



STATE OF NEW JERSEY

In the Matter of Kayode Lasekan
Ancora Psychiatric Hospital,
Department of Human Services

CSC DKT. NO. 2015-1665
OAL DKT. NO. CSV 17153-14

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

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ISSUED: OCTOBER 22, 2015 BW

The appeal of Kayode Lasekan, Human Services Technician, Ancora Psychiatric Hospital, Department of Human Services, removal effective August 5, 2014, on charges, was heard by Administrative Law Judge Robert Bingham, II, who rendered his initial decision on September 17, 2015. 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, including a review of the DVD recording of the incident, the Civil Service Commission, at its meeting on October 21, 2015, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

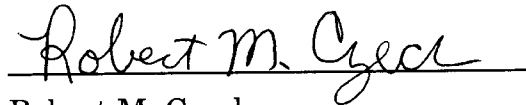
ORDER

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 Kayode Lasekan.

Re: Kayode Lasekan

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
OCTOBER 21, 2015

A handwritten signature in cursive script that reads "Robert M. Czech". The signature is written in black ink and is positioned above a horizontal line.

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 17153-14

AGENCY DKT. NO. 2015-1665

**IN THE MATTER OF KAYODE LASEKAN,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.**

William B. Hildebrand, Esq., for appellant Kayode Lasekan

Adam Verone, Deputy Attorney General, for respondent Department of Human Services, Ancora Psychiatric Hospital (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: May 4, 2015

Decided: September 17, 2015

BEFORE ROBERT BINGHAM II, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Human services technician Kayode Lasekan (appellant) appeals a removal from employment by the Department of Human Services, Ancora Psychiatric Hospital (respondent or Ancora) by Final Notice of Disciplinary Action (FNDA) dated November 24, 2014, charging conduct unbecoming a public employee and other sufficient cause,¹

¹ Specifically, Lasekan was charged with violations of (1) Administrative Order 4:08 C-3.1, physical or

for alleged patient abuse.² The Civil Service Commission transmitted the appeal to the Office of Administrative Law (OAL), where it was filed on December 19, 2014, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The hearing was held on May 4, 2015, and the record closed at the conclusion of the proceedings. Extensions were granted, until September 17, 2015, for issuance of this decision.

FACTUAL DISCUSSION

Background

Appellant is a human services technician (HST) at Ancora, where he has been employed since 2007. On June 16, 2014, he was assigned to supervise patient W.R. on a one-to-one basis, for precaution against W.R.'s suicidal ideation and self-injurious behavior. At approximately 5:20 p.m., appellant accompanied W.R. into the "day room" of Ancora's Birch building, where it was mealtime. The day room contains chairs and tables where patients eat their meals, and the area is equipped with video-surveillance cameras. After W.R. got his tray and meal, an altercation with appellant occurred and it was captured on surveillance video. It resulted in the restraint of W.R. and his removal from the area. It also resulted in appellant going to the hospital emergency room and being out from work temporarily. As a result of the incident, the above charges were leveled against appellant. The FNDA specifically alleges that appellant swung his right arm towards W.R.'s head, while holding a clipboard, resulting in W.R.'s head and torso moving in a backward motion. Ancora imposed a penalty of removal, effective August 5, 2014. The parties stipulate that appellant has no prior disciplinary history.

mental abuse of a patient, client, resident, or employee, and (2) Administrative Order 4:08 E-1.1, violation of a rule, regulation, policy, procedure, order or administrative decision, namely, Executive Policy AD LD 0401, HR -15 and Administrative Bulletin 3:18.

² Lasekan had received a Preliminary Notice of Disciplinary Action (PNDA), as well as an Amended PNDA, dated August 5, 2014, leveling the same charges.

