PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
Office of Program Integrity and Accountability
P.O. Box 700
Trenton, NJ 08608

SARAH ADELMAN
Commissioner

DEBORAH ROBINSON
Director

FINAL AGENCY DECISION
OAL DKT. NO. HSL 03971-21

AGENCY DKT. NO. DRA #21-005

O.K.,

Petitioner,

v.

DEPARTMENT OF HUMAN SERVICES, OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY,

Respondent.

T. Lambert Tamin, Esq., for petitioner

Michael R. Sarno, Deputy Attorney General, for respondent (Matthew J. Platkin, Attorney General, State of New Jersey, attorney)

Record Closed: May 17, 2023 Decided: August 17, 2023

BEFORE **ELISSA MIZZONE TESTA,** ALJ

STATEMENT OF THE CASE

Petitioner, O.K., appeals the decision of respondent, Department of Human Services, Office of Program Integrity and Accountability, ("DHS"), of substantiated abuse by O.K. of individuals receiving services from the Division of Developmental Disabilities ("DDD"), while employed by Community Access Unlimited, Roselle, New Jersey ("CAU"); and the placement of O.K.'s name on the Central Registry of Offenders against Individuals with Developmental Disabilities ("Central Registry").

PROCEDURAL HISTORY

In or around October and November 2020, petitioner was employed as a direct support professional, commonly known as an awake overnight, at CAU. CAU provides assistance with daily living to its members, who are individuals with developmental disabilities. She worked at the Roselle location, where both members from the subject incidents resided. The members are referred to by their initials, T.A. and T.F. Both had intellectual disabilities and, thus, received services through DDD. On November 6, 2020, CAU submitted an incident report documenting allegations of abuse by petitioner against T.A. that had occurred on a prior unknown date. DHS opened an investigation into the matter. During the course of the T.A. investigation, DHS became aware of an additional allegation of abuse by O.K. against T.F., which launched a second investigation.

The investigations revealed that based on a preponderance of the evidence obtained, the allegations that O.K. verbally and psychologically abused T.A. and T.F. were substantiated. As a result, petitioner's name was placed on the Central Registry.

O.K. gave written notice of her intent to appeal on April 23, 2021, and DHS transmitted the matter to the Office of Administrative Law ("OAL") as a contested case, where it was filed on April 28, 2021.

Several telephone conferences and case management issues were conducted and addressed prior to the Hearings conducted on, April 22, 2022, May 19, 2022 and September 21, 2022. The parties were permitted to obtain transcripts and file written summations. The last submission was dated May 17, 2023, at which time the record was closed. An extension was granted to August 17, 3023, to file the Initial Decision.

STATEMENT OF FACTS

The parties to this action stipulated to the following **FACTS** identified below as points 1-8:

1. From August 3, 2020 until on or around November 4, 2020, petitioner was employed as a "direct support professional," which was commonly known as an "awake overnight" position, at Community Access Unlimited ("CAU").
2. CAU provides assistance with daily living to its "members," who are individuals with developmental disabilities.
3. Petitioner worked at CAU's Roselle location, where T.A. and T.F. resided. Both T.A. and T.F. have developmental disabilities and, thus, received services through DHS' Division of Developmental Disabilities ("DDD").
4. Annie Bonnett was also a CAU employee who worked at the Roselle location with O.K. during the same "awake overnight" shifts, which were from 11:00 p.m. – 9:00 a.m., at all relevant times.
5. The "awake overnight" position required CAU staff members to remain awake during the entire shift from 11:00 p.m. – 9:00 a.m., and that role involved assisting the members with their daily life needs.
6. The incident involving T.F. and petitioner occurred on election night – November 3,

2020 into November 4, 2020 - at around midnight.

