on how to handle aggressive patients.

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<sup>1</sup> Smith described code grays as volatile situations requiring additional assistance.

Two other officers responded to assist with D.F.'s lock-in, but did so after Smith. Smith did not call a supervisor to assist because no code gray had been called. He left the center because he felt he could assist D.F. The situation called for his experience, so he responded.

Upon review of the video, Smith reiterated that as he was asking D.F. what the problem was, D.F. grabbed him and began to scratch and pull him down. D.F. was also kicking. "So in order to get him off of me I threw—I threw some punches." T2 31:8-10.

Smith wrote the incident report on the date of the altercation. He did not indicate in the report that he had been injured. D.F.'s nail marks were visible on his neck, but he did not include this in his report. He first sought medical assistance approximately one month later. Smith gave a witness statement several days after the incident.

Smith explained that following the incident, while he was writing his report in the center, he noticed D.F. in his room banging his head on the door. Smith signaled to other officers on the unit to check on D.F.

Due to his anxiety, Smith did not return to work the day after the incident.

Upon questioning about his investigative interview statement, Smith testified that he did not recall hitting D.F. After seeing the video of the incident, Smith realizes that he is responsible for the action he took in defense of being assaulted. T2 42:7-10.

On re-direct, Smith testified that he completed the incident report approximately fifteen minutes after he was assaulted and attempted to defend himself. His adrenaline was high, he did not recall striking D.F. in the face. Smith denied grabbing the patient.

**Keith Alexander** has a Ph.D. in clinical psychology. He testified that he has been practicing psychology for thirty-one years. He is the owner and director of a private psychology practice and the primary doctor for New Jersey's Workers' Compensation program. Dr. Alexander was qualified without objection as an expert in the area of clinical psychology.

Alexander prepared a report dated, January 12, 2019, of his treatment of Smith. [P-20]. He was familiar with Smith's injury from the prior, September 18, 2010, incident. Following that incident, Alexander diagnosed Smith with P.T.S.D. and post-concussion syndrome. Alexander determined that Smith was able to return to work after his 2010 injury. Alexander continued to treat Smith from December 2010 to February 2013. Alexander, along with Smith's treating psychiatrist, Dr. Amin, believed that Smith was progressing significantly and able to return to work.

Alexander was also aware of Smith's September 8, 2016, incident. The timing of that incident was significant because it occurred around the anniversary date of his 2010 injury. Anniversary reactions cause heightened anxiety and create greater likelihood of reaction. Smith typically attempted to remove himself from work around the anniversary date of the 2010 incident but could not do so in 2016.

Alexander's report referenced a report by Dr. Diane Rose, a psychiatrist who evaluated Smith [on behalf of Risk Management] and concluded that he returned to work [following the 2010 incident] with some mild residual symptoms of PTSD. Dr. Rose concluded that Smith required additional treatment due to the 2016 incident with D.F. As a result, he was referred back to Dr. Alexander for sixteen additional treatment sessions.

Based on his evaluation and additional treatment, Dr. Alexander concluded that Smith is able to return to work. He noted that further additional treatment would help ensure Smith's coping abilities if he were to return to work. Alexander estimated that six to twelve additional treatment sessions would be appropriate. Additional treatment would reduce the chance of a repeat violent episode. As a practical concern, Alexander noted that Smith might first need to return to work to obtain insurance coverage in order to continue treatment. Alexander does not believe that Smith is a violent person.

On cross-examination, Dr. Alexander testified that he believes Smith is fit for duty even though he would be returning to work with violent patients. He acknowledged that he returned Smith to work on three prior occasions and that this would be the fourth time. He noted that the two prior return attempts did not result in a violent episode by Smith. Alexander acknowledged that he did not review the video of the incident and that all of

his information regarding the altercation was obtained from Smith. He was not aware of the proximity of the other officers who responded to the incident along with Smith. However, that information would not likely change his opinion regarding Smith's ability to return to work.

