The appeals of Freddie Green and Elijah Muse, Human Services Assistants with Trenton Psychiatric Hospital, Department of Human Services, of their removals, effective April 14 and 15, 2004, respectively, on charges, were heard by Administrative Law Judge Joseph F. Martone (ALJ), who rendered his initial decision on August 30, 2006. Exceptions were filed on behalf of the appellants and cross exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having reviewed the testimony and evidence presented before the Office of Administrative Law (OAL), and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on December 20, 2006, adopted the ALJ's recommendation to uphold the removal of appellant Green. However, the Board did not adopt the ALJ's recommendation to uphold the removal of appellant Muse. Rather, the Board reversed the charges and the removal of Muse.

DISCUSSION

The appointing authority presented that the appellants were removed on charges of physical or mental abuse of a patient, violating administrative procedures and regulations involving safety and security, and failure to report injury, abuse or accident involving a patient. Specifically, it was alleged that on March 29, 2004, the appellants were involved in an incident in which a patient, J.W., was severely injured.

Upon the appellants’ appeals, the matters were transmitted to the OAL for hearings as contested cases and consolidated. At the hearing, several employees testified regarding this matter and their testimony was summarized by the ALJ.

Bob Smallwood, then a Program Coordinator for the Intensive Treatment Unit (ITU), testified that he was aware of an incident involving J.W. that occurred on March 29, 2004. Smallwood stated that he received a call from Brenda Starling, a medication nurse, at 9:15 a.m. who advised him that J.W. had an injured eye. Upon arriving at the scene, Smallwood was advised that J.W.’s injury was serious and that he needed to be sent to the hospital. When Smallwood asked what happened to J.W., staff advised him
that J.W. fell down. However, J.W. pointed to Eric Daniels, a former Human Services Assistant\(^1\), and said “he kicked me.” Statements were taken from various staff members and the State Police were contacted due to the seriousness of J.W.’s injury. Smallwood identified various statements, including those from appellant Green, in which Green spoke about moving J.W. to the quiet room. Smallwood also testified that it would be easy for J.W. to collapse to the floor, although he had never seen him do so, and that J.W. had a history of violence.

Inese Barbara Conklin, a Charge Nurse, testified that J.W. was not assigned as a “one-to-one” on March 29, 2004 and that she saw J.W. that morning and he was not in a good mood. Conklin stated that J.W. is in a wheelchair 90% of the time and on the morning of the incident, he needed extra medication, which he was provided, for pain. Starling contacted Conklin and advised her that J.W.’s eye was swollen and bleeding. Upon her arrival at the scene, i.e., the quiet room, she noted that there was no blood on the floor or wall and J.W.’s eye was swollen and bleeding. Conklin testified that Daniels advised her that J.W. tried to throw a chair and fell, striking his eye. When Conklin asked J.W. what had happened, he did not say anything to her. Conklin also testified that J.W. had been on “one-to-one” in the past because he has been aggressive and harmful to others and stated that the ITU is for the most difficult patients.

Carolyn Vanessa Taylor, Assistant Director of Nurses, testified that she investigated the incident involving J.W. and that appellant Muse told her that he had no involvement with J.W. She also spoke with J.W., who said that Daniels kicked him in the eye. Taylor stated that both Muse and Green failed to report the incident. Taylor indicated that she reviewed a videotape made by the hospital videotaping system on the day in question and provided an explanation of the images seen on the videotape as part of her testimony. In pertinent part, Taylor noted that at approximately 7:41 a.m., Green and Daniels moved J.W. in a wheelchair from the ITU’s dayroom to an adjacent quiet room area where J.W. sits on a restraint bed. At 7:57 a.m., J.W. stood up and walked into the “front” quiet room and sat down in a “restraint” chair inside the door. At 7:58 a.m., appellant Muse, Joseph Stephens, a Human Services Assistant, and Michael Greiner, a Charge Nurse,\(^2\) walk by the room. J.W. was not injured at this time. At approximately 8:04 a.m., Stephens, Green and Muse drag the restraint chair, with J.W. still sitting in it, to a “rear” quiet room, with Greiner following. J.W. falls out of the chair onto the floor. At approximately 8:05 a.m., Daniels moves a restraint bed in front of the rear quiet room door, Stephens and Greiner have left the room, and Green and Muse are standing in the doorway in front of the bed. Muse leaves

\(^1\) Daniels was removed on charges effective April 14, 2004.
\(^2\) Greiner was removed on charges effective April 14, 2004.
the area and Daniels makes several trips in and out of the room with towels. Green also enters the room again. Christine Williams, a Human Services Assistant, looks into the rear quiet room at 8:14 a.m. and at 9:04 a.m. Starling goes into the quiet room looking for J.W.