7. During the incident with T.F., petitioner admits to removing her belt and holding it up during her altercation with T.F.
8. After DHS conducted investigations into allegations arising from allegedly two separate incidents involving petitioner and T.A. and then petitioner and T.F., DHS placed petitioner on the Central Registry for caregivers who have abused or neglected individuals with developmental disabilities, which petitioner has appealed.

TESTIMONY

ANNIE BONNET

1. T.A. Incident:

Bonnet, O.K.'s coworker, testified that she had witnessed both incidents involving petitioner, and she testified that her relationship with O.K. was fine at the time of both incidents. For several years, Bonnet has worked for CAU as an overnight caretaker and worked with petitioner, T.A. and T.F. in the Fall 2020 period - during the time of the two subject incidents. While acknowledging that T.A. is intellectually disabled, Bonnet described T.A. as very outgoing, always laughing and very bubbly. With regard to the incident between O.K. and T.A., Bonnet testified that both she and petitioner were working the 11:00 p.m. to 9:00 a.m. shift at CAU's apartment building in Roselle, New Jersey, on the second level, a few weeks before November 3, 2020. It is where T.A. and her roommate, K.A., lived at the time. (R-14). Once Bonnet went to the second level around 11:00 p.m., at the beginning of her shift, she testified that she heard some yelling and some altercation coming from T.A.'s bedroom. She looked into the room and saw both petitioner and T.A. screaming and yelling at one another. Both were in front of T.A.'s bed very close to each other's face. She heard T.A. saying to petitioner, "*You're mean, You're mean*." (emphasis added). Notably, Bonnet explained that she did not witness petitioner attempt to de-escalate the situation at all.

Bonnet further testified that T.A. was upset and crying. She then tried to get T.A. to relax and go to bed. Bonnet then spoke to petitioner, who she described as really mad and explained that the altercation started because T.A. evidently gave her the finger. The witness noted that such behavior was not a reason for O.K. to be yelling at T.A. because it was common for a member to give staff a finger. She further explained that it was the staff's job to redirect a member who does that. Bonnet felt that petitioner's conduct was very inappropriate.

When Bonnet was questioned regarding petitioner's denial that the incident ever occurred and that O.K. never had any personal issues with T.A. or abused her, Bonnet testified that such was not consistent with her observations because the incident happened right in front of her. (Ex. R-17),

2. T.F. Incident:

T.F. also lived at the same Roselle location as T.A. Prior to the incident, Bonnet testified that she never had an issue with T.F. nor was she ever threatened by him. Bonnet testified that

she knew he had a history of aggression with other members, but had never seen him aggressive towards staff or petitioner prior to November 3, 2020. (R-36 and R-37).

The incident between petitioner and T.F. occurred on November 3, 2020, in the living room. Both Bonnet and petitioner were working the 11:00 p.m. to 9:00 a.m. shift. Bonnet testified that T.F. was playing his music loudly from his phone and disturbed petitioner who was sleeping while on duty, which is not permitted. Petitioner asked T.F. to lower the music on his phone, which he refused to do. Then petitioner walked over to T.F., who was lying on the couch in the living room and tried to take T.F.'s phone from his hand, but she could not get it. Bonnet testified that there was yelling between O.K. and T.F and then O.K. took off her belt, at which time he stood up. Bonnet testified that petitioner looked and sounded very mad and angry when she removed her belt, while T.F. looked pretty surprised. T.F. then said, "[A]re you going to hit me, hit me." (1T58:3-4). Petitioner just said, "You need to give me that phone." (1T58:5). Bonnet testified that O.K. had the belt in her hand as she continued to demand that T.F. give her his phone. T.F. refused and then walked back to his room.