Reports and Interviews

An internal investigation ensued and a number of reports were generated. A Confidential Incident Report, dated June 16, 2014, signed by Vivienne Brown, RN, (J-10) indicates that patient W.R. spat upon "staff" when directed to relinquish a knife and fork from his pocket, and staff subsequently used a clipboard to block W.R.'s second attempt to spit upon the staff. According to the report, W.R. began to attack the staff, a Code Blue was called, and W.R. was placed in two-point restraints. W.R. reported that appellant was "too close to me. I felt threatened." A Medical Response Note (J-11) indicates that W.R. complained of being hit by staff with a clipboard, and said that he was agitated and was spitting on staff at the time; however, the note further indicates that during the examination, he did not remember being hit. He had no pain and no visible injury. A physician's Restraint Record dated June 16, 2014, (J-13) indicates that at approximately 11:00 a.m., R.W. had attempted to attack staff; he remained highly agitated and his one-to-one supervision for suicide and self-injurious/assaultive behavior would continue. A Ward Report (J-14) indicates that during the evening shift on June 16, 2014, W.R. was "undirectable" after putting a fork in his pocket, and he attacked and spat on staff. A "Code Blue" was called and two-point restraints were applied. A mental-status exam dated June 17, 2015, described W.R. as calm, cooperative and coherent, but he had a history of disruptive behavior and poor insight into his condition or impaired judgment. (J-12.)

A number of employees gave statements in July 2014. On July 1, Donald Menter, HST, affirmed that he had one-to-one supervision of a patient in the day room at the time of the incident. He heard "something," from the "front left side" of where he was seated, and observed that W.R. was aggravated and two staff members were directing him out of the day room. He did not see appellant hit W.R. with a clipboard (R-6).

On July 2, Winston Quarshee, a human services assistant (HSA), affirmed that he was in the day room at the time of the incident and observed that W.R. refused to relinquish a fork and spoon to appellant, who was his one-to-one supervisor, and put them in his pocket instead. When appellant warned that he would call a code, W.R.

threw them on the floor and Quarshee picked them up. W.R. became irate and used racial slurs, and then he and appellant walked toward the window near the air conditioner. Quarshee next saw W.R., who had a tray of food, spitting at appellant. Quarshee then went and helped appellant. A code was called and Quarshee assisted in escorting W.R., in two-point restraints, to the observation room. At no time did Quarshee see appellant swing at or assault W.R. with anything. (R-9.)

On July 3, Vivian Brown, RN, affirmed that on June 16 she was the "second charge nurse" who completed a "risk management 104" (J-10) involving the incident. (R-4.) Appellant had reported to her that he used the clipboard to block against W.R. spitting upon him. W.R. had reported that he felt threatened because appellant was too close to him, but he did not say that appellant swung at or hit him with the clipboard. And he did not exhibit any injuries or complain of pain. However, when Supervisor Ngozi arrived, he told her that appellant hit him with the clipboard. Yet, when Director Reyes assessed W.R. in Brown's presence, he said that he did not know anything about being hit.

On July 9, Marc Mason affirmed that he was medication administrator and mealtime monitor on June 16 when he observed a disagreement between W.R. and appellant regarding a restriction from using utensils (R-5). W.R. said racial slurs to appellant before the two of them went toward the air conditioner. Mason subsequently heard a commotion and then saw W.R. going toward appellant and pulling at his shirt. Mason did not see appellant swing at or hit W.R. with anything. W.R., who had previously made unsubstantiated allegations of abuse, did not report any injuries and none were visible.

On July 10, Patricia Holguin, HST, affirmed that she had one-to-one supervision of a patient in the day room at the time of the incident. She observed W.R. spit in appellant's face. Mr. Mason and three staff "score" out of the day room, and W.R. then said that the staff (appellant) hit him with the clipboard (R-7).

Also on July 10, Norman Porter, HSA, affirmed that he was in the day room at the time of the incident and observed that W.R. was agitated and argumentative with

appellant. Porter heard a commotion, turned around, and saw W.R. "going after" appellant, who tried to wrap his arms around W.R. Appellant's clipboard was in his left arm at the time, and Porter did not observe appellant swing at or hit W.R. with it. Porter recalled the clipboard "being knocked out of [appellant's] hand when [W.R.] hit it" (R-8).

