A-7

STATE OF NEW JERSEY

In the Matter of Darrick Valentine
Ann Klein Forensic Center,
Department of Human Services

CSC DKT. NO. 2016-894
OAL DKT. NO. CSV 16199-15

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

**ISSUED:** SEP 07 2017 **BW**

The appeal of Darrick Valentine, Senior Medical Security Officer, Ann Klein Forensic Center, Department of Human Services, removal effective May 27, 2015, on charges, was heard by Administrative Law Judge Jeffrey N. Rabin, who rendered his initial decision on July 27, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of September 6, 2017, 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 Darrick Valentine.

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
SEPTEMBER 6, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

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

**INITIAL DECISION**
OAL DKT. NO. CSV 16199-15
AGENCY DKT. NO. 2016-894

**IN THE MATTER OF DARRICK VALENTINE, DEPARTMENT OF HUMAN SERVICES, ANN KLEIN FORENSIC CENTER.**

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**William A. Nash**, Esq., appearing for appellant, Darrick Valentine (Nash Law Firm, LLC, attorneys)

**Angela Juneau Bezer**, Deputy Attorney General, appearing for respondent, Department of Human Services, Ann Klein Forensic Center (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record closed: June 15, 2017 Decided: July 27, 2017

BEFORE **JEFFREY N. RABIN,** ALJ:

## STATEMENT OF THE CASE

Appellant, Darrick Valentine, a Medical Security Officer at Ann Klein Forensic Center (AKFC), appeals disciplinary action seeking his removal for conduct unbecoming an employee, in violation of N.J.A.C. 4A:2-2.3(a)(6); physical or mental abuse of a patient, client or resident, in violation of Administrative Order (A.O.) 4:08 C3; and

inappropriate physical contact or mistreatment of a patient, client, resident or employee, in violation of Administrative Order C5, by the respondent, AKFC.

At issue is whether the disciplinary guidelines in the New Jersey Department of Human Services Disciplinary Action Program Policy (DAP) Handbook, Administrative Order 4:08 Table of Offenses and Penalties, which indicate removal for a first offense of physical abuse of a patient, may be mitigated to allow for a lesser penalty.

## PROCEDURAL HISTORY

Appellant was served with a Preliminary Notice of Disciplinary Action on May 27, 2015, suspending him without pay. Appellant did not request a departmental hearing, and on August 7, 2015, a Final Notice of Disciplinary Action was served, removing him from his position. Appellant filed an appeal, and the Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL), where it was filed on October 9, 2015. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On July 14, 2016, respondent filed a Notice of Motion for Summary Decision, pursuant to N.J.A.C. 1:1-12.5. On November 4, 2016, Dean J. Buono, ALJ, issued a ruling on the briefs which granted in part respondent's Motion, finding that appellant did commit the offenses he was charged with. Accordingly, the within hearing was held on the issue of discipline/penalty only.

The hearing was held on February 21, 2017.[1] Post-hearing letter-briefs were received from respondent on February 28, 2017, and appellant on March 24, 2017. The record closed on June 15, 2017.

[1] The recording system malfunctioned subsequent to the hearing. Accordingly, the parties reconstructed the record on June 14, 2017, pursuant to New Jersey Court Rule 2:5-3(f).

## FACTUAL DISCUSSION

Undisputed Facts from the Summary Decision:

1. On April 18, 2015, appellant punched patient J.G. at Ann Klein Forensic Center (AKFC).

2. Such conduct constituted conduct unbecoming a public employee.

3. Appellant physically or mentally abused a patient.

4. This conduct constituted inappropriate physical contact or mistreatment of a patient.

Undisputed Facts from the within Hearing:

1. There is a history of violence by patients against AKFC employees.

2. Appellant was aware his job as a Medical Security Officer at AKFC would entail dealing with patients with psychological issues and criminal records and that there would be the potential for violence against employees.

3. Appellant had been attacked twice by patients prior to the within incident.

4. Appellant received initial training and periodic training thereafter as to proper employee procedures, specifically defensive guidelines to be followed when a patient displayed aggressive or violent behavior, as set forth in the Policy on Personal Defensive and Control Techniques in Aggressive Patient Situations and Emergencies. (Exhibit R-2.)