When petitioner took off her belt during the encounter with T.F., Bonnet explained that she was shocked and very surprised. Bonnet went on to explain that during the encounter, T.F. never made any gesture that looked like he was going to physically strike O.K. She further testified that petitioner never gave any impression that she was scared of T.F. Bonnet noted that T.F. never threatened to hit or raise his hand toward petitioner, nor did he charge, rush or corner her. When questioned about O.K.'s written version of the events from petitioner's email, Bonnet denied petitioner's claims that T.F. rushed her, raised his hand to hit her, or that T.F. said that he would hit O.K., or cornered her between the chair and wall. (Exhibit R-17)

Further, Bonnet testified that CAU trained them on ways to protect themselves from an aggressive individual and how to handle situations like the above. She testified that pursuant to CAU's policies and training, there was never an acceptable circumstance where an employee like petitioner could display a belt against a member or yell in a member's face.

NATASHA WHITE

White currently works for CAU as a full-time trainer of employees. As a trainer, she trains staff on various topics, such as defensive techniques, preventing abuse and neglect, medication administration, CPR, and first aid. She explained that CAU serves and assists adults living with varying cognitive and/or physical disabilities in both the residential and community setting. CAU and its staff refer to the adults as members because they consider them members of a community.

White recalls that O.K. had her new employee orientation in August 2020. She testified that on her first day of orientation, White trained petitioner and the other employees present on, *inter alia*, CAU's policy and procedures, Danielle's Law, Stephen Komninos' Law and preventing abuse and neglect. On the second and third days of orientation, employees learned about time keeping and medication administration and received computer training. The fourth day featured van driving, first aid and CPR training, while the fifth day taught them about the electronic health records system. White testified that after the five-day orientation, all employees then received forty hours of "shadow" training with an experienced employee. This "shadow" training occurred at the location that the employee was assigned to in order to get to know the different styles of the members that they would eventually work with in the future. Employees also learned how to handle difficult behaviors and verbally de-escalate situations with an

emphasis on ensuring that new staff understand that a member is not your child or your pet and that members should lead the lives that they want to live. Trainers convey that members do not have bedtimes or curfews and get to generally live their lives with staff supporting them.

As for specific training on how to respond to a verbally combative member, White testified that employees like petitioner got trained on this topic during the orientation courses for crisis intervention, positive behavior supports, Danielle's Law and Stephen Komninos' Law, as well as, through computer self-instructs. This is done during orientation. CAU taught employees that if they felt that they were in physical danger, they could use block or duck techniques or call for help; however, they were told never to strike a member. Furthermore, White described the "lead along" technique, which consists of gently leading the member away from the escalated situation. They covered several verbal de-escalation tactics too, such as making a noise to gain the member's attention and allowing them to emotionally vent.

White testified that petitioner's orientation form shows that she received training on the Abuse/Neglect/Exploitation policy, Danielle's Law and other personnel policies. (R-9) These included techniques on how to respond to a verbally or physically combative member. O.K. signed and initialed the Orientation Form as the employee, while White signed it as the trainer signifying petitioner's successful completion of the courses on August 3, 2020. (R-9). Similarly, White believed that O.K. adequately understood the concepts taught to her on defensive techniques from the training program, which was affirmed when White signed the completion and competency training forms for petitioner. (R-9) Furthermore, White explained that during training, the different forms of abuse were covered, including physical and emotional abuse as well as review of the CAU Abuse and Neglect Policy. White noted that the Abuse and Neglect Policy is accessible to all staff both in hard copy and electronic form.

White confirmed that petitioner received at least forty-five to forty-eight hours of training and was properly trained on how to handle and appropriately respond to combative members. White testified that CAU employees like O.K. are never trained or permitted to use a belt to respond to a member who is verbally or physically threatening them. The reason is because it is degrading, disrespectful and inconsistent with the training received on de-escalation tactics. White further explained that making threats against or yelling at a member is not a permissible defensive technique because it could further escalate the situation. She explained that just displaying a belt to a member during an altercation is not consistent with CAU's code of ethics. (R-52).