Smith's initial treatment, provided by Dr. Alexander and Dr. Amin, was incomplete. Alexander prepared and signed a pension form dated December 8, 2016, (R-21), indicating that Smith was totally and permanently disabled. He explained that the form was incomplete. It was prepared at a time when Smith was considering the possibility of pursuing an accidental disability retirement. It was also prepared at a time before Smith obtained authorization for additional treatment with Alexander. The form was never submitted.

Dr. Alexander signed a different version of the pension form on December 27, 2017 (P-21). At the time, Smith had just starting treatment again and was unsure if he wanted to pursue an accidental disability or try to get his job back. Alexander again concluded that Smith was totally and permanently disabled and indicated the Smith's "psychological & physical symptoms are triggered by the work environment in which he was assaulted many times." T3 29:1-3. Alexander further noted that the assault in September 2016 produced a "dissociative episode during which he struck a patient. He has a greater likelihood of having a recurrent violent episode with similar outcome if triggered at work during performance of his regularly... assigned duties." T3 29:9-14. Alexander explained that this conclusion was reached prior to Smith completing the additional treatment that resulted in his improvement.

Thereafter, in April 3, 2018, Alexander changed his opinion and concluded in his treatment notes that Smith was able to return to work. (R-22). At this point, Smith had completed his sixth additional treatment session. Alexander acknowledged that if Smith were to return to work, he might need to take time off around the anniversary date of his injury.

Alexander opined that he could "guarantee with ninety-five (95%) certainty" that Smith would not have another violent episode with a patient. T3 40:21-22, 42:1-2. He

noted that Smith was successful when he returned to work from 2010 incident, as there was no repeat incident for several years. Alexander considered the 2016 incident to be a "perfect storm." He believed the event was significant because there were also three other violent episodes that day. Alexander based this conclusion on conversations he had with Smith.

Alexander explained that Smith could return to work without incident if he obtained some transitional treatment. T3 46: 8-12. He acknowledged that without transitional treatment, it was uncertain what would happen. T3 46:25–47:8-12.

### Credibility

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' story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). 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).

As to the credibility of respondent's witnesses, I accept the testimony of Rahsheed Davis as credible. While he acknowledged that he signed the incident report prepared by Smith even though it was not an accurate, his testimony at hearing was consistent with his statement given on September 15, 2016, (one week after the incident). It was also

consistent with the testimony of Officer McMullen [who testified that it looked like Smith was punching D.F.]. Additionally, Davis' testimony is consistent with other credible evidence in the record including the video and witness statement of Officer Peagler, which provides that Smith grabbed D.F.'s arm and that after D.F. hit him, "...Smith responded by hitting [D.F.] several times in the face." [J-13, page 8].

I also accept the testimony of Ronald McMullen as credible. While he acknowledged that he was approximately fifty feet away and did not see where Smith made contact, he testified that Smith's arms were moving and that it appeared he was punching D.F. Additionally, McMullen's testimony is consistent with the video and with his statement given on September 20, 2016 (approximately two weeks after the incident) in which he stated "I observed Officer Z. Smith swinging punches at [D.F.]. I went over and grabbed Officer Z. Smith and told him to go in the center." McMullen also noted in his statement that he was initially unsure where Smith was swinging but as he got closer, he saw Smith "swinging towards [D.F.'s] head area." [R-13, page 10].

I also accept the testimony of Sandi Ferguson as credible. Her testimony regarding training and Ann Klein's policies and practices including defensive control techniques was straightforward and reasonable.

I accept the testimony of Hector Figueroa as credible. His limited testimony concerning his role in directing an officer to photograph D.F.'s injuries and the nature of the center control assignment, was also straightforward and reasonable.

As to the credibility of appellant's witnesses, I do not accept appellant as credible. As an initial matter, he did not report the altercation or the claimed injury caused by D.F. in the incident report he wrote on the day of the altercation. He reported the claimed attack by D.F. only after the investigation into alleged patient abuse was initiated. Also, his testimony that he did not recall hitting D.F. was not plausible. Further, his testimony and initial statement that he saw D.F. banging his head in his room, does not ring true but rather appears to be an attempt to account for D.F.'s otherwise unexplained injuries. Moreover, Smith's testimony is inconsistent with the testimony/statements of other witnesses including Officers Davis, McMullen, and Peagler, as well as the video, in which

Smith can be seen, albeit partially, repeatedly moving an arm in a motion consistent with punching at D.F. Additionally, Smith's claims of self-defense are not reasonable. His contention that he had no assistance from the other officers is not supported by the credible evidence in the record. His claims that there were other violent incidents on that date to which no one else responded are also unsupported by the record. Finally, even if Smith was initially unable to break away from D.F.'s hold, it does not explain his conduct in repeatedly punching D.F. particularly after Officer Davis intervened.

