



STATE OF NEW JERSEY

In the Matter of L.D.
 New Lisbon Developmental Center,
 Department of Human Services

FINAL ADMINISTRATIVE ACTION
 OF THE
 CIVIL SERVICE COMMISSION

CSC DKT. NO. 2017-1973
 OAL DKT. NO. CSV 00010-17 and
 HSL 17491-16
 (Consolidated)

ISSUED: JULY 9, 2019 BW

The appeal of L.D., Human Services Assistant, New Lisbon Developmental Center, Department of Human Services, removal effective March 3, 2016, on charges, was heard by Administrative Law Judge Joseph A. Ascione, who rendered his initial decision on April 16, 2019. 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 Commission, at its meeting of July 9, 2019, 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 L.D.

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
THE 9TH DAY OF JULY, 2019



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

L.D.,

Petitioner,

v.

**THE OFFICE OF PROGRAM
INTEGRITY AND ACCOUNTABILITY,**

Respondent,

and

**IN THE MATTER OF L.D.,
THE OFFICE OF PROGRAM
INTEGRITY AND ACCOUNTABILITY
SERVICES, NEW LISBON
DEVELOPMENTAL CENTER.**

OAL DKT. NO. HSL 17491-16

AGENCY DKT. NO. DRA 16-004

OAL DKT. NO. CSV 00010-17

AGENCY DKT. NO. 2017-1973

(CONSOLIDATED)

L.D., petitioner/appellant, pro se

Aaron J. Cruz, and Caroline Gargione, Deputies Attorney General, for the Office of Program Integrity and Accountability, New Lisbon Developmental Center, respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: June 25, 2018

Decided: April 16, 2019

BEFORE JOSEPH A. ASCIONE, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

HSL 17491-16

Appellant, L.D., a Human Service Assistant, was placed on the Central Registry of Offenders against Individuals with Developmental Disabilities ("Central Registry"), on

October 5, 2016, for the alleged February 29, 2016, physical abuse of a patient while employed at Holly Cottage, New Lisbon Development Center (hereafter, "Holly", and "New Lisbon".) The charged violations are of N.J.S.A. 30:6D-73 et seq. and N.J.A.C. 10:44D et seq. New Lisbon conducted an investigation and subsequently conducted a hearing on November 2, 2016, and sustained appellant's placement on the Central Registry. The Department of Human Services subsequent to appellant's then counsel's¹ November 4, 2017 appeal, transmitted this matter to the Office of Administrative Law ("OAL") on November 16, 2017, the OAL recorded the filing on November 17, 2017.

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On March 1, 2016, New Lisbon issued a Preliminary Notice of Disciplinary Action, ("PNDA") against appellant/petitioner, suspending L.P. with pay, pending removal. A new PNDA issued on March 3, 2016, concurrent with an Informal Predetermination Hearing, terminating pay, pending removal. New Lisbon charged Civil Service violations, under N.J.A.C. 4A:2-2.3(a) (6), Conduct unbecoming a public employee, and (11) Other sufficient cause; and violations of C. 3-1, Physical or mental abuse of a patient, C.5-1, Inappropriate physical contact or mistreatment of a patient, and C.8-2, Falsification, intentional misstatement of material fact in connection with work, and sought removal of appellant. On December 6, 2016, New Lisbon issued a Final Notice of Disciplinary Action ("FNDA") repeating all the above charges. On December 21, 2016, then counsel for appellant/petitioner filed the appropriate and timely appeal of the removal.

On May 5, 2017, the undersigned after discussion with counsel and their recommendations, issued an Order of Consolidation and Order Designating Predominant Interest. The HSL is designated as the predominant interest.

A hearing before the undersigned commenced and concluded on May 15, 2018. By correspondence, dated April 20, 2018, D.L. requested an interpreter and the ability to include a character witness.

¹ On November 1, 2017, counsel was relieved of representation pursuant to its motion and appellant/petitioner proceeded pro se.