SHELIA McDOWELL

Since September 1996, McDowell has been employed with CAU, and she is currently the Managing Assistant Executive Director. At the time of the incident, her role was Assistant Executive Director and she supervised twenty to twenty-five employees, including petitioner. McDowell testified that CAU's members are all twenty-one years old or older and diagnosed with some type of developmental or intellectual disability. She explained that employees are informed about members' disabilities as early as the interview process. As for training, she discussed how employees receive a week of orientation and are instructed on several topics, including abuse and neglect concepts and medication administration, and then they shadow a senior employee for their first three shifts at their assigned location. McDowell testified that employees receive training on "Basic Counseling Skills" and "Defensive Techniques," which teach them how to re-direct members and protect themselves if a member is hitting, punching

or pushing staff or others or generally is verbally or physical combative. Thus, prior to an employee working on her first shift, she receives fifty-sixty hours of training.

McDowell testified that with respect to T.A. and T.F., they were at the same location where petitioner worked, which was CAU's Roselle apartment complex. She also confirmed that K.A. was another member at CAU and T.A.'s roommate at the time. With regard to T.A., McDowell noted that T.A. had a history of verbal, but not physical, aggression; and, for T.F., he had a history of verbal aggression, as well as physical aggression, but only against other members and not against staff. She confirmed that these traits are common for CAU members, and staff are made aware of such. For instance, each member's support plans are made available to staff through a binder kept at the members' location. She noted that employees also have access to CAU's policies.

Petitioner's position was a "full-time awake overnight," meaning that she worked from 11:00 p.m. to 9:00 a.m. and was required to remain awake during the entire shift. Her role was to assist the members living at that location with daily life needs.

McDowell identified (R-41) as part of CAU's Communication Log from November 3, 2020 for the Roselle location, which is used for communication between staff about the members and includes information on incidents, medication and the like. She testified that the Director of the Roselle location reviewed petitioner's entry for November 3, 2020, and noticed that O.K. wrote at one point, "We all woke up," which indicated that petitioner was sleeping. That was problematic because it was an awake overnight shift. When the Director questioned petitioner, the incident with T.F. was discussed and how petitioner allegedly threatened T.F. with a belt, which led to McDowell opening an investigation. During the T.F. investigation, she then learned about petitioner's incident before the T.F. incident.[1]

For the T.A. incident, T.A. told McDowell that petitioner told her to go to bed, yet T.A. did not want to and gave O.K. the middle finger. Petitioner then became very upset and started yelling at T.A. in her bedroom. O.K. removed her belt and, according to T.A., hit her in the leg. McDowell also interviewed Bonnet, who conveyed that she heard petitioner and T.A. yelling from the bedroom. Bonnet then went to the bedroom and saw petitioner in T.A.'s face yelling at her saying, "You don't do that to me, you don't do that to me." Bonnet was shocked because she did not know that a staff person would do anything like that and tried to calm the situation. McDowell next interviewed petitioner, who denied that the incident ever happened at all, even after she was informed what both T.A. and Bonnet had said about it. She denied yelling at T.A. and said that they never had any issues between them.

McDowell also personally investigated the allegations of abuse against T.F. She first interviewed T.F. He admitted that he refused to turn the volume on his phone lower or go to bed as O.K. requested, but said that petitioner tried to take his phone and yelled at him. T.F. then stated that petitioner at one point told him that he didn't scare her. She eventually took off her belt and held it up while yelling at him. His impression at the time was that petitioner was crazy and he thought that she was going to hit him and that it scared him.

She next interviewed Bonnet. Like T.F.'s account, Bonnet said that after T.F. refused to turn down the volume on his phone, petitioner went over to T.F. first and tried to take his phone. When she failed in that endeavor, O.K. said, "I'm - - you know, I was in the military, you can't scare me. You need to go to bed." At that point, Bonnet saw petitioner take off her belt and held

[1] McDowell explained that the T.A. incident was initially reported as occurring on November 6, 2020, but that was the date that CAU learned about the incident. The T.A. incident, however, occurred weeks before the November 3, 2020 incident with T.F.

it up while still yelling at T.F. Bonnet kept telling petitioner to calm down and observed that T.F. "looked scared like he didn't know what was going on." McDowell found it significant that petitioner went over to T.F. first because it could have instigated and made the incident worse when she approached him.

