In the Matter of Daniel Wilkinson, Ancora Psychiatric Hospital
CSC Docket No. 2009-4276
OAL Docket No. CSV 8568-09
(Civil Service Commission, decided November 22, 2011)

The appeal of Daniel Wilkinson, a Human Services Assistant with Ancora Psychiatric Hospital, Department of Human Services, of his removal effective September 24, 2008, on charges, was heard by Administrative Law Judge Elia Pelios (ALJ), who rendered his initial decision on October 18, 2011. Exceptions were filed on behalf of the appointing authority and cross exceptions were filed on behalf of the appellant.

Having considered the record and the attached ALJ’s initial decision, and having made an independent evaluation of the record, including a review of a videotape of the incident, the Civil Service Commission (Commission), at its meeting on November 22, 2011, did not adopt the ALJ’s recommendation to dismiss the charges and reverse the removal. Rather, the Commission upheld the appellant’s removal.

DISCUSSION

The appellant was removed effective September 24, 2008, on charges of conduct unbecoming a public employee, other sufficient cause, and violation of departmental regulations concerning physical abuse of a patient and compliance with policies. It was asserted that on September 7, 2008, the appellant engaged in a physical altercation with a patient, J.M. Specifically, the appointing authority claimed that the appellant pushed J.M. with both hands, which resulted in J.M. becoming agitated and being placed in physical restraints. Upon the appellant’s appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

Initially, the appellant filed a motion seeking dismissal of the charges or, alternatively, the exclusion of video surveillance footage of the incident in question. The appellant asserted that there were two surveillance cameras in the day room where the incident transpired, but the appointing authority only produced footage from one of those cameras. He alleged that the footage from the other camera was destroyed, and he argued that all surveillance footage should be excluded due to the appointing authority’s failure to preserve the images from the second camera. The ALJ denied the appellant’s motion, finding that Jeanne Coffee-Senkovich, a Quality Assurance Specialist, Health Services, credibly testified that the footage from the second camera was of little use, since the camera was further from the incident and the view of the incident from that camera was partly obstructed. The ALJ emphasized that, in addition to the credibility of Coffee-Senkovich’s testimony, her
assertion regarding the quality of the video footage from the second camera was supported by a review of the layout of the day room. The ALJ also found it credible that Coffee-Senkovich acted in good faith when she did not preserve the footage from the second camera. Relying on the lack of malicious intent in destroying the footage from the second camera and the lack of evidence concerning the materiality of that footage to the instant proceedings, the ALJ declined to sanction the appointing authority for failing to produce the footage from this second camera.

On the merits, the ALJ set forth that a number of the witnesses who testified did not directly observe the incident; rather, they testified with regard to their interpretations of the videotape of the incident or applicable policies. In addition, James Tornatore, a Quality Assurance Specialist, Health Services, testified regarding a statement provided by Andre Ausby, a former temporary employee, who was present during the incident. Tornatore testified that, consistent with the second written statement Ausby provided, Ausby told him in his interview that the appellant pushed J.M. In contrast, Magdalena Allen, a Charge Nurse – 12 Months, testified that J.M. was extremely agitated leading up to the incident because a fire alarm had gone off, and J.M. did not want to go to the day room as required during the fire alarm. She testified that J.M. was cursing and yelling at staff and patients, and she, thus, ordered a "code blue" and ordered the appellant to restrain J.M. for the safety of the other patients and staff. Allen asserted that the appellant acted properly and at her direction when he approached J.M. and engaged physically with him. Ronata Turner, a Human Services Assistant, also testified that she heard Allen order the appellant to restrain J.M., and Allen instructed her to “call the code.” Additionally, the ALJ noted that Forrest Carroll, a Training Assistant, testified that the appellant told him that J.M. was grabbing at the keys on his belt, which is dangerous for a patient as agitated as J.M.