The undersigned informed D.L. that the OAL did not provide interpreters, but she could request same from the Department of Human Services. The undersigned made no direction to provide D.L. with an interpreter. As an interpreter D.L. wanted her minister, George Asare Tandoh (Tandoh), who she also planned to be her character witness. In regard to the character witness, the undersigned informed her that a character witness was inappropriate for the findings of this matter. The undersigned did qualify Tandoh, as a Liberian English interpreter, his participation limited to only act as an interpreter. The Department of Human Services and petitioner/appellant delivered oral closing arguments, the record remained open until June 22, 2018, to submit additional exhibits. The record closed on June 25, 2018. Due to the undersigned unavailability, the Acting Director of the OAL, granted extensions of time to issue the Initial Decision pursuant to orders, dated August 9, 2018, September 24, 2018, November 8, 2018, December 24, 2018, February 8, 2019 and March 25, 2019.

TESTIMONY

James David Bowers Jr. (Bowers)

Bowers has three years of experience as an employee of New Lisbon as a Cottage Training Supervisor. Previously he was at Ancora Psychiatric Hospital and was employed as a residential living specialist. In February 2016, he served at Holly Cottage. Holly Cottage houses the highest functioning women population. One of the residents is a patient, A.R., who had a history of harming herself, and altercations with other residents. She is a vulnerable patient, is physically and mentally disabled, with a prosthetic boot for her right foot. Her protocol included a physical check every ten minutes. A.R., at the time was one of approximately twenty-three patients at Holly Cottage. There were six staff he supervised, regularly.

L.D. and Bowers had an interaction on February 29, 2016. L.D. complained to Bowers' supervisor, Mr. Steven J. Long. The nature of the complaint was that Bowers followed her around that day. Bowers saw that as his job function. L.D., the Human Service Assistant ("HAS"), needed to check A.R. every ten minutes. Bowers supervised

L.D. L.D. never complained to him. Bowers viewed L.D. as a less than an adequate employee due to attitudinal issues with supervision. Bowers identified the protocol used by New Lisbon regarding patient behavioral issues. He described it as, "Handle with Care." Physical force is prohibited, especially if one can back up to avoid confrontation.

On the evening of February 29, 2016, while Bowers attended to a patient snack distribution, L.D. distributed medications. He heard a commotion at Holly House, the commotion resulted from an interaction between L.D. and A.R. Bowers had to intervene to separate the two women. L.D. had been standing over A.R. at the couch. L.D. had grabbed A.R.'s hair and attempted to pull her up from the couch that A.R. had been seated upon. The two women grabbed each other's hair. On accomplishing the separation, L.D. pivoted around Bowers and struck A.R. with a closed fist in the ribs. , When Bowers reprimanded L.D. about the subsequent hitting of A.R., she responded, "Did you see what she did to me?"

Noreen Riche (Riche)

Riche is an HSA employee of New Lisbon with six years of service at the time of the incident. She did not observe the incident but acted after the incident to calm down an agitated A.R. by escorting her to the shower. Riche observed a red mark on A.R.'s torso. Riche called in the facility nurse to examine A.R. Riche also heard Bower's describe the incident in front of D.L. and D.L. had no reaction nor did she dispute Bowers' representation of the incident.

Steven J. Long (Long)

Long is the Head Cottage Training Supervisor at New Lisbon at the time of the incident, and served in that capacity ten months prior thereto. He views Bowers as a rigid employee but fair, and Long is satisfied with Bowers' services. He viewed L.D. as being great with clients and came to work on time. He viewed her as a good employee. He fielded more than one complaint between Bowers and L.D. over the issue of whether L.D. had been treated unfairly and whether L.D. followed Bowers' directions. He noted to the DHS investigator, Harlan Cannon, that the meeting on the day of the

incident was not a formal complaint, but minor. L.D. had previously complained about other supervisors. He described L.D. as having, "selective hearing" she "doesn't hear what you want her to do." Long did not view Bowers and L.D. as having a history. He did advise L.D. that she would be subject to disciplinary action if she did not follow Bowers' directions.

HSA's are to help patients. HAS are trained to apply redirection on agitated patients, verbally or with food offerings. Physical restraint, if necessary, is to be nonaggressive and limited. Striking or grabbing is prohibited. Before placement occurs of an HSA at a cottage, all training regarding patient interaction is completed. L.D. underwent this training.