Taylor testified that as a result of her investigation, she learned from staff what happened. She also stated that Greiner participated in two interviews. In the first interview, Greiner denied any knowledge of J.W.’s injury. However, at a second interview, Greiner admitted that he saw J.W. sitting on the floor with a stream of blood coming from his eye. Greiner explained that he returned to the room on his way to the exit and saw blood on J.W.’s eye. Greiner also advised that he knew that J.W. was not injured from being dumped out of the chair, that he observed Daniels standing silently in the room on the side of J.W., and that Green and Muse were near the doorway.

Robin Runion, Quality Assurance Specialist, testified that she interviewed Williams who advised her that she found J.W. on the floor in the quiet room and Daniels told her that J.W. had fallen. Runion also testified that she spoke with Green, who indicated that he pushed J.W. from one room to the other by sliding the restraint chair. However, J.W. was not hurt by being slid on the chair. Runion further stated that she participated in Greiner’s interview, who indicated that when he came back in the area he saw J.W. bleeding and that both appellants were at the doorway to the rear quiet room at that time. Upon her review of the video, she noted that Green, Muse and Greiner did not look into the room at the same time and that Green went in and out of the room several times.

Appellant Green testified that when he left J.W. in the rear quiet room after he slid out of the restraint chair, he was fine. He stated that he did not look into the room after the removal of the restraint chair and neither Conklin nor Greiner said anything about the restraint bed being in front of the quiet room door. Green acknowledged that if a staff member sees that a patient is injured, that it must be reported to the nurse. Green reviewed the videotape of the incident during the hearing and provided a detailed description of what was captured on video. However, he testified that he did not know how the injury to J.W. occurred and denied that he saw Daniels injure J.W. Green also stated that the video revealed that he was seen looking into the room and that Daniels climbed over the restraint bed carrying a towel.

Appellant Muse testified that he saw the back of J.W. as he was standing in the doorway and that he stayed in the area for “five or ten” minutes and then went on a one-on-one assignment. When he returned from
his assignment, he spoke with Daniels and Green and only saw the back of J.W., who was saying he was the Incredible Hulk. Muse stated that he saw no one injure or harm J.W., that he saw no blood on the floor, and that he found out that J.W. was injured when he returned from lunch. He also testified that he did not give towels to Daniels, that Daniels did not ask him for towels, and that he did not see any towels. Muse also stated that he did not question why the restraint bed was in front of the door because a nurse, Greiner, was present. Further, he stated that at 8:17 a.m., he asked Daniels if he needed anything and Daniels said that everything was “O.K.” Muse also indicated that J.W. was not making any sound at all at this time and acknowledged that if he sees a staff member injure a patient, he must report the injury.

The ALJ set forth in his initial decision that the videogape of the incident revealed that Daniels was the only person in the room with J.W. at 8:05 a.m. and that appellants Green and Muse were seen standing in the doorway in front of the bed watching Daniels and J.W. He also noted that Greiner’s statement indicated that he also observed Green and Muse looking into the rear quiet room at that time. When Greiner returned to the room on his way to the exit, he saw the blood on J.W.’s eye. Greiner knew that J.W. was not injured when he slipped out of the restraint chair. The ALJ also noted that Muse left the area at 8:05:35 a.m. and Daniels stepped out of there at 8:05:52 a.m., making several trips in and out with towels. Green followed Daniels to the nurses’ station where Daniels told him to wet a towel, and Green went back into the room with Daniels. The ALJ indicated that it was crucial to determine the time of injury to J.W. in order to determine if the appellants were aware of the injury, thus obligating them to report it.