Appellant provided statements on the date of the incident (June 16) and on July 3. On an employee statement form dated June 16 (R-2), he indicated that at the time of the incident, he had one-to-one supervision with the patient (W.R.), whom he tried to redirect from pocketing cutlery in the day room. Appellant reported, "the client kept his cutlery in his pocket during dinner and I tried to redirect him, he got angry and spat on my face[,] hit me and pulled my badge around my neck and a code was called." (*Ibid.*) In the section of the form for describing his own actions, appellant wrote that the client attacked him physically and spat on him because appellant redirected him not to put cutlery in his pocket, as he was on suicide watch. Further, the patient hit him, pulled the badge around his neck, put food on him and spat on his face. A code was called and another staff member responded to assist.

On July 3, during a risk-management interview (R-3), appellant indicated that he had a one-to-one assignment for W.R. due to W.R.'s suicidal ideation, and self-injurious and aggressive behaviors. When W.R. got his dinner tray he pocketed the knife, fork and spoon, and appellant tried to redirect him due to the potential danger to himself and others. W.R. became agitated, spat on appellant, and used a racial slur. Another patient told him to stop being rude, after which W.R. took his tray and walked to the other side of the day room, where he put the tray on the air conditioner. Appellant tried to redirect him to get a chair, whereupon he placed an orange from his tray into his pocket. When appellant asked why he had done that, W.R. became more agitated and threatened to again spit on appellant. Before appellant knew it, W.R. spat on him again and threw his food at appellant. All appellant could do at that point was to block, with his hand, both the food and W.R.'s spit. W.R. grabbed appellant's badge and shirt. Appellant called a code and another staff member came to help. Appellant's statement further indicated that he could not remember what happened with the clipboard, and that he did not attempt to hit W.R. After the incident appellant went to the hospital for pain in his neck and finger, and was out from work for one week.

Rules and Policies

Ancora's Executive Policy "AD LD 0401" (J-6) strictly prohibits patient abuse, which is defined as

any act, omission or non-action in which an employee engages with service recipients, that does not have as its legitimate goal the healthful, proper and humane care and treatment of the service recipient, which causes or may cause physical or emotional harm or injury to a service recipient, or deprives a service recipient of his/her rights, as defined by law or Departmental policy.

Pursuant to Ancora's Policy "HR-15" (J-7), patient abuse will not be tolerated at Ancora and any employee who neglects or abuses a patient will be subject to discipline.³ Additionally, Administrative Bulletin 3:18, regarding policies and procedures for reporting and investigating allegations of patient abuse and professional misconduct,⁴ describes physical abuse (as defined in Administrative Order 4:08, Supplement 1) as

a physical act directed at a service recipient by a DHS 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.

[J-8.]

³ Policy "HR-15" indicates that the penalties for employees for patient neglect or abuse are to be recommended and processed in accordance with applicable provisions of the Department of Human Services and Administrative Order 4:08.

⁴ Pursuant to Administrative Bulletin 3:18, allegations of abuse made by service recipients always constitute reasonable cause to suspect abuse.

Administrative Bulletin 3:18 describes verbal/psychological abuse/mistreatment as

[a]ny verbal or nonverbal acts or omissions by a DHS employee . . . which inflicts emotional harm, mental distress, invocation of fear and/or humiliation, intimidation, degradation, or demeaning a service recipient. Examples include, but are not limited to: teasing, bullying, ignoring need, favoritism, verbal assault, or use of racial slurs, or intimidating gestures (i.e., shaking a fist at a service recipient).

[Ibid.]

Pursuant to Administrative Order 4:08, the penalty for physical or mental abuse of a patient, client, resident, or employee is removal, even for a first offense.

I **FIND AS FACT** all of the above, as to the undisputed background facts, the occurrence of interviews and generation of reports as described, and the existence of the applicable orders, rules and policies.