Finally, McDowell interviewed petitioner. Petitioner claimed that after T.F. refused to turn the volume on his phone down, he began yelling, so she tried to take his phone. McDowell testified that O.K. admitted to taking off her belt but said that she was trying to scare him away from her. McDowell testified that O.K. first denied taking off her belt, but then admitted to doing such.

McDowell also asked her about her comment that the phone volume caused them to all wake up, indicating that petitioner was sleeping. O.K. claimed that she meant the other residents were sleeping, not her, even though she used the word "we" when writing. Further, O.K. never called 911, nor did she report any injuries from the altercation.

McDowell testified that CAU's investigation for the T.A. incident concluded by substantiating the allegation of verbal abuse because the evidence showed that O.K. yelled at T.A. and yelling at a member is considered verbal abuse. With regard to the T.F. incident, McDowell concluded that the allegation of physical abuse was substantiated because CAU considered a threat with an object - petitioner's belt in this case - as a physical threat and, thus, physical abuse. Even so, McDowell testified that CAU also considered it a form of psychological mistreatment or abuse. Moreover, CAU substantiated the allegation of verbal abuse against T.F. due to petitioner's yelling. As a result of the two investigations, CAU terminated petitioner from her employment. (R-21, R-8 and R-46).

McDowell testified that as per CAU policy and practice, it is never acceptable for a CAU employee to use a belt to respond to a member who is physically or verbally threatening because it's abuse. Likewise, it is never acceptable for a CAU employee to yell at or verbally threaten a member in response to a member's verbal or physical threats because it's abuse. Finally, she reiterated that such behavior could escalate - rather than de-escalate - the situation.

Despite petitioner's claim that another CAU member, M.M., physically assaulted her in September 2020, McDowell testified that CAU has no record, report or documentation of any such incident.

O.K.

Petitioner testified that she was employed at CAU from August 3, 2020 until November 2020, as an overnight direct care worker. O.K. explained that she was assigned to take care of T.A., T.F. and two other residents who all had developmental disabilities at CAU's Roselle location. She also confirmed that in August 2020, she received five days of orientation training at CAU, which included learning about laws that guide staff and training on behaviors, as well as on CAU's Abuse, Neglect and Exploitation Policy.

With regard to the T.A. incident, petitioner denied that any altercation occurred between her and T.A. She denied that she ever removed her belt against T.A. and denied ever having an argument with T.A. Petitioner testified that T.A. was a very good lady and that they had a good relationship. Petitioner stated that Bonnet lied in her testimony and stated that Bonnet's account was not true regarding the T.A. incident. O.K. testified that she had no prior issues with T.A. and that T.A. had never previously made false allegations against her. Similarly, she had no prior issues with Bonnet or K.A.

As for the T.F. incident, petitioner confirmed that it occurred on election night, November 3, 2020 into November 4, 2020, at around midnight. Petitioner confirmed that Bonnet witnessed the entire incident. She testified that she asked T.F. to lower the volume on his phone and that he eventually rushed her and acted as though he was going to hit her. Petitioner stated that she got scared. She claimed that he also said he was going to hit her while she moved back telling him not to hit her. Petitioner did admit in her testimony that she removed her belt and held up her belt to T.F. and told him to move back and not to hit her. He then went to his room. Petitioner conceded that she removed the belt with the purpose of getting T.F. away from her. O.K. also admitted that no CAU policy or training ever permitted a staff member to use her belt against a member for any purpose. Petitioner further testified that her CAU position did not permit her to sleep during her shifts, but that she did write in the logbook (R-41) regarding the T.F. incident that "we all woke up."