The ALJ noted that the value of Tornatore’s testimony regarding Ausby’s statement was limited, since Ausby himself did not testify at the proceeding. The ALJ also noted that Ausby gave a statement prior to the one he supplied to Tornatore, which was inconsistent with his claim that the appellant pushed J.M. The ALJ recognized that hearsay evidence is admissible before the OAL as long as some legally competent evidence exists to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. See N.J.A.C. 1:1-15.5(b) (Also known as the Residuum Rule); See also e.g., Matter of Tenure Hearing of Cowan, 224 N.J. Super. 737 (App. Div. 1988). The ALJ also reviewed the video footage of the incident in question. He found the footage to be “grainy, lack[ing] audio, and at so low a frame rate so as to render the viewing choppy at best.” Initial Decision at 19. Nevertheless, the ALJ was able to discern what appeared to be keys on a retractable line on the appellant’s belt, which was extended at the time that J.M. and the appellant break apart. Thus, the ALJ found that the video provided a residuum of competent evidence to

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1 Ausby’s temporary appointment was discontinued, effective April 11, 2009.
support the appellant’s claim to Carroll that J.M. grabbed the keys on his belt while the appellant was approaching J.M. to restrain him as ordered by Allen. Based on the testimony and videotape, the ALJ concluded that the contact between the appellant and J.M. represented the appellant’s attempt to “disarm” J.M., who had grabbed his keys. The ALJ concluded that such action did not rise to the level of physical abuse or conduct unbecoming a public employee, and he recommended dismissing the charges and reversing the removal.

In its exceptions to the ALJ’s initial decision, the appointing authority summarizes its view of the contents of the surveillance video, and it underscores that pushing a patient is not an authorized restraint technique. Rather, it is considered physical abuse. The appointing authority also emphasizes that it is clear from the videotape that neither Allen nor Turner were able to see the physical altercation between the appellant and J.M. because their backs were turned when the incident occurred. In addition, the appointing authority asserts that Allen initially denied being in the day room when the incident occurred, and she initially told investigators that the appellant told her to “call a code” due to J.M.’s behavior. However, at the OAL, Allen insisted that she independently determined that J.M. needed to be restrained, and she called the code without the input of the appellant. Moreover, the appointing authority contends that an adverse inference should be drawn from the appellant’s failure to testify, since the video clearly shows him pushing J.M., and there was no direct evidence to justify such actions.

In response, the appellant expresses his agreement with the ALJ’s initial decision. Nevertheless, the appellant asserts that the ALJ should have completely excluded the surveillance footage of the incident, in light of its destruction of the footage from the second surveillance camera in the day room. He argues that all surveillance video contained relevant evidence, and that the appointing authority failed to present a “plausible” explanation for the destruction of the surveillance footage at issue. The appellant also contends that this footage could have contained evidence important to his defense. In addition, the appellant contests all references to the fact that the video in the record showed evidence of a push. The appellant asserts that the “silent strobe-like video” only displayed one “frame where Appellant held the wris[ts] of the patient, and a later frame where the patient was leaning backward.” Moreover, the appellant contends that the testimony of Tornatore should have been excluded in its entirety, since he made unsupported representations concerning a conversation with Ausby, particularly because the appointing authority failed to produce Ausby to testify and there was information concerning Ausby’s changing his statement in order to avoid adverse actions against himself. Further, the appellant contends that, even if it had been established that he pushed J.M., such action did not constitute abuse. He relies on In the Matter of Eva Taylor, 158 N.J. 644 (1999), to support his contention that the charge of physical abuse of a patient must be supported by evidence of malicious intent to injure the patient. The appellant emphasizes that J.M. sustained no injury in the
incident, and there is no evidence that the appellant acted with malice towards J.M. He further contends that federal regulations define “abuse” as “willful infliction of injury,” and he argues that the appointing authority’s policies cannot override precedent of the New Jersey Supreme Court or federal regulations.