As to Dr. Keith Alexander, while I find him to be well credentialed, I do not accept his opinion that Smith can return to work as reasonable. It does not appear reasonable that Alexander could guarantee with a specific degree of mathematical certainty (i.e. ninety-five percent) that Smith could return without another violent episode. This appears particularly unreasonable given that Alexander previously opined, in December 2016 and again in December 2017, that Smith was totally and permanently disabled and that his symptoms are triggered" by the work environment in which he was assaulted many times" and "he has a greater likelihood of having a recurrent violent episode with similar outcome if triggered at work during performance of his regularly... assigned duties." If Smith were returned to work at Ann Klein, he would again be working with aggressive and unpredictable patients and be subject to the same or similar conditions that triggered the violent altercation with D.F.

Further, Dr. Alexander's opinion is lacking in reasonableness and reliability given that he acknowledged that he did not view the video of the incident and that the information upon which he relied concerning the incident and the manner in which it occurred, came from Smith, whose testimony I have concluded to be not credible.

### **Findings of Fact**

After having an opportunity to consider the testimony, observe the demeanor of the witness and assess their credibility, as well as having considered the documentary evidence in the record, I **FIND** the following as **FACT**:

Smith was employed at Ann Klein as a senior medical security officer. While there, he received training on dealing with non-compliant patients including Therapeutic Options and defensive control techniques.

On September 18, 2010, Smith was assaulted by another patient. Smith was physically injured as a result of that prior assault and was diagnosed with PTSD.

As a result of 2010 incident, Smith was out of work for an extended time. Smith was cleared for return to work by his then treating doctors, Amin and Alexander. Despite this clearance, Smith had several failed attempts at returning to work and did not return until February 2013.

On September 8, 2016, Smith was involved in an incident with patient D.F. D. F. refused another officer's efforts to get him to lock-in and remained seated in the common area.

While attempting to get him to comply with lock-in, Smith grabbed D.F. D.F. punched Smith several times. In response, Smith punched D.F. several times in the area of his face. Smith was initially separated from D.F. by Officer Davis but continued to punch D.F. Smith was eventually separated from D.F. by Officer McMullen.

As result of the altercation, D.F. sustained a black eye.

On September 8, 2016, shortly after the altercation, Smith prepared an incident report. He made no mention of the altercation with D.F. or of his own injuries which he claimed were caused by D.F.

Smith first mentioned the claimed assault by D.F. in an interview statement taken on October 21, 2016, after the allegation of patient abuse had been reported.

Smith first sought treatment approximately one month after the incident.



Smith received authorization for sixteen additional treatment sessions with Dr. Alexander. He began these additional treatments with Dr. Alexander in November 2016.

On December 8, 2016, Alexander prepared a pension form opining that Smith was totally and permanently disabled.

In December 27, 2017, Dr. Alexander prepared another version of the pension form again concluding that Smith was totally and permanently disabled as a result of being assaulted by a patient in 2010 and 2016. The draft reports were not submitted to pensions.

Thereafter, on April 3, 2018, Alexander concluded in his treatment notes that Smith was capable of returning to work as a medical security officer at Ann Klein.

### **LEGAL ANALYSIS AND CONCLUSIONS**

Appellant's rights and duties are governed by the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment, or provides other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6 through 2-20; N.J.A.C. 4A:2-2.2, through 2.3. Major discipline includes removal, or fine, or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, failure or inability to perform duties, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3.

The appointing authority has 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). The evidence must "be such as to lead a reasonably cautious mind to the 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).