Petitioner testified that for the T.A. incident, Bonnet, T.A. and K.A. all have to be either lying or inaccurate for her version to be true because their accounts contradict petitioner's. Similarly, for the T.F. incident, petitioner agreed that both Bonnet and T.F. have to be lying or inaccurate for her version to be true because their accounts contradict petitioner's.

Finally, she testified that if she loses this case, she could no longer work with developmentally disabled individuals in New Jersey. Thus, she agreed that she has a lot at stake regarding the outcome of this case.

MACKENZIE WECHSLER

Since 2018, Wechsler has been employed as an investigator at DHS's Office of Investigations. She previously worked as a Habilitation Plan Coordinator for the DDD, where she interacted with individuals with developmental disabilities on a daily basis. As for her role as an Investigator, she conducts civil investigations for incidents of abuse, neglect and/or exploitation, including collecting relevant documents and interviewing witnesses, and then writes a final report on the investigation. The goal is to determine whether an allegation of abuse is substantiated or unsubstantiated.

Wechsler's investigation found that both T.A. and T.F. were individuals receiving services from the DDD. Wechsler interviewed T.A., who told her that petitioner had threatened her with a belt, hit her pillow, and hit her bed and hit her leg during an escalating argument. Wechsler researched T.A.'s history and found that T.A. did not have a history of false allegations. She next interviewed K.A., who was an eye witness and T.A.'s roommate at the time. K.A. saw petitioner enter their bedroom and threatened that she would hit T.A. with a belt and saw petitioner hit the bed and pillow with her belt, and then slammed the door on her way out. Subsequently, Wechsler interviewed Bonnet about the incident, who said that the T.A. incident occurred approximately two weeks prior to the T.F. incident, or roughly in late October 2020. Bonnet said that she saw both petitioner and T.A. in each other's faces, arguing and yelling, which Wechsler noted was consistent with Bonnet's two written statements about the altercation.

Finally, she interviewed petitioner, who denied that the entire incident happened with T.A. She denied that an argument occurred or that she removed her belt. Moreover, petitioner initially told the investigator that they were lying, yet when Wechsler attempted to clarify whom she meant by "they", petitioner denied previously making the statement to the investigator. Wechsler testified that this issue negatively affected petitioner's credibility for the

investigation because O.K. either forgot or was lying about what she previously told the Investigator.

As for the investigation into the T.F. incident, Wechsler first interviewed T.F. He said that on the night of the incident, petitioner was mad, removed her belt and said she would hit him, so he had to protect himself and stand his ground. She researched T.F.'s service plan and did not find a history of T.F. making false allegations. The Investigator also interviewed Bonnet about the T.F. incident, and she revealed that petitioner and T.F. argued about turning down the volume on his phone, which then escalated. Eventually, they were yelling in each other's faces and petitioner moved closer to T.F., took off her belt, held it, and said that she would hit him. While petitioner admitted to moving closer to T.F. at some point, claiming that it was to ensure that he could hear her, the Investigator testified that O.K.'s excuse was problematic because the room was a small area, "so it's questionable why . . . you need to move closer so someone could hear you." Moreover, the Investigator continued, "that behavior could be considered provocative, attached to the yelling, and then removing the belt, like the whole scenario seemed that the incident had occurred as verbal and psychological abuse." (2T148:12-150:17).

Wechsler also interviewed petitioner about the T.F. incident. Petitioner claimed that T.F. rushed her, which made her scared, so she removed her belt and he said "Don't hit me." The investigator asked petitioner if she knew of proper responses when a member was threatening staff, and she mentioned that she could have called 9-1-1 or blocked him or run away. Wechsler relied on this statement to conclude that petitioner had indeed received the State-mandated trainings for responding to such situations.