In reply, the appointing authority underscores that, in response to Taylor, supra, which held that a finding of patient abuse must be predicated on a finding of malice or intent to injure under the policies and regulations of the Department of Human Services, its policies were amended to define “abuse” differently. It notes that, in 2000, Administrative Order 4:08 was amended to define “physical abuse” as “a physical act directed at an individual, patient, or resident of a type that could tend to cause pain, injury, anguish, and/or suffering.” Prior to that amendment, at the time of the Taylor decision, “physical abuse” under Administrative Order 4:08 was defined as “a malicious act directed toward a patient, resident, client, or employee with the intent to cause pain, injury, suffering or anguish.” Taylor, supra at 660. Additionally, the appointing authority notes that the federal regulations cited by the appellant expressly do not apply to psychiatric institutions.

In response, the appellant maintains that Taylor remains good law, and he cites numerous cases decided since that time where a finding of malicious intent was required. He also argues that a mere amendment to the appointing authority’s policies cannot override a New Jersey Supreme Court opinion. Finally, the appellant notes that other policies of the appointing authority other than Administrative Order 4:08 require intent in order to support a finding of abuse.

At the outset, the Commission notes its agreement with the ALJ’s determination that the appellant had not demonstrated that any sanctions were appropriate due to the appointing authority’s failure to produce the footage from the second surveillance camera. As the appellant notes, the ALJ was required to consider the materiality of the destroyed evidence, as well as the intent of the appointing authority when the evidence was destroyed. Mattei v. New Jersey Administrative Office of the Courts (Division of Civil Rights, decided May 27, 2003). As the ALJ found, surveillance footage is routinely recycled and recorded over. Nevertheless, the footage from both cameras in the day room was reviewed by Coffee-Senkovich during the investigation of the present matter. The ALJ found that Coffee-Senkovich credibly testified that the destroyed footage was of little use, since the view of the incident was partially obstructed from the second camera. Thus, in accordance with Mattei, supra, the ALJ found that the materiality of the footage from the second camera was limited, and that Coffee-Senkovich acted in good faith when the footage was recorded over.

The Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. See Matter of J.W.D., 149 N.J. 108 (1997).
“[T]rial courts’ credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record.” See also, In the Matter of Eva Taylor, supra (quoting State v. Locurto, 157 N.J. 463, 474 (1999) ). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. Id. at 659 (citing Locurto, supra). The Commission appropriately gives due deference to such determinations. However, in its de novo review of the record, the Commission has the authority to reverse or modify an ALJ’s decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. See N.J.S.A. 52:14B-10(c); Cavalieri v. Public Employees Retirement System, 368 N.J. Super. 527 (App. Div. 2004). Here, the Commission finds no basis to disturb the ALJ’s determination that Coffee-Senkovich credibly testified with regard to both the contents of the disputed footage and her intent when the footage was destroyed.

With regard to the standard for overturning an ALJ’s credibility determination, N.J.S.A. 52:14B-10(c) provides, in part, that:

The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the finding are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.

See also, N.J.A.C. 1:1-18.6(c); Cavalieri, supra.

Upon an independent review of the record, including a review of the videotape, the Commission disagrees with the ALJ’s assessment of the evidence. For the reasons explained below, the Commission finds that the appointing authority has met its burden of proof with regard to the charge of physical abuse of a patient and conduct unbecoming a public employee and upholds the appellant’s removal. Based on its review of the videotape and the record, the Commission makes the following findings:

1. On September 7, 2008, in the hallway prior to the incident, J.M. can be seen exiting his room in the presence of Ausby, who appears to be attempting to persuade J.M. to move to the day room. The appellant, who is walking down the hallway, walks in between Ausby and J.M. and exchanges words with J.M. Although the appellant proceeds past J.M and Ausby, he turns around and returns to the area.

2. J.M. enters the day room with Ausby, when the appellant again enters the day room and exchanges words with J.M. Both the appellant and J.M. are gesturing during this exchange.
3. The appellant exits the day room and returns a few seconds later with Allen. At this point, the appellant and Allen walk past J.M. to the middle of the day room.

4. The appellant turns toward J.M. while in the middle of the day room and appears to be speaking and gesturing to J.M.

5. The appellant walks toward J.M. J.M.’s hands are in front of him, with his right hand on the right side of his chest and his left hand across his waist near his abdomen.