## Conduct Unbecoming a Public Employee

The appellant is charged with “conduct unbecoming a public employee” in violation of N.J.A.C. 4A:2-2.3(a)(6). Conduct unbecoming a public employee is an elastic phrase that 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 Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances “be such as to offend publicly accepted standards of decency.” Karins, 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)).

Here, the witness testimony, statements of Davis, McMullen and Peagler, and the video confirm that appellant punched D.F. several times. Moreover, appellant admits that he punched D.F. Even if Smith’s claims that he acted in self-defense were credible, they do not in any way excuse or justify his failure to employ the appropriate defensive control techniques taught by Ann Klein. Nor do they excuse or justify his actions in repeatedly punching D.F. and continuing to engage with D.F. after he was initially separated from D.F. by Davis. Similarly, appellant’s argument that his actions were caused by his PTSD does not justify or excuse his conduct. Ann Klein is a mental health facility for patients who are involved in the criminal justice system and require a secure environment. While these patients are often aggressive and unpredictable, they deserve appropriate care that is free from abuse. Appellant’s actions towards D.F. are contrary to and offend publicly accepted standards of decency and good behavior.

Accordingly, I **CONCLUDE** that the respondent has proven by a preponderance of the credible evidence that appellant’s conduct towards patient D.F. constitutes 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

Administrative Order 4:08, defines physical abuse as:

A physical act directed at a service recipient by a DHS<sup>2</sup> employee...of a type that could tend to cause pain, injury, anguish, and/or suffering. Such acts include, but are not limited to, the service recipient being kicked, pinched, bitten, punched, slapped, hit, pushed, dragged, and/or struck with a thrown or held object.

[R-20 see Supplement 3, see also R-14, page 3 of 12.]

Here too, the testimony, witness statements, and the video confirm that appellant punched D.F. multiple times during the September 8, 2016, altercation. Appellant's action was clearly the type that could and indeed did cause pain and injury to D.F.

Appellant's reliance on IMO Curtis Robinson, CSV 14260-12, Initial Decision, (December 2, 2013), adopted, N.J. Civil Service Comm'n (February 12, 2014) <http://njlaw.rutgers.edu/collections/oal/>, and his argument that his actions, when put into context, do not constitute abuse are unpersuasive. In IMO Robinson, the issue to be determined was whether Robinson's actions, as a senior medical security officer at Ann Klein, in pushing a patient could be considered abuse and if so, what penalty should be imposed. There, the ALJ concluded that when placing Robinson's actions in context, the facts demonstrated that his response to the patient's act of grabbing his genitals, in a space from which he could not retreat, was defensive in nature and reasonable. As a result, the ALJ concluded that Robinson's actions did not constitute abuse.

The holding in IMO Robinson, was fact sensitive. The facts in this matter are distinguishable. Here, D.F. was seated in a reclined position with his feet up, Smith was standing to the side and/or slightly behind D.F. Even if D.F. did grab his neck, [as opposed to his genitals as in IMO Robinson] Smith should have been able to break away from him without much force. Rather than attempt to disengage or to employ any of the

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<sup>2</sup> In its closing argument, Ann Klein acknowledges that while it is now within the Department of Health, it was formerly within the Department of Human Services and continues to routinely apply its Disciplinary Action Program.

defensive control techniques consistent with his training, Smith responded to D.F. with force and repeated punches even after other officers responded. Further, Smith was not in a confined space but in the common area which allowed ample room for him to retreat from D.F. Thus, Smith's actions were neither reasonable nor defensive in nature.

Accordingly, for the reasons set forth above, I further **CONCLUDE** that respondent has met its burden as to this charge and that appellant's actions also constitute physical abuse of a patient in violation of A.O. 4:08, C3.

### **Inappropriate Physical Contact or Mistreatment of a Patient, Client, Resident, or Employee**

Having concluded that appellant's actions constitute physical abuse in violation of A.O. 4:08, C-1.3, I further **CONCLUDE** that respondent has met its burden as to this charge and that appellant's actions also constitute inappropriate physical contact or mistreatment in violation of A.O. 4:08, C5.