Harlan Cannon (Cannon)

Cannon is a Quality Assurance Supervisor Investigator with seven years of service with the Department of Human Services, Office of Program Integrity and Accountability. He undertook the investigation of the incident of February 29, 2016. He interviewed the various witnesses who testified at the hearing, as well as some of the residents and others. His report is exhaustive and closer in time to the incident, being conducted in the summer of 2016. He reviewed the records of A.R. and identified her as a patient of the Division of Developmental Disabilities. He concluded that there was substantiation of abuse by L.D. against A.R. He based this despite L.D.'s denial. He interviewed A.R. and he found her to have a history of false reports against employees of New Lisbon, but he found her testimony to be consistent with the testimony of Bowers. Cannon did not find L.D. truthful. He found Bowers credible. His credibility finding related here are to explain his conclusion that abuse was substantiated. During his interviews, L.D. stated that Bowers threatened revenge. Bowers denied that to Cannon. L.D. denied the physical abuse.

L.D.

L.D. denied physical abuse of A.R. She claimed to have returned to work at the end of February 2016, after a proposed twenty-day disciplinary action, settled for seven

days. The action there is based upon L.D. complaint that another HSA had physically attacked a patient. That complaint by L.D. resulted in the charges against her for filing a false claim.

She claimed Bowers harassed her by following her around and she was the only one that was followed around by him. She claimed that A.R. was the "tiger." While A.R. attacked her, Bowers allegedly watched and did nothing. He eventually separated them. She does not remember any prior altercation with A.R. She claims it is not in her nature to lie and she never abused a patient before.

The factual findings set forth below are the result of credibility determinations. This tribunal cannot conclude Bowers took any inappropriate actions against L.D. She had an altercation with a patient and expressed frustration with the patient for numerous reasons. L.D. was specifically being heard to say, "Did you see what she did to me?" Additional frustrations included a day of short staff, extra responsibilities and concerns that she was being watched intensely by her supervisor, who she believed treated her unfairly. That frustration led to her actions which resulted in an assault on the patient who suffered from a disability. She denies any inappropriate action, but she has not supported her rendition of the facts with anything but her own testimony of being targeted. Weighing her testimony against the testimony of her supervisor, the preponderance of the evidence supports Bowers rendition of the facts, and the investigator's viewing of A.R.'s torso and scalp which reflected consistency with Bowers' rendition. The witnesses for the respondent were performing their duties. This tribunal does not accept that the observation of her supervisor is questionable. The incident occurred. This supports the ultimate findings.

FACT FINDING

After hearing the testimony and evaluating the documentary evidence and the credibility of the witness, I **FIND** as **FACTS** the following:

1. D.L. did understand the severity of the proceeding and could communicate effectively with the tribunal without need of an interpreter.

2. The undersigned accepted Tandoh, as a Liberian English interpreter, his value questionable to the tribunal. However, it provided petitioner/appellant with a person who she appeared comfortable assisting her.
3. On February 29, 2016, L.D., an employee of New Lisbon as an HSA, had an altercation with A.R. one of the patients at New Lisbon.
4. A.R. is a patient of the Department of Development Disabilities.
5. The DHS Office of Program Integrity and Accountability's Office of Investigations commenced its investigation on March 1, 2016. Cannon completed most of the investigation contemporaneously with the incident, although some additional statements were taken as late as June 27, 2016. The initial investigation report was issued on or about May 16, 2016, and concluded on August 17, 2016.
6. The DHS Office of Program Integrity and Accountability's Office of Investigations substantiated a finding of physical abuse by L.D. against A.R. and so notified L.D. by correspondence, dated October 5, 2016.
7. L.D.'s employment included training regarding the redirection of agitated patients, the appropriate restraint of patients, and the prohibition of pulling patient's hair and hitting patients.
8. In the evening of February 29, 2016, despite this training, L.D. did have an altercation with A.R. each pulling the other's hair. Bowers, L.D.'s supervisor, intervened, and separated the women. After the separation L.D. struck A.R. in the torso.
9. The investigation did reveal marks to A.R.'s scalp and torso consistent with the facts related by the witnesses.
10. There is no indication, other than L.D.'s words, that the complaint made by Bowers against L.D. is motivated by retaliation for L.D.'s prior complaint(s) against Bowers. One of those complaints having occurred the same day but prior to the incident charged.