6. J.M. moves slightly towards the appellant, and the appellant leans forward and pushes J.M. strongly, propelling him backward. What appears to be the appellant’s keychain is visible at this moment while the appellant and J.M. are separating.

7. Ausby steps in between the appellant and J.M., and the appellant and Ausby proceed to attempt to restrain J.M.

At the outset, the ALJ found that insufficient evidence was presented by the appointing authority to sustain the charges of physical abuse of a patient and conduct unbefitting a public employee. In this regard, the ALJ relied heavily on his view of the videotape in order to make his determination that the appellant did not act inappropriately. Accordingly, the Commission’s assessment of this matter must start with its own review of the incident involving J.M. and what was captured on the videotape.

During an Executive Session of the Commission’s November 22, 2011 meeting, the Commission members viewed a videotape of the incident involving the appellant and J.M. As an initial matter, the Commission notes that it disagrees with the assessment of the ALJ and the appellant that the video footage was “grainy,” “choppy,” or “strobe-like.” The footage viewed by the Commission contained an uninterrupted video; while the speed of the video could be adjusted, this allowed the Commission to view the incident in “real-time” and in slow motion in order to closely assess the movements of all involved. After its review of the videotape, the Commission rejects the ALJ’s finding that the videotape is not conclusive with respect to the allegation that the appellant physically abused J.M. See also, In the Matter of Aletha Crosland, Docket No. A-3604-09T4 (App. Div., October 19, 2011). All three Commission members present at the meeting agreed that the videotape captured sufficient visual evidence which demonstrated that the appellant was the aggressor in this situation and, as will be discussed in further detail below, that his actions rose to the level of physical abuse. Further, notwithstanding J.M.’s conduct toward the appellant, employees in psychiatric
institutions are expected to exercise appropriate self-restraint when working with patients who cannot necessarily exercise personal restraint due to their conditions.

The Commission emphasizes that the appellant’s actions, as captured on the videotape, are not consistent with the claims that he was attempting to restrain J.M., as allegedly ordered by Allen, or that he was attempting to disarm J.M., who had allegedly grabbed the appellant’s keys. Initially, before the appellant returns to confront J.M., Allen can be seen walking away with her back turned, which is inconsistent with the claim that she ordered the appellant to restrain J.M. The video contains visual evidence that the appellant pushed J.M. away from him with significant force; clearly, if the appellant was attempting to restrain J.M., he would not have done so in a way that moved the patient away from him. Further, while the video reflects that the appellant’s retractable keychain was extended between him and J.M. while the two separated after the push, there is no evidence that J.M. attempted to grab the keys prior to the push. In this regard, when the appellant and J.M. approach each other, J.M.’s right hand is resting on the right side of his chest, and his left arm, which was closest to the area of the appellant’s keys, was laying across his abdomen, his hand resting near his right hip. Even assuming, arguendo, that J.M. reached for the appellant’s keys prior to the push, the Commission is not convinced that the push was a necessary or appropriate response to the grabbing of the keys. It would seem that the more appropriate response would have been to focus on J.M.’s left hand and attempt to remove the keys from his hand. Further, it cannot be ignored that the appellant repeatedly placed himself in proximity to J.M. As the appellant did not testify, it is not clear why, if J.M. was being combative and directing insults toward him, he would continue to return to confront J.M., first in the hallway and then twice in the day room, rather than removing himself from the situation. The Commission finds that the appellant had every opportunity to avoid a physical confrontation with J.M., but he instead chose to continue to confront the agitated patient.