Testimony

Helen Ehrke, a quality assurance specialist, testified that she is responsible for the investigation of abuse and neglect complaints,⁵ and she thus reviewed the documentation and video, and conducted interviews relative to appellant's alleged abuse of patient W.R. On June 16, 2014, appellant had been assigned one-to-one supervision of W.R., requiring a duty to maintain visual contact and approximately a three-arms'-length distance, based upon the patient's precaution status. W.R. reported to her that appellant swung a clipboard at his head. According to Ehrke, a surveillance video depicting a view within the "day room" corroborated W.R.'s statement and showed appellant swinging at him. Viewing the video during her testimony, she described a point at which appellant held the clipboard and swung it toward W.R.'s head, causing him to then attack appellant. Another employee responded and restrained W.R. The

⁵ Ehrke testified that she had previously been a nurse at Ancora for seventeen years.

incident occurred within seconds, perhaps even in just one second. Ehrke substantiated an abuse charge against appellant because Ancora policy forbids any physical assault directed toward a patient that could cause physical or mental harm, and there was no justification for appellant swinging a clipboard at W.R.'s head.

On cross-examination, Ehrke acknowledged that based upon the reports she reviewed there had been no injury to W.R., though appellant was injured. She had interviewed half a dozen staff members, none of whom reported actually witnessing the incident. However, a staff person named Patricia Holguin reportedly saw W.R. spit in appellant's face and, when later walking out of the day room, heard W.R. say that appellant was trying to hit him with the clipboard. Further, although W.R. had also reported to a supervisor named Ngozi Azu that he was hit with the clipboard, a medical report indicates that he did not remember being hit.

Ngozi Azu, nursing supervisor at Birch Hall, testified that on June 16, 2014, she responded to a code and found W.R. in restraints. She asked why he was in restraints and he responded that nothing would have happened if appellant had not hit him with the clipboard. She did not witness the incident and did not observe any injuries to W.R.

Edmund Dillon, a twenty-nine-year Ancora employee and current section chief in the Office of Employee Relations, testified as to his familiarity with Ancora's policies, including his membership on the committee that wrote many of them. According to Dillon, Ancora has a zero-tolerance policy regarding patient abuse. The policies proscribing both physical and verbal/psychological abuse⁶ do not require intent. The act, rather than the actor's intention, is the issue. And there is no requirement that the patient sustain injury. Administrative Order 4:08 covers the relative rules and regulations as well as violations and penalties.

⁶ Dillon described mental abuse as including bullying, intimidating, threatening, and denying privileges.

Dillon also reviewed the reports and the video and was involved with preparation of the disciplinary charges. He explained that the abuse charge is based upon appellant swinging his right arm toward the patient's head while holding a clipboard, rather than an allegation that he hit the patient. Dillon agreed that prior to the incident, appellant had been calm. And when W.R. became the aggressor, appellant did retreat.

Appellant Kayode Lasekan testified that he began employment at Ancora in 2007 as an HSA and is now an HST. His responsibilities include monitoring and caring for patients and assuring their safety. Appellant testified that he has had no prior disciplinary problems.

Appellant was familiar with W.R., whom he knew to be assaultive and self-injurious, but with whom appellant had a good relationship. On June 16, he had one-on-one supervision (three arm's lengths) of W.R., who was agitated. At mealtime, W.R. put a knife and fork in his pocket, and after appellant tried to verbally redirect his behavior, W.R. spat in appellant's face. Another patient, M.D., told W.R. not to act that way. W.R. then placed his tray on the air conditioning unit and put an apple in his pocket. When appellant instructed him to sit down and eat, W.R. threatened to spit again, and then turned and spat at appellant. According to appellant, he raised his right arm to block the spit. Appellant demonstrated by raising his right arm, bent inward at the elbow. According to appellant, W.R. grabbed at his neck and appellant retreated to escape. A code was called, one staff member responded, and W.R. was placed in two-point restraints.

Appellant was out of work for seven days with an injury to his neck and fingers. He had given an initial interview within hours after returning from the emergency room on June 16, when he stated that W.R. "spat on my face, hit me, pulled my badge around my neck" (R-2). He was also interviewed (on July 3) approximately ten days after returning to work. At that time, he said that when he directed W.R. to a chair and table, W.R. put an orange in his pocket, threatened to and did spit on appellant, and threw food at appellant. Appellant blocked the food and spit, and W.R. grabbed appellant's badge and shirt. Appellant could not remember what happened with the clipboard, but

he did not hit W.R. After a code was called, he went to the hospital and was out from work for a week (R-3).