11. L.D.'s actions are viewed as a "carless disregard" as to A.R.'s personal safety. L.D.'s actions lacked reasonableness and prudence. L.D. did what a person ought not to do to a person under one's care.
12. L.D.'s actions reflect conduct unbecoming a public employee.
13. L.D.'s actions are a physical or mental abuse of a disabled patient under her care.
14. L.D.'s actions include inappropriate physical contact or mistreatment of a patient.
15. L.D.'s made intentional misstatement of material facts in connection with her work records and in response to investigatory questioning.

LEGAL ANALYSIS AND CONCLUSION

HSL 17491-16

N.J.S.A. § 30:6D-73 provides as to individuals with developmental disabilities receiving care from State operated facilities.

The Legislature finds and declares that:

- a. It is in the public interest for the State to provide for the protection of individuals with developmental disabilities by identifying those caregivers who have wrongfully caused them injury;
- b. The safety of individuals with developmental disabilities receiving care from State-operated facilities or programs, from those facilities or programs licensed, contracted, or regulated by the Department of Human Services or Children and Families, or from State-funded community-based services shall be of paramount concern;
- c. It is the intent of this legislation to assure that the lives of innocent individuals with developmental disabilities are immediately safeguarded from further injury and possible death and that the legal rights of such individuals are fully protected; and
- d. Therefore, this act establishes a Central Registry of Offenders Against Individuals with Developmental

Disabilities in the Department of Human Services to prevent caregivers who become offenders against individuals with developmental disabilities from working with individuals with developmental disabilities.”

In furtherance of that finding, N.J.A.C. § 10:44D-4.1, provides for placement on the Central Registry of Offenders Against Individuals with Developmental Disabilities.

It states:

(a) Upon completion of every investigation of abuse, neglect or exploitation that results in substantiation of the allegation or allegations, the investigating unit shall determine whether the incident involves any or all of the elements specified in (b), (c) or (d) below.

(b) In the case of a substantiated incident of abuse, the caregiver acted intentionally, recklessly or with careless disregard to the well-being of the service recipient resulting in injury to an individual with a developmental disability or by exposing the latter to a potentially injurious situation.

1. Acting intentionally is the mental resolution or determination to commit an act.

2. Acting recklessly is the creation of a substantial and unjustifiable risk of harm to others by a conscious disregard for that risk.

3. Acting with careless disregard is the lack of reasonableness and prudence in doing what a person ought not to do or not doing what ought to be done.

(c) In the case of a substantiated incident of neglect, it shall be determined if the caregiver acted with gross negligence, recklessness or evidenced a pattern of behavior that caused harm to an individual with a developmental disability or placed that individual in harm's way.

1. Acting with gross negligence is a conscious, voluntary act or omission in reckless disregard of a duty and of the consequences to another party.

2. Acting with recklessness is the creation of a substantial and unjustifiable risk of harm to others by a conscious disregard for that risk.

3. A pattern of behavior is a repeated set of similar wrongful acts. ...

(e) If the investigating unit determines that the elements in (b), (c) and (d) above are present or absent, the persons enumerated in N.J.A.C. 10:44D-3.1(d) will be notified in writing that the caregiver, who had been substantiated for abuse, neglect and/or exploitation will be or will not be considered for placement on the Central Registry of

Offenders Against Individuals with Developmental Disabilities.

Here, despite L.D.'s denial, this tribunal is convinced the incident took place. Her supervisor, Bowers, and the patient, A.R., confirmed the altercation. A.R.'s torso and scalp also revealed indications of physical contact, consistent with the witnesses related versions of the facts.

I **CONCLUDE** that the DHS has shown by a preponderance of the evidence that A.R. is an individual protected by N.J.S.A. § 30:6D-73; upon the report of an occurrence of an incident on February 29, 2016, an investigation took place and concluded petitioner violated N.J.A.C. § 10:44D-4.1ff, when she had an altercation with a patient under her care. The investigation substantiated the finding that L.D. be placed on the Central Registry of Offenders Against Individuals with Developmental Disabilities.

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Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a). Such an employee may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a).