Having established that the appellant pushed a patient, J.M., with significant force, the Commission must assess whether that action constituted physical abuse of a patient and conduct unbecoming a public employee. The appellant relies on Taylor, supra, to support his claim that, even if he pushed J.M., he did not act with malicious intent and thus, cannot be found guilty of physical abuse. The appointing authority counters that Taylor interpreted a prior version of Administrative Order 4:08, which the appellant is charged with violating. Indeed, the Court in Taylor was applying the former Administrative Order 4:08, which defined “physical abuse” as “a malicious act directed toward a patient, resident, client, or employee with the intent to cause pain, injury, suffering or anguish.” Apparently in response to Taylor, the appointing authority amended this definition. Administrative Order 4:08 now defines “physical abuse” as “a physical act directed at an individual, patient, or resident of a type that could tend to cause pain, injury, suffering or anguish.” This amendment to the very disciplinary standard the Court
was applying in *Taylor* persuades the Commission that a showing of malicious intent to injure is not necessary in the present case in order to sustain the charge of physical abuse of a patient. Further, the Commission underscores that, even if necessary, it is satisfied based on the credible evidence in the record that the appellant possessed such intent. As noted above, the video clearly shows that the appellant engaged in a physical act that was not aimed at restraining J.M. or removing his keys from J.M.’s hands. Nor was it a case where the appellant reacted to a physical threat from the patient in an act of self-defense. The video clearly shows the appellant approaching J.M. in a menacing manner, and it clearly depicts him pushing J.M., propelling him backwards. Again, since the appellant did not offer any direct testimony regarding his intent in doing so, the Commission is left with the visual evidence of the incident, and it is compelled to find no reason, other than malicious intent, for the appellant’s actions. Likewise, the Commission is persuaded that the appellant’s abusive actions constituted conduct unbecoming a public employee.

In determining the proper penalty, the Commission’s review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant’s offense, the concept of progressive discipline, and the employee’s prior record. *George v. North Princeton Developmental Center*, 96 N.J.A.R. 2d (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual’s disciplinary history. *See Henry v. Rahway State Prison*, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a “fixed and immutable rule to be followed without question.” Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 N.J. 474 (2007).

In this case, it is clear that removal is the proper penalty. In this regard, it is noted that in *In the Matter of Tammy Herrmann*, 192 N.J. 19 (2007), the State Supreme Court upheld the removal of Herrmann, a Family Service Specialist Trainee with the Department of Youth and Family Services, who, during an investigation of alleged child abuse, flicked a lighted cigarette lighter in front of a special needs child. Herrmann had been employed for approximately six months at the time of the incident and had no prior discipline but her conduct “divested her of the trust necessary for her position” and “progressive discipline [was not]

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2 As an aside, the Commission notes that, even if a finding of malicious intent was required and the video did not support such a finding, the appellant’s actions would constitute inappropriate physical contact with a patient and conduct unbecoming a public employee, which could support his removal.
appropriate in this matter.” Id. at 38. An individual in the appellant’s position is entrusted with the care of psychiatric patients. As noted above, while not necessary to sustain the charge of physical abuse of a patient, the appellant acted with malicious intent when he pushed J.M., after repeatedly returning to confront him. While the appellant’s intent is not relevant to a determination of the charges, it is properly considered when determining the proper penalty. The appellant’s inappropriate and abusive behavior cannot be tolerated and is worthy of severe sanction. As noted above, some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See Carter and Herrmann, supra. Intentional patient abuse would clearly be the type of action which would tend to destroy public respect in the delivery of governmental services. As such, the appellant’s actions are sufficiently egregious and warrant his removal even without consideration of his prior employment record. See also, In the Matter of Aletha Crosland, supra. Nevertheless, in this case the appellant’s employment record also reveals two major disciplinary actions (a 30-day suspension in 2002 for engaging in a verbal and physical altercation with a co-worker and a 53-day suspension in 2004 for inter alia, leaving his assigned work area without permission, falsification and negligence) and several minor disciplines since his employment commenced in 1999. Finally, as noted above, even if the Commission found that the appellant’s conduct did not rise to the level of patient abuse and was, rather, inappropriate physical contact, his actions, coupled with this disciplinary history, justify his removal.

Accordingly, based on the totality of the record, the Commission finds that the penalty imposed by the appointing authority was neither unduly harsh nor disproportionate to the offense and should be upheld.

ORDER

The Civil Service Commission finds that the action of the appointing authority in imposing the removal was justified. Therefore, the Commission dismisses the appeal of Daniel Wilkinson.

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