5. Appellant was aware of the "zero tolerance" policy which prohibited the physical abuse of patients, and that the penalty for a first offense of physical

abuse was removal. There were no circumstances under which punching a patient was permitted at AKFC.

6. On April 18, 2015, appellant punched patient J.G. and did not follow the required defensive protocols. (Exhibit R-1.) Appellant had never been previously disciplined or reported for violations.

7. Appellant never sought treatment for psychological or emotional issues prior to April 18, 2015. At no time did appellant seek help from his employer or advise anyone at AKFC that he had experienced psychological or emotional issues due to the violent behavior of patients.

8. On March 23, 2016, appellant began seeing Victor J. Nitti, Jr., Ph.D., who diagnosed appellant with Post-Traumatic Stress Disorder (PTSD).

9. On February 3, 2017, Dr. Nitti wrote that appellant's PTSD had remitted and that appellant could return to his position at AKFC.

**Testimony:**

*For appellant:*

**Darrick Valentine**, appellant, began working at AKFC in July 2007, first as an Escort Officer, then as a Medical Security Officer in Unit 5. Appellant tried to adhere to the required defensive techniques in the past but they "didn't work" for him. He was aware that he had not followed those defensive guidelines in the incident with patient J.G., but that was because he experienced a "hot white flash," and did not remember punching J.G. It was only after the incident, when he saw his fists were bruised and somebody told him what happened, that he became aware he had punched a patient. Appellant also testified that when patient J.G. threatened and shoved him, he became scared, and that is why he did not follow the defensive guidelines.

Appellant had experienced sleep problems as a result of dealing with patients' violent behavior, but had never informed anyone at work. He sought no help until approximately one year after the incident, when he began seeing Dr. Nitti. Appellant said Dr. Nitti taught him coping exercises if a violent situation were to arise again.

Appellant testified that the white flash "cannot happen again," although Dr. Nitti never told him he was permanently cured. Appellant later acknowledged that he may again someday suffer the white flash and symptoms of PTSD.[2] Appellant stated he would still fear for his safety if he returned to work at AKFC.

Appellant stated, with no further detail, that he had also seen a Dr. Bereanu.[3]

Credibility:

In evaluating evidence, it is necessary to assess the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as "inherently incredible" when "it is inconsistent with other testimony or with

[2] Dr. Nitti's letter/report did not address appellant's "hot white flash." (Exhibit A-1.)
[3] This was the only reference to Dr. Bereanu made at this hearing. Dr. Bereanu was not produced as a witness and her letter/report dated May 5, 2016, was not offered into evidence. No weight has been given to her report in reaching the within conclusions.

common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Further, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), *certif. denied*, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

After having the opportunity to review the evidence and observe his testimony, I accept the appellant's testimony as credible and truthful. Accordingly, I **FIND** as fact that appellant feared for his safety at his job, and that there was no certainty on his behalf as to whether the white flash or PTSD could reoccur.

## LEGAL ARGUMENT AND CONCLUSION

The first issue is whether the disciplinary guidelines in the DAP Handbook Table of Offenses and Penalties, which indicated removal as the penalty for a first offense of physical abuse of a patient, could be mitigated to allow for a lesser penalty, in consideration of appellant's diagnosis of Post-Traumatic Stress Disorder.

Appellant's rights and duties are governed by the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.

In assessing the propriety of a penalty in a civil disciplinary action, the primary concern is the public good; factors to be considered are the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. North Princeton Development Center, 96 N.J.A.R. 2d 465 (CSV)(1996). Progressive

discipline is required in those cases where an employee is guilty of a series of offenses, none of which is sufficient to justify removal. Harris v. North Jersey Developmental Center, 94 N.J.A.R. 2d (CSV)(1994).