Appellant explained that if he had intended to hit W.R., he would have gone forward. But he just tried to redirect him. Appellant felt bad, but was not angry, when W.R. was spitting, because he knew that W.R. had other incidents earlier that day. He acknowledged familiarity with the policy regarding patient abuse and denied abusing W.R.

On cross-examination, appellant said that W.R. had been “difficult” before dinner and had initially spat at him after appellant forbade pocketing the knife and fork. As to appellant’s reaction, he testified that he felt bad but not disgusted, and he simply left W.R.’s spit on his face. After W.R. then placed his tray on the air conditioner and appellant redirected him to sit at a table, W.R. spat on appellant again. According to appellant, W.R. made racial slurs and threats that did not bother him, because he knew W.R.’s behavior; only the spitting bothered him.

Viewing the video during his testimony, appellant stated that it depicted the “second incident,” when he was redirecting W.R. When asked where in the video W.R. spat and threw food at him, appellant said that the food was in W.R.’s mouth. Appellant denied moving toward W.R. at all, and insisted that he merely was stopping the attack, blocking the food and the spit with the clipboard. In his statement on July 3 (R-3), appellant said he tried to block with his hand and admittedly did not mention the clipboard, explaining that the statement was just a summary.

The Video

The video (R-5) depicts an overhead view of the dayroom area—which has windows and an air-conditioning vent along the far wall, chairs along an adjacent wall, and chairs and rectangular tables in the middle of the room—at approximately 5:20 p.m. on June 16, 2014. People holding food trays gradually enter the area and take seats, mostly at the rectangular tables. At approximately 5:25 p.m., W.R., who has a food tray,

enters the area and walks across the room with appellant, who is wearing a hat and holding a clipboard in his right hand, walking a short distance behind him.

At the far side of the day room, W.R. places his tray on the air-conditioning unit and faces the window just above it, his back to the rest of the room. Appellant stops within a few feet just behind him. Appellant's arms are at his sides and W.R.'s arms are bent in front of him, above his tray on the air-conditioning unit. Appellant turns around, facing the day room, while W.R. remains stationary facing the window. Appellant then turns sideways and stands at an angle toward W.R., who turns left, slightly away from the window, with his left arm extended to his side near his pocket. W.R. first turns slightly right to again face the window, then turns left again (positioned sideways to appellant), and then slightly right to again face the window.

Next, appellant lowers his head momentarily, and then takes three steps toward W.R., who remains standing facing the window with his arms in front of him. With appellant's third step, he is positioned approximately two feet to the left of W.R., who had begun to turn his torso slightly left upon appellant's approach. Appellant swiftly swings his right hand holding the clipboard, with his right arm completely horizontal, at W.R.'s head. The clipboard appears to strike W.R.'s face, as his head turns right at the apparent point of contact and his upper body leans slightly backward. W.R. then advances with extended arms toward appellant. As appellant retreats, he holds up his right arm, which is bent at the elbow, so as to deflect W.R.'s advance. After appellant retreats several steps, the two men became stationary and face off before another staff member responds and assists in restraining W.R., who is knocked down and then escorted from the area and out of view.

Summary

Judicial rules of evidence generally do not apply to administrative-agency proceedings, N.J.R.E. 101(a)(3), and under the residuum rule, hearsay is admissible to corroborate or support competent evidence. N.J.A.C. 1:1-15.5(b). Under this rule, hearsay

may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.

[Weston v. State, 60 N.J. 36, 51 (1972).]

Thus, the ultimate finding must be supported by a residuum of competent evidence.

Here, the statements of Donald Menter (R-6), Winston Quarshee (R-9), Vivian Brown (R-4; J-10 (“Risk Management–104”)), Marc Mason (R-5), Patricia Holguin (R-7), and Norman Porter (R-8), as well as those attributed to W.R., are all hearsay, as none of those persons testified. The same applies to statements contained in the various reports where the declarant or author did not testify. While admissible under the residuum rule, no weight is given to any such hearsay statements not corroborative of competent evidence, particularly the events depicted on video, which is authentic and competent evidence, as specifically described above.