The Investigator looked into petitioner's training history, too. She confirmed through records that O.K. received training on Danielle's Law, which is for life threatening emergencies, Stephen Komninos' Law; abuse, neglect and exploitation, and CAU's Incident Reporting Policy. None of the policies permitted staff to yell in a member's face or use a belt against a member, nor did any of the CAU training teach such. Furthermore, because petitioner wrote in the Communication Log for that shift that "we all woke up," indicating that she was sleeping on her shift, it violated CAU's Timekeeping Policy.

Despite petitioner's claim that another member previously beat her, the Investigator looked into the alleged incident, but was unable to find any incident report or corroboration that the incident occurred.

With regard to the T.A. allegations, Wechsler substantiated the verbal and psychological abuse, but did not substantiate the physical abuse. She found corroborating evidence that petitioner yelled in T.A.'s face and threatened her.

For the T.F. incident, the Investigator substantiated the verbal and psychological abuse allegations because of corroborating evidence that petitioner removed her belt while yelling in T.F.'s face.

It is necessary for the ALJ to assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. 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, internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. Unites 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 trier of fact

may reject testimony as "inherently incredible," and may also reject testimony when "it is inconsistent with other testimony or with common experience" or it is "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "[t]he interests, 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).

The only testimony that was consistent throughout all of witnesses' testimony is that O.K. took off her belt and held up her belt to T.F. in a threatening manner and that O.K. has received all of the training on Danielle's Law, which is for life threatening emergencies, Stephen Komninos' Law; abuse, neglect and exploitation, and CAU's Incident Reporting Policy. In addition, all the testimony was consistent in that an awake overnight caretaker is to stay awake during his/her entire shift. As to the remainder of the testimony presented, every witnesses' testimony was consistent with one another, except for O.K.'s. O.K. even agreed that in order for her version to be true as to the T.A. and T.F. incidents, all of the other witnesses' testimony and evidence presented must be a lie or inaccurate. As the trier of fact, the ALJ must also consider O.K.'s interest in the outcome, motive or bias. O.K testified that if she loses this case, she could no longer be able to work with developmentally disabled individuals in New Jersey. Thus, she agreed that she has a lot at stake regarding the outcome of this case. Further, the outcome of this case could have serious consequences as to her immigration status. Therefore, in evaluating the testimony and evidence, THE ALJ FOUND all witness, except O.K., to be credible witnesses.

LEGAL DISCUSSION AND CONCLUSION

It is the policy in New Jersey to provide for the protection of individuals with developmental disabilities. N.J.S.A. 30:6D-73(a). The Legislature created the Central Registry to protect the legal rights and safety of individuals with developmental disabilities "by identifying those caregivers who have wrongfully caused them injury" and preventing those caregivers who become offenders from working with individuals with developmental disabilities in the future. Ibid. The CRA establishes a Central Registry of Offenders Against Individuals with Developmental Disabilities ("Central Registry") for caregivers that are found to have committed substantiated acts of abuse, neglect, and/or exploitation against individuals with developmental disabilities. N.J.S.A. 30:6D-77(a)-(b). A "caregiver" is defined under the Act as "a person who receives State funding, directly or indirectly, in whole or in part, to provide services or supports, or both, to an individual with a developmental disability; except that "caregiver" shall not include an immediate family member of an individual with a developmental disability." N.J.S.A. 30:6D-74. The CRA prohibits any caregiver placed on the Central Registry from receiving "State funding, directly or indirectly, in whole or in part, to provide services or supports, or both, to an individual with a developmental disability." N.J.A.C. 10:44D-1.1(a).

Here, after investigating this matter, DHS found that the findings substantiated that O.K. abused T.A. and T.F. and that her actions met the statutory and regulatory criteria for placement of her name on the Central Registry. It is undisputed that O.K. was a caregiver for T.A. and T.F.

within the meaning of the Act, and that T.A. and T.F. are individuals receiving services from the Division of Developmental Disabilities. The inquiry here is two-fold. The first issue is whether O.K. committed an act of abuse against T.A. and T.F. If so, the second question is whether O.K.'s actions were intentional, reckless or with careless disregard to the well-being of T.A. and T.F. which could have resulted in fear or injury to them or potentially exposed them to an injurious situation within the meaning of the Act.