Based on the videotape, in conjunction with the testimony of the witnesses and the hearsay statements of individuals with knowledge, the ALJ found that J.W.’s injury occurred at some time prior to 8:05:52 a.m. At 8:05:52 a.m., and prior, Green and Muse are seen standing in the doorway. The appellants leave the area and Daniels and Green return to the rear quiet room carrying towels. Against this background, the ALJ found Muse’s testimony that he only saw the back of J.W.’s head incredible, in view of the fact that towels were obtained by Daniels and Green to wipe up the blood immediately after Muse left the doorway. From that evidence, together with testimony concerning the cleaning of the blood and the use of the towels to do so, the ALJ inferred that both appellants Green and Muse were aware of the injury to J.W. at that time. Therefore, the ALJ found that both Green and Muse were aware of the injury to J.W. and failed to report it. However, the ALJ determined that there was insufficient evidence to establish patient abuse on the part of the appellants. As such, the ALJ found that the appointing authority had met its burden of proof that the appellants failed to
report the injury, abuse or accident involving a patient and recommended that appellants be removed. The Board agrees with the ALJ with regard to the findings that appellant Green was aware of the injury to J.W. and failed to report it. However, for the reasons explained below, the Board finds that the appointing authority has not met its burden of proof with regard to appellant Muse on the charge that he was aware of the injury to J.W. and failed to report it.

In their exceptions to the ALJ’s initial decision, the appellants state that on the day of the incident, J.W. was agitated and was acting out and went into the quiet room. After a period of room switching, the appellants exited the room and stopped briefly at the doorway. Daniels remained in the room and left less than a minute later. The appellants take exception to the ALJ’s statement that Daniels told Green to get him a wet towel and notes that this does not appear in any of the testimony. Further, the videotape does not show Green bringing any towels to Daniels or taking any away. Thus, they argue that there is no competent evidence that shows that Green participated in any way to provide or take away towels from Daniels. The appellants also take exception with the determination that they observed an injury to J.W. The appellants reiterate that they both testified that they did not see Daniels cause any injury to J.W. and the videotape does not show that they acted in a manner of having seen any kind of injurious conduct. Thus, the appellants request that the portions of the videotape be reviewed in light of their arguments and a finding made that the conclusions of the ALJ are unsupported.

In its cross exceptions, the appointing authority presents that based on the totality of the competent and credible evidence presented during the hearing, the ALJ determined that the appellants failed to report the injury and violated administrative procedures involving the safety and security of patients. It asserts that it proved by a preponderance of the credible evidence that the appellants’ conduct was unbecoming a public employee and that the removals should be sustained. The appointing authority emphasizes that Green was present at some point in the rear quiet room with Daniels, who had the towels. Thus, it was evident that something unusual happened and neither contacted a nurse to attend to J.W. Additionally, the appointing authority maintains that both Green and Muse witnessed Daniels injure J.W., but neither reported the incident, when they knew they should have. Therefore, the appointing authority maintains that the removals should be affirmed.

Initially, the Board 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 witnesses and common human experience that are not transmitted by the record.” See In re Taylor, 158 N.J. 644 (1999) (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 Board appropriately gives due deference to such determinations. However, in its de novo review of the record, the Board has the authority to reverse or modify an ALJ’s decision if it is not supported by the credible evidence. 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 findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.


Further, in conjunction with his assessment of the videotape, the ALJ infers that both appellants were aware of J.W.’s injury. Accordingly, the Board’s assessment of this matter must include its own review of the incident involving J.W. and what was captured on the videotape. During an executive session of the Board’s meeting on December 20, 2006, the Board members reviewed the videotape of the incident involving the appellants and J.W. several times.

CONCLUSION WITH RESPECT TO FREDDIE GREEN

With respect to appellant Green, upon an independent review of the record, including a review of the videotape, the Board agrees with the findings of the ALJ and concludes that the appointing authority has met its burden of proof. Specifically, the Board finds that the credible evidence in the record supports the ALJ’s conclusion that the appointing authority met its burden of proof with regard to the charge that Green was aware of J.W.’s injury and failed to report it. There is ample evidence in the record demonstrating that Green was involved with Daniels as he is seen going into the quiet room with Daniels, who is carrying towels. Green’s multiple involvements with J.W., after Greiner first witnessed the injury, clearly demonstrate that he was aware of J.W.’s condition and failed to report it and
that his testimony that he was unaware of any injury is not believable. As such, the Board finds that the appointing authority has met its burden of proof with respect to Green.