Further, making factual findings requires a weighing of the credibility of the witnesses, *i.e.*, “an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it ‘hangs together’ with other evidence.” Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). “The 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.) (citation omitted), *certif. denied*, 10 N.J. 316 (1952). 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). Testimony, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954).

Appellant was the only witness with firsthand knowledge of the incident in

question. His testimony that W.R. initially spat in his face and that his reaction was to leave it there is simply incredible. Appellant's testimony and prior statements are somewhat inconsistent, as with his description of food throwing, and they are contradicted by the surveillance video's depiction of events (J-5), which does not show W.R. spitting on or throwing food at appellant, but which does show appellant swinging his right hand with the clipboard at the head of W.R. Further, his hearing-room demonstration of his right arm elevated and bent inward as a defensive posture, to indicate his position at the time of the alleged swing, is inconsistent with the video depiction of his right arm fully extended horizontally toward W.R.'s head.

Based upon the testimony and exhibits, as well as the opportunity to observe the appearance and demeanor of the witnesses, I further **FIND AS FACT**:

1. During the evening shift at Ancora on June 16, 2014, appellant had one-to-one supervision of W.R. for precaution against suicide and self-injurious and assaultive behavior. Earlier that day W.R. was involved in an altercation with staff and had remained agitated.
2. At approximately 5:25 p.m., in the Birch Hall dayroom, W.R. placed his food tray on the air-conditioning unit and faced the window just above it, while appellant had followed him there and stopped within a few feet just behind him. Appellant wore a hat and held a clipboard in his right hand. Appellant turned toward the center of the day room and then turned back and stood at a side angle toward W.R., who remained stationary facing the window. W.R. slightly turned left and right: left, with his left arm extended to his side; right, to again face the window; then left again (positioned sideways to appellant); and then slightly right to again face the window.
3. At approximately 5:26 p.m., appellant lowered his head momentarily, and then took three steps toward W.R., who remained standing at the window (with his arms in front of him). From approximately two feet to the left of W.R., who had begun to turn his torso slightly left upon appellant's approach, appellant swiftly swung his right hand holding the clipboard, with his right arm completely

horizontal, at W.R.'s head. The clipboard appeared to strike W.R.'s face, W.R.'s head turned right at the apparent point of contact, and his upper body leaned back slightly. Notably, W.R.'s hearsay statements are inconsistent as to whether he was actually struck by appellant.

4. Appellant's aggression provoked W.R., who then physically retaliated by advancing toward appellant with extended arms. Appellant retreated, holding up his right arm that was bent at the elbow in order to deflect W.R.'s advance. Another staff member responded and assisted in controlling W.R., who was knocked down, restrained, and then escorted from the area and out of view.

5. After the incident, W.R. did not exhibit signs of injury. Appellant went to the hospital, where he was treated and released, and thereafter stayed out from work for seven days.

6. Appellant was not being attacked or assaulted by W.R. when appellant swung at W.R.'s head.

LEGAL ANALYSIS AND CONCLUSIONS

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, N.J.S.A. 11A:2-6, including conduct unbecoming an employee, N.J.A.C. 4A:2-2.3(a)(6), and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). On appeal from the imposition of such discipline, the appointing authority has the burden of proving justification for the action, N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a), and the employee's guilt by a preponderance of the competent, credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Preponderance may be described as the greater weight of the credible evidence. State v. Lewis, 67 N.J. 47 (1975).

"Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for government employees and

confidence in the operation 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, supra, 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)). Thus, unbecoming conduct may include behavior that is improper under the circumstances; it may be less serious than a violation of the law, but it is inappropriate on the part of a public employee.