### **PENALTY**

A civil service employee who commits a wrongful act related to his or her duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, 2.3(a). This requires a de novo review of appellant's disciplinary action. In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983).

However, "[p]rogressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position . . . ." In re Herrmann, 192 N.J. 19, 33 (2007).

In an attempt to mitigate his conduct, appellant claims, among other things, that he acted in self-defense and that his reaction in punching D.F. was due to his diagnosis of PTSD and triggered by his past experience of being assaulted by another patient in 2010. For the reasons set forth herein, these claims are unpersuasive and do not warrant mitigation of the penalty of removal.

Additionally, appellant's disciplinary history reveals four prior suspensions including two prior thirty-day suspensions (relating to incidents in December 2006 and April 2006) and two prior five-day suspensions (relating to incidents in March 2005 and October 2004). Even without appellant's prior disciplinary history, the seriousness of the current charges warrants imposition of the penalty of removal. Anne Kline is a psychiatric facility responsible for the care and treatment of mentally ill individuals who are in the legal system and require a secure environment. As a medical security officer, appellant was required to treat all patients with dignity and respect and was prohibited from punching or striking patients and/or otherwise engaging in acts of physical abuse, or inappropriate physical contact. Appellant's actions fell far short of his responsibilities and publicly accepted standards of decency. Thus, the penalty of removal, which is consistent with the table of offenses outlined in the Disciplinary Action Program, is warranted.

Accordingly, I **CONCLUDE** that removal is the appropriate penalty and should be **AFFIRMED**.

### **ORDER**

I hereby **ORDER** that the charges against appellant are **SUSTAINED**. I further **ORDER** that respondent's action removing appellant from his position of employment is **AFFIRMED** and appellant's appeal is hereby **DISMISSED**.

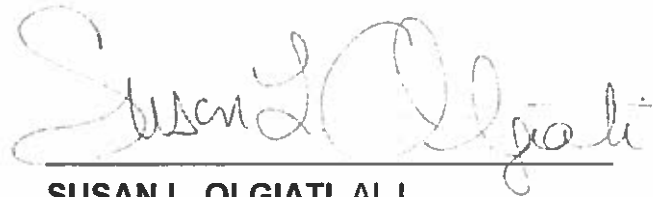
I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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.

May 28, 2020  
DATE

  
\_\_\_\_\_  
**SUSAN L. OLGATI, ALJ**

Date Received at Agency: \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

SLO/vj

**APPENDIX**

**Witnesses**

**For respondent:**

Rahsheed Davis  
Ronald McMullen  
Sandi Ferguson  
Hector Figueroa

**For appellant:**

Zachery Smith  
Keith Alexander, Ph.D.

**Exhibits**

**Joint**

J-13<sup>3</sup> Investigation Report

**For respondent:**

R-1 Incident report by Smith  
R-2 Davis interview statement September 15, 2016  
R-3 Davis interview statements September 29, 2016, November 4, 2016,  
R-4 Video  
R-5 Not admitted  
R-6 McMullen witness & interview statements  
R-7 AKFC policy, Personal Defensive Control Techniques

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<sup>3</sup> This exhibit was originally marked as R-13.

- R-8 Therapeutic Options training handout
- R-9 AKFC policy, reporting and investigation patient abuse and neglect
- R-10 Mandatory Reporting of Patient Abuse policy
- R-11 Smith learning transcript
- R-12 Patient photos
- R-13 See J-13
- R-14 Administrative bulletin 3:18
- R-15 Smith disciplinary history
- R-16 Video instructions
- R-17 PNDA
- R-18 FNDA
- R-19 Senior medical security officer job description
- R-20 Administrative Order 4:08
- R-21 Pension form signed by Keith Alexander, Ph.D., December 8, 2016
- R-22 Alexander's handwritten progress notes regarding Smith

**For appellant<sup>4</sup>:**

- P-1 – 19 Not Admitted
- P-20 Report of Dr. Keith Alexander
- P-21 Pension form signed by Keith Alexander, December 27, 2017
- P-22 Not Admitted
- P-23 CV Keith Alexander

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<sup>4</sup> Appellant's exhibits were pre-marked as "P" exhibits.