An appeal to the Civil Service Commission requires the OAL to conduct a de novo hearing to determine the employee's guilt or innocence, as well as the appropriate penalty if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987).

The burden of persuasion falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The appointing authority must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

The facts presented reflect that L.D. engaged with A.R., a person with a developmental disabilities, by grasping A.R.'s hair. L.D., after being separated by her superior, again made physical contact with A.R.'s torso. L.D. then made false statements during the investigation by denying that the altercation took place and alleging that her supervisor retaliated against her for her complaints to his supervisor.

I **CONCLUDE** that New Lisbon has shown by a preponderance of the evidence that appellant violated N.J.A.C. 4A:2-3(a)(6), Conduct unbecoming a public employee, and N.J.A.C. 4A:2-3(a)(12), Other sufficient cause, specifically, Violation of supplement 1, of Administrative Order 4.08 of the Department of Human Services Disciplinary Action Program, C. 3-1, Physical abuse of a client; C. 5-1, Inappropriate physical contact or mistreatment of a client; and C. 8-2, Falsification, intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report, investigation or other proceeding.

PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against a civil service employee, the proofs and penalty on appeal based on the charges presented must be evaluated. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962). Depending on

the conduct complained of and the employee's disciplinary history, major discipline may be imposed. West New York v. Bock, 38 N.J. at 522–24. Major discipline may include removal, disciplinary demotion, and suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

Civil Service regulations hold HSAs to a high degree of responsibility for his or her actions with a patient. Here L.D.'s prior disciplinary action relates to a previous falsification in connection with a complaint against another employee. That disciplinary violation resulted in a seven-day sanction. That appears to be her only prior violation and would dictate against termination. However, the actions here compel removal. L.D.'s altercation, even if a result of the day's frustrations, cannot be justified or tolerated. One may understand L.D.'s actions on a day of frustrations; however, the care of patient's, especially those protected by statute because of their vulnerability, cannot remotely countenance such action. The factual circumstances present cannot support a lesser penalty.

Accordingly, I **CONCLUDE** that the respondent's imposition of removal is appropriate.

ORDER

For the reasons stated above, I hereby **ORDER**:

Petitioner/appellant's petition opposing the placement of her name on the Central Registry of Offenders Against Individuals with Developmental Disabilities is **DENIED**; and

The respondent's actions placing L.D. on the Central Registry of Offenders Against Individuals with Developmental Disabilities is **GRANTED**.

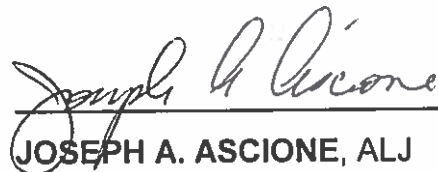
L.D.'s appeal of her Civil Service Violation is **DENIED**. New Lisbon's removal of L.D. is **AFFIRMED**.

I hereby **FILE** this Initial Decision with **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY**.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY**, who by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the Director of the Office of Program Integrity and Accountability does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest 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 **ADMINISTRATIVE HEARINGS COORDINATOR, OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY, 222 South Warren Street, 4th Floor, PO Box 700, Trenton, NJ 08625-0700**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 16, 2019 _____
DATE



JOSEPH A. ASCIONE, ALJ

Date Received at Agency:

4/16/19

Date Mailed to Parties:

4/16/19

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APPENDIX

LIST OF WITNESSES

For Petitioner/Appellant:

L.D.

For Respondent:

James David Bowers - Cottage Training Supervisor-New Lisbon

Noreen Riche - Care Giver retired-New Lisbon

Steven J Long - Head Cottage Training Supervisor-New Lisbon

Harlan Cannon - Quality Assurance Supervisor Investigator-New Lisbon

LIST OF EXHIBITS

For Petitioner/Appellant:

None

For Respondent:

- R-1 Final Notice of Disciplinary Action, dated December 6, 2016
- R-2 Preliminary Notice of Disciplinary Action, dated March 2, 2016
- R-3 Preliminary Notice of Disciplinary Action, dated March 1, 2016
- R-4 Investigation Report
- R-5 *Not admitted*
- R-6 D.L.'s Training Record
- R-7 Prior Disciplinary Record