The general causes for discipline set forth in N.J.A.C. 4A:2-2.3(a) include the present offense of other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). In this matter, the specific charges include violations of: (1) Administrative Order 4:08 C-3.1, physical or mental abuse of a patient, client, resident, or employee, and (2) Administrative Order 4:08 E-1.1, violation of a rule, regulation, policy, procedure, order or administrative decision, namely, Executive Policy AD LD 0401, HR-15 and Administrative Bulletin 3:18. Ancora’s Executive Policy AD LD 401 strictly prohibits patient abuse, which is “any act, omission or non-action . . . that does not have as its legitimate goal the healthful, proper and humane care and treatment of the service recipient, which causes or may cause physical or emotional harm or injury.” (J-6, emphasis added.) Additionally, Administrative Bulletin 3:18 (J-8) and Administrative Order 4:08 (R-1) describe physical abuse as a physical act directed at a service recipient of a type that could tend to cause pain, injury, anguish, and/or suffering. Administrative Bulletin 3:18 describes verbal/psychological abuse/mistreatment as “[a]ny verbal or nonverbal acts or omissions . . . which inflicts emotional harm, mental distress, invocation of fear and/or humiliation, intimidation, degradation, or demeaning a service recipient.” (R-1.) Under Ancora’s Policy HR-15 (J-7), patient abuse is not to be tolerated and, pursuant to Administrative Order 4:08, the penalty for physical or mental abuse of a patient, client, resident, or employee is removal, even for a first offense.

Here, while having direct one-to-one supervision of W.R., appellant swung his right hand holding a clipboard at W.R.'s head. That action by appellant caused W.R.'s head to turn to the right and his upper body to lean backward. It also provoked W.R. to physically retaliate against appellant, which resulted in W.R. being knocked down, restrained, and removed from the area. Even if, for the sake of argument, appellant had been spat upon by W.R., he was not physically threatened when he swung at W.R. and there could be no excuse for his conduct.

Appellant's conduct as an HST at Ancora was inappropriate and clearly improper under the circumstances. It was contrary to the "implicit standard of good behavior" incumbent upon a public employee. Hartmann, *supra*, 258 N.J. Super. at 40. Further, it had the clear capacity to cause physical or emotional harm or injury. Indeed, it was an act directed at a patient that could tend to cause pain, injury, anguish, and/or suffering (physical abuse), as well as emotional or mental distress, fear, intimidation, and/or humiliation (psychological abuse).

I therefore **CONCLUDE** that respondent has met its burden of proof, by a preponderance of credible evidence, to sustain the charges of conduct unbecoming a public employee, and other sufficient cause, namely, the above violations of orders, rules and policies.

Penalty

Generally, consideration must be given to the concept of progressive discipline, involving penalties of increasing severity. W. New York v. Bock, 38 N.J. 500 (1962). However, progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). It is well established that when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest, progressive discipline need not apply. In re Herrmann, 192 N.J. 19, 28 (2007); In re Stallworth, 208 N.J. 182 (2011). It has been held that termination without progressive discipline is appropriate in

circumstances where an employee cannot competently perform the work required of the position. Klusaritz v. Cape May Cnty., 387 N.J. Super. 305, 317 (App. Div. 2006), certif. denied, 191 N.J. 318 (2007).

The parties have stipulated that appellant has no disciplinary history. Nonetheless, respondent asserts that appellant's conduct demonstrated a lack of self-control, was inexcusable, and put both himself and others at risk. Without a doubt, appellant's behavior was unbecoming to his public position, and so egregious that even with his unblemished record, removal is appropriate. Ancora has a zero-tolerance policy regarding patient abuse, with a penalty of removal for a first offense. Further, there is no evidence that the policy is being arbitrarily or unreasonably applied to appellant.

This case is distinguishable from In re Knowlden, No. A-4963-11 (App. Div. April 30, 2014), <<http://njlaw.rutgers.edu/collections/courts/>>, where the court affirmed the Commission's reduction of a penalty of removal to a six-month suspension. The petitioner, an HST, was charged with physical abuse of a patient, inappropriate physical contact or mistreatment of a patient, falsification, conduct unbecoming a public employee, and violation of DHS policy and procedures, and was found to have punched a patient after being attacked. In addition to petitioner's unblemished employment record, the Commission considered—and the court agreed—that petitioner's conduct was a reflexive reaction to being punched by the patient.

