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**SENT VIA ELECTRONIC MAIL
AND FIRST CLASS MAIL**

Director Deborah Robinson
NJ Department of Human Services
DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY
222 South Warren Street, 4th Floor
PO Box 700
Trenton, NJ 08625-0700

ATTN: Exceptions

**Re: D.L. v. DHS- AKFC
OAL Docket Number: HSL 04079-2019S & CSV 04380-19 (Consolidated)
Agency Ref Number: 2019-2468**

Dear Director Robinson:

This firm is counsel to Appellant D.L. in connection with the above-referenced action. Please accept this letter brief as Appellant's Reply to Respondent's Reply to Petitioner's Exceptions to the Initial Decision issued on January 4, 2024, by the Honorable Edward J. Delaney, Jr., A.L.J. to the Initial Decision.

While ordinarily, credibility findings should not be disturbed, such is not the case here because a review of the record leaves one with the feeling that the decision is clearly a mistaken one and so plainly unwarranted that the interests of justice demand correction. Here, the Initial Decision failed to reconcile the conflicting testimony of Gerasimowicz and instead found him to be believable. By failing to appropriately weigh the conflicting

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"credible" evidence, the findings in the Initial Decision are so wide of the mark as to warrant a rejection of those findings. For example, the Initial Decision relies heavily on the witness interview of Gerasimowicz and specifically the following:

Bolden interviewed Gerasimowicz who stated that D.L. punched M.F. on the right side of M.F.'s face, at which time Gerasimowicz told D.L. not to ever do something like that again while Gerasimowicz was there. (R-4 at DHS 37.) Bolden interviewed Moore who stated that M.F.'s behavior caused D.L. to "go off," and that he heard a "thwack" sound coming from D.L.'s direction. Moore admitted that his head was down, and he could not tell who struck M.F. Moore heard Gerasimowicz respond by yelling, "He hit him." (R-4 at DHS 38.) The incident took place at 11:30 p.m., but it was not reported by Gerasimowicz until 3:52 a.m. the next morning. Bolden agreed that Gerasimowicz was the only individual in the room who witnessed D.L. punch M.F.

Critical aspects from the above findings are not supported by the record regardless of the underlying credibility of those testifying. Here are some examples:

(1) **Gerasimowicz stated that D.L. punched M.F. on the right side of M.F.'s face that Moore a heard a "thwack" sound coming from D.L.'s direction.**

- a. It is not plausible that a punch was so loud to generate a "thwack" sound but was only observed by Gerasimowicz and not the others who were standing at the bedside of M.F.
- b. It is not plausible that a punch which generates a loud "thwack" sound left no evidence of bruising on the right side of M.F.'s face.

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(2) Moore heard Gerasimowicz respond by yelling, “He hit him.” (R-4 at DHS 38) however Gerasimowicz himself testified that he did not recall yelling “he hit him”;

Transcript of Alec Gerasimowicz, Page 159, Lines 10-12:

10 Q Do you recall yelling, “He hit him,” when Mr.

11 [D.L.] struck M.F.?

12 A I do not.

(3) The incident took place at 11:30 p.m., but it was not reported by Gerasimowicz until 3:52 a.m. the next morning.

Gerasimowicz’s testimony does not add up because on the one hand, Gerasimowicz testified that he developed a fondness for M.F. but on the other hand Gerasimowicz allegedly observed his friend M.F. get punched in the face and did not alert any of the medical team, who were entering and exiting M.F.’s room, to evaluate M.F. for injuries. This defies common sense.

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(4) The finding that the evidence did not show any prior issues or “bad blood” between D.L. and Gerasimowicz is erroneous and not supported by the record:

Respondent cites to video evidence without any audio for the proposition that the video “clearly shows that D.L. was acting in a ‘highly agitated state’ towards Gerasimowicz” (Respondent’s Brief at page 4) yet also argues that there was no “bad blood” between D.L. and Gerasimowicz. In fact, Gerasimowicz himself testified that he engaged in “verbal combat” with D.L.:

Transcript of Alec Gerasimowicz, Page 194, Lines 14-17:

14 Q And you then say that you had a, “Verbal
15 combat,” those are your words, with [D.L.].
16 Correct?
17 A Yes.

Given that Gerasimowicz admits to bias, no further credibility assessment is required. In other words, once Gerasimowicz admits that he engaged in “verbal combat” with D.L. , this calls into question a finding that there was no “bad blood” between Gerasimowicz to motivate Gerasimowicz to fabricate an unfounded accusation that D.L. punched M.F. on the right side of the face without leaving a mark, the punch was so loud

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that it created a “thwack” sound but no bruise and none of the staff who were standing at M.F.’s bed side noticed the punch except for Gerasimowicz who was standing at the end side of the bed at the furthest distance from M.F.’s face while M.F. was being placed in a 4 point restraint at the direction of the Hospital’s doctors.

Finally, Respondent argues that D.L.’s testimony was allegedly inconsistent with some of his statements because at the hearing D.L. testified that he turned M.F.’s face with the back of his hand (an approved technique taught in training and used when a patient is spitting) because D.L. denied placing his hands on M.F. in his initial written statements. In fact, in his written statement of 4-13-18, D.L. wrote “I had put my hand in front of the patient face so he wouldn’t spit on my self or other staff”. (R 26, DHS 14). This is consistent with D.L.’s testimony at the hearing:

Transcript of D.L. Page 172, Lines 7-18:

7 Q And this interview you said you took both
8 hands after -- attempted to bite you, you took both
9 hands and completely covered M.F.’s face, right?
10 A Yes, that’s what I said, yes.
11 Q We can agree that’s different than what was
12 in your written statements, right?
13 A -- covered is like putting my hand in front of his
14 face the same way I put it in front of his mouth. I
15 didn’t put it over his mouth or over his face where,
16 you know, like grab his face, like cup his mouth or cup



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17 his face, no, I didn't do any of that if that's what
18 you're trying to --

In other words, D.L. provided consistent testimony as he was describing two separate events. In the one event, he placed his hands over M.F.'s face without touching or "cupping" M.F.'s face and in the other event he testified that he used the training technique to redirect M.F.'s face at the jaw line. These separate events are not contradictory and are completely overshadowed by the inconsistent and incredible testimony of Gerasimowicz.

Finally, the Initial Decision clearly placed the burden on Appellant when the burden should have been placed squarely on Respondent. For these reasons, the Initial Decision should be rejected.

Respectfully yours,
Nash Law Firm LLC

William A. Nash

By: William A. Nash, Esquire

cc: DAG Caroline Gargione
DAG Eric Zimmerman
The Honorable Edward J. Delanoy, ALJ
Mr. David Leonard