Respondent cited N.J.A.C. 4A:2-2.3(a)(6) for the charge of "conduct unbecoming a public employee"; penalties for this charge are set forth in N.J.A.C. 4A:2-2.2(a), which permit discipline ranging from suspension and demotion, to removal. For the other two charges, respondent cited the DAP Handbook Table of Offenses and Penalties. (Exhibit R-4.) In that Table, the charge of "Inappropriate physical contact or mistreatment of a patient, client, resident or employee" was listed as offense C-5, where for a first offense a supervisor had latitude to impose a minimum penalty of an "Official Reprimand" to a maximum penalty of "Removal"; for a second offense, the only penalty available was "Removal."

Because there was a range of penalties for these two charges, a civil service employer was entitled to consider the option of two-tier progressive discipline, which then allowed for mitigating factors to be considered.

But the focus here should be on the offense with the strictest penalty: offense C-3. The DAP Handbook Table of Offenses and Penalties indicates that for offense C-3, "[p]hysical or mental abuse of a patient, client, resident or employee," the penalty for the first offense is "removal." (Exhibit R-4).

Appellant committed a first offense of physical abuse of a patient. The issue then became whether mitigating factors may be considered in light of a penalty of removal for this first offense.

The DAP Handbook applies a "fairness" standard by allowing the "consideration of appropriate and demonstrable mitigating factors." (Exhibit R-4, Supplement 1, paragraph 1.) To mitigate the charges against him, appellant introduced evidence as to the violent working conditions at AKFC. Appellant claims these conditions caused him to suffer PTSD, and that the PTSD caused him to ignore the defensive guidelines he was trained to follow, leading to the physical abuse of patient J.G. Additionally,

appellant offered in mitigation the fact that he never had been previously disciplined or reported for violations.

In addressing these mitigating factors, it is noteworthy that appellant was aware from the beginning that he had accepted a position at a hospital housing mentally ill patients with criminal records, and that dealing with violent behavior was a part of the job for a Medical Security Officer. He was given training when he started his job at AKFC, specifically in how to deal with violent episodes, and received continuing training throughout his nearly eight years at AKFC. He was aware that there were no circumstances under which punching a patient was permitted. Appellant voluntarily undertook his job with full knowledge of what the position entailed.

Yet, despite being trained in AKFC defensive guidelines, appellant believed he was entitled to override those guidelines when he felt the need to defend himself. Further, appellant offered no assurances that if he returned to his job he would be willing to strictly follow the defensive guidelines required of AKFC employees, despite his awareness that the zero tolerance policy for physical abuse of patients meant his position could be terminated for even a single infraction.

PTSD is a serious condition which affects many who have dealt with stressful and violent occurrences. When considering it as a mitigating factor, however, one must look at the medical and mental history of the affected person.

Despite suffering and witnessing numerous violent encounters with patients, appellant never sought psychological or emotional help or counseling from AKFC during his nearly eight years working there (either before or after the incident with patient J.G.), although such help was available to employees. There had been no diagnosis of PTSD prior to the incident with patient J.G. Appellant never informed his supervisors that he was having emotional or psychological issues due to the violent nature of the job, or that he was having sleep problems. It was not until approximately one year after the incident with J.G.--and after he was removed from his job--that appellant sought help.

Accordingly, appellant has not on his own established a medical or mental history such that PTSD might have justified his physical abuse of a patient.

In deciding what weight to give Dr. Nitti's written letter/report (Exhibit A-1), it must be noted that Dr. Nitti did not appear at the discipline/penalty hearing to elaborate on his report; no foundation was laid as to whether Dr. Nitti had any expertise in identifying or treating PTSD; no information was given as to when the PTSD began or how long it would typically have taken to treat a patient for PTSD; Dr. Nitti wrote that appellant's PTSD was remitted and he could return to work, but never addressed in his report what the likelihood of reoccurrence was if appellant returned to AKFC; he taught appellant "coping methods" in case such a stressful situation did arise again; Dr. Nitti never stated that appellant was permanently cured. Appellant himself testified that there was a chance he might again display symptoms of PTSD. Finally, Dr. Nitti's letter/report never addressed the "hot white flash", a claim introduced by appellant at this hearing.