In In re Wilkinson, No. A-2355-11 (App. Div. February 24, 2014), <<http://njlaw.rutgers.edu/collections/courts/>>, the court affirmed the Commission's removal of an Ancora employee charged with physical abuse of a patient and conduct unbecoming. The Commission, reversing the administrative law judge, found that the employee was the aggressor and that he had committed the charges by pushing the patient. As to penalty, the Commission noted that the employee's actions were sufficiently egregious so as to warrant removal, even without consideration of his prior record. The court agreed that removal was not disproportionate to the charge, especially given the employee's disciplinary history that included a major disciplinary infraction in 2004. The court noted the "strong public policy 'protecting the mentally ill

and developmentally disabled from abuse or mistreatment, to which they are particularly vulnerable, often being without the knowledge, ability, or resources to protect or vindicate their civil rights.” Wilkinson, supra, No. A-2355-11 (App. Div. February 24, 2014), <<http://njlaw.rutgers.edu/collections/courts/>> (citing Fees v. Trow, 105 N.J. 330, 338 (1987)).

Here, considering the nature of the incident and its surrounding circumstances, the potential adverse impact on Ancora’s patient population and staff, and appellant’s denial of responsibility, based upon the record, it is inescapable that appellant’s continued employment at Ancora, notwithstanding his lack of a disciplinary history, would be contrary to the public interest.

Accordingly, I **CONCLUDE** that respondent’s imposition of removal is the appropriate penalty in this matter.

DECISION AND ORDER

Respondent has proven by a preponderance of the credible evidence the charges of conduct unbecoming a public employee, and other sufficient cause, namely, violations of: (1) Administrative Order 4:08 C-3.1, physical or mental abuse of a patient, client, resident, or employee, and (2) Administrative Order 4:08 E-1.1, violation of a rule, regulation, policy, procedure, order or administrative decision, namely, Executive Policy AD LD 0401, HR -15 and Administrative Bulletin 3:18.

Therefore, it is hereby **ORDERED** that the charges, as set forth in the above paragraph, are **SUSTAINED**, and in light of the seriousness of these infractions, and for the reasons set forth above, respondent shall be **REMOVED** from employment as an HST at Ancora Psychiatric Hospital.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, 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.

September 17, 2015

DATE



ROBERT BINGHAM II, ALJ

Date Received at Agency:

9/17/15

Date Mailed to Parties:

9/17/15

/lam

APPENDIX

WITNESSES

For Appellant:

Kayode Lasekan

For Respondent:

Helen Ehrke

Ngozi Azu

Edmund Dillon

EXHIBITS

Joint Exhibits:

- J-1 Preliminary Notice of Disciplinary Action, dated August 1, 2014
- J-2 Amended Preliminary Notice of Disciplinary Action, dated August 5, 2014
- J-3 Final Notice of Disciplinary Action, dated January 24, 2014
- J-4 Video Log, dated June 16, 2014
- J-5 Video of Incident, dated June 16, 2014
- J-6 Executive Policy and Procedure Manual: subsection #0401, Reporting and Investigating Allegations of Patient Abuse and Professional Misconduct
- J-7 HR Policy Manual: HR-15 Patient Neglect and Abuse
- J-8 Administrative Bulletin 3:18: Policies and Procedures for Reporting and Investigating Allegations of Patient Abuse and Professional Misconduct
- J-9 Excerpts from N.J.A.C. 4A-Disciplinary Appeals
- J-10 Confidential incident report, dated June 16, 2014
- J-11 Medical Officers of the Day Response Note, dated June 16, 2014
- J-12 Mental Status Exam, dated June 17, 2014
- J-13 Restraint Records, dated June 16, 2014
- J-14 Ward Report, dated June 16, 2014

J-15 Discipline of Nursing Staff Assignments, dated June 16, 2014

For Appellant:

None

For Respondent:

- R-1 Administrative Order 4:08
- R-2 Kayode Lasekan Employee Statement Form, dated June 16, 2014
- R-3 Kayode Lasekan Interview Statement, dated July 3, 2015
- R-4 Vivian Brown Interview Statement, dated July 3, 2014
- R-5 Marc Mason Interview Statement, dated July 9, 2014
- R-6 Donald Menter Interview Statement, dated July 1, 2014
- R-7 Patricia Holguin Interview Statement
- R-8 Norman Porter Interview Statement
- R-9 Winston Quarshee Interview Statement