In determining the proper penalty, the Board’s review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Board 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, an analysis of the appellant’s past disciplinary history is unnecessary in this case since it is clear that removal is the proper penalty. An individual in the appellant’s position is entrusted with the care of mentally disabled individuals. Failure to report an injury to a patient can have adverse consequences and such inappropriate behavior cannot be tolerated and is worthy of severe sanction. Accordingly, the Board finds that the penalty imposed by the appointing authority was neither unduly harsh nor disproportionate to the offense and should be upheld.

**CONCLUSION WITH RESPECT TO ELIJAH MUSE**

With respect to Muse, upon an independent review of the record, including a review of the videotape, the Board does not agree with the findings of the ALJ and concludes that the appointing authority has not met its burden of proof and reverses his removal. Based on its review of the video and the record, the Board makes the following findings:

1. Greiner’s statement that he first saw J.W. sitting on the floor with a stream of blood coming from his eye occurred between 8:05 a.m. and 8:06 a.m. Prior to that point, there was no testimony that J.W. was bleeding.

2. It was Muse’s uncontested testimony that at 8:05:35 a.m. he left the area, but returned and was by the door of the rear quiet room at 8:05:52. He stated that he did not see any blood on the floor, that J.W. was facing the wall, that the restraint bed was by the door, and that he did not question this because Greiner was present.

3. The ALJ determined that J.W.’s injury occurred sometime prior to 8:05:52 a.m. However, the Board’s review of the videotape indicates that when Greiner comes back through the outer room
and looks into the rear quiet room and reports that he sees that J.W. is bleeding, the videotape indicates that it is 8:05:59 a.m.

4. At 8:05:59 a.m., the videotape indicates that Muse is walking away and is not facing the rear quiet room.

5. The ALJ’s determination that Muse’s testimony that he only saw the back of J.W. when he was in the doorway, given that Daniels and Green were obtaining towels to clean up the blood from J.W.’s injury, was not credible, is not supported. While Greiner may have seen J.W. bleeding at 8:05:59 a.m., Muse was facing the other way.

The ALJ reasoned that Muse was aware of J.W.’s injury based on hearsay statements and testimony of witnesses. After its review of the videotape, the Board rejects the ALJ’s finding that Muse was aware of the injury to J.W. and failed to report it. The Board found that according to the videotape, in conjunction with Greiner’s report, the first eyewitness to J.W.’s injury occurred at 8:05:59 a.m. At that time, Muse is walking away and not facing the quiet room. As such, given the placement of Green and Daniels prior to that time, it is plausible that Muse’s view of J.W. could have been obstructed by those other employees. Therefore, the Board finds, consistent with his testimony, that it cannot be definitely determined that Muse was aware that J.W. was injured. Therefore, the Board finds that the appointing authority has not met its burden with respect to Muse and the charges should be dismissed.

Since the charges have been dismissed and the penalty reversed, Muse is entitled to mitigated back pay, benefits and seniority and reasonable counsel fees pursuant to N.J.A.C. 4A:2-2.10 and N.J.A.C. 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division’s decision, Dolores Phillips v. Department of Corrections, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Board’s decision will not become final until any outstanding issues concerning back pay and/or counsel fees are finally resolved. In the interim, as the court states in Phillips, supra, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate Muse to his permanent position.

ORDER WITH RESPECT TO FREDDIE GREEN
The Merit System Board finds that the action of the appointing authority in imposing the removal was justified. Therefore, the Board affirms that action and dismisses the appeal of Freddie Green.

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

ORDER WITH RESPECT TO ELIJAH MUSE

The Merit System Board finds that the action of the appointing authority in imposing a removal was not justified. Therefore, the Board reverses the removal and reinstates the appellant. The Board further orders that the appellant be granted back pay, benefits and seniority for the period of his separation from employment. The Board further awards reasonable counsel fees pursuant to N.J.A.C. 4A:2-2.12. Proof of income earned and an affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to N.J.A.C. 4A:2-2.10 and N.J.A.C. 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and/or counsel fees. However, under no circumstances should the appellant’s reinstatement be delayed pending resolution of any potential back pay and/or counsel fee dispute.

The parties must inform the Board, in writing, if there is any dispute as to back pay and/or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Board will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to R. 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.