In focusing on the effect on the public good, as set out in George v. North Princeton Development Center, supra, there is concern for returning an employee to a job where he has for many years feared for his safety; that may have caused him to suffer from PTSD and/or may have caused a sleep disorder; and that may have caused him to blackout in fear at a critical moment when he needed to consciously follow safety guidelines in order to deal with an aggressive patient. Appellant stated he would still fear for his safety if he returned to work at AKFC.

Without any expert medical guidance as to the white flash scenario, or sufficient medical guidance as to how long it takes a person to fully recover from PTSD, or the likelihood of recurrence of PTSD, sending such an employee back to a job where he has to deal with aggressive patients would put those very patients in jeopardy of once again suffering physical abuse at the hands of a Medical Security Officer.

Accordingly, appellant's introduction of PTSD as a mitigating factor did not carry sufficient weight to overturn respondent's decision to remove appellant for physical abuse of a patient.

The second issue is whether the disciplinary guidelines in the DAP Handbook could be mitigated due to the appellant having no prior disciplinary actions on his record.

When considering removal of an employee, his entire prior work/disciplinary record must be considered. In re Stallworth, 208 N.J. 182 (2010). In the within matter, appellant had never been disciplined or reported at AKFC prior to the incident with patient J.G.

Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be considered. W. New York v. Bock, 38 N.J. 500 (1962). 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. Henry v. Rahway State Prison, 81 N.J. 571 (1980). Progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished record. Id.

Numerous cases have upheld the removal of an employee for a first violation. In re Hermann, 192 N.J. 19 (2007) (in upholding an employee's removal, the court held that while progressive discipline is a worthy principle, it is not subject to universal application); *See also* Henry v. Rahway State Prison, supra (progressive discipline bypassed by the court where an employee was engaged in severe misconduct, especially where the employee's position involved public safety and the misconduct caused a risk of harm to persons or property); Bowden v. Bayside State Prison, 268 N.J. 469 (App. Div. 1993), *certif. denied* 135 N.J. 469 (1994) (upholding the removal of a corrections officer for a first major discipline, having taken into consideration the important role that corrections officers play in dealing with inmates).

A security officer at a facility such as AKFC, which houses patients with criminal records and psychological issues, is charged with the safety of those patients while at the same time having to maintain order at the facility. The mere fact that appellant had

not been disciplined before is not sufficient to require the use of progressive discipline, and does not preclude his being removed for a first disciplinary action, especially when such misconduct has the potential to cause serious harm to patients at that facility.

Accordingly, none of the mitigating factors introduced by appellant carry sufficient weight to overturn respondent's decision to remove appellant for a first offense of physical abuse of a patient.

## ORDER

Accordingly, I **ORDER** that the disciplinary action of respondent Ann Klein Forensic Center in removing appellant Valentine from his position as a Medical Security Officer is **AFFIRMED**, and that the appeal is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION** pursuant to N.J.A.C. 1:1-18.6., by which law it is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 27, 2017
DATE

**JEFFREY N. RABIN**, ALJ

Date Received at Agency: July 27, 2017

Date Mailed to Parties: July 27, 2017

JNR/cb

## APPENDIX

## WITNESSES

**For appellant:**

Mark Smith

Stanley Sprouse

Darrick Valentine, appellant

Charles Moore, respondent representative

**For respondent:**

Sandra Ferguson

Hector Figueroa

## EXHIBITS

**For appellant:**

A-1 Letter from Victor J. Nitti, Jr., Ph.D. to appellant counsel William A. Nash, Esq.

**For respondent:**

R-1 DVD of April 18, 2015, incident between petitioner and J.G., along with viewing instructions

R-2 AKFC Policy on Personal Defensive and Control Techniques in Aggressive Patient Situations and Emergencies

R-3 Final Notice of Disciplinary Action served on petitioner, dated August 7, 2015

R-4 New Jersey Department of Human Services Disciplinary Action Program Handbook (DV-26 through DV-48)

## BRIEFS

**For appellant:**

Letter-brief dated March 24, 2017

**For respondent:**

Letter-brief dated February 28, 2017