The burden of proof falls on the agency in enforcement proceedings to prove a violation. See Cumberland Farms, Inc., v. Moffett, 218 N.J. Super, 331, 341 (App. Div. 1987). As such, DHS bears the burden of establishing the truth of the allegations by a preponderance of the competent, credible evidence. See, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). 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, 275 (1958). What is required to meet this burden is fact-specific and as such, must be judged on a case-by-case basis.

"Abuse" is defined under the regulations as "wrongfully inflicting or allowing to be inflicted physical abuse, sexual abuse or verbal or psychological abuse or mistreatment by a caregiver upon an individual with a developmental disability." N.J.A.C. 10:44D-1.2; see also, N.J.S.A. 30:6D-74. "Physical abuse" is defined as any acts by a caregiver against an individual with a developmental disability that causes "pain, injury, anguish or suffering" and include, but are not limited to, "the individual with a developmental disability being kicked, pinched, bitten, punched, slapped, hit, pushed, dragged or struck with a thrown or held object." Ibid. "Verbal or psychological abuse or mistreatment" is defined as any "verbal or non-verbal act or omission by a caregiver that inflicts one or more of the following: emotional harm; mental distress; or invocation of fear, humiliation, intimidation or degradation to an individual with a developmental disability." N.J.A.C. 10:44D-1.2. Examples include, but are not limited to "bullying; verbal assault; [and/or] intimidating gestures, such as shaking a fist at an individual with a developmental disability." Ibid.

Here, the evidence shows that O.K. yelled at and used her belt against T.A. and T.F. that upset and/or scared them. With respect to the T.A. incident, Bonnet saw O.K. yelling in T.A.'s face that caused T.A. to cry and become upset. (R-1). In addition, both T.A. and K.A. reported that O.K. threatened to hit T.A. with her belt while she wielded it. It should be noted that O.K. had denied that this incident occurred. However, it was found that O.K.'s testimony was not credible. As for the T.F. incident, it is undisputed that both petitioner and T.F. were yelling at each other, that O.K. removed her belt and then held her belt up to T.F. in a threatening manner. Regardless of the fact that O.K. testified that the motive behind her threatening behavior towards T.F. was to instill fear in T.F. because she was scared of him and wanted him to stay back from her, the behavior and gesture was still threatening in order to instill fear and to cause T.F. to be scared that he may be hit. It is further undisputed that petitioner had received all of the requisite CAU training and that petitioner's conduct was not permissible under CAU's policies or training and that she did not follow the appropriate protocol when dealing with T.A. and T.F.

In sum, the **ALJ CONCLUDED** that O.K.'s acts fall within the scope of the CRA for verbal, and/or psychological abuse of T.A. and T.F., as developmentally disabled individuals.

The second prong of this inquiry is whether O.K.'s actions were intentional, reckless or with careless disregard to T.A. and T.F.'s well-being. To warrant the inclusion of a caregiver on the Central Registry for a substantiated incident of abuse, "the caregiver shall have acted with

intent, recklessness, or careless disregard to cause or potentially cause injury to an individual with a developmental disability." N.J.S.A. 30:6D-77(b)(1). The Act's implementing regulations, promulgated by DHS, specifically defines these mental elements:

> 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.
>
> [N.J.A.C. 10:44D-4.1(b).]

In sum, **ALJ CONCLUDED** that O.K.'s conduct in both the T.A. and T.F. incidents was intentional, reckless and/or with reckless disregard. O.K.'s yelling and use of her belt was to control and or intimidate T.A. and T.F. Further, it can be deduced that since O.K. used this conduct against two patients, then her conduct was intentional. The **ALJ AFFIRMED** DHS's placement of O.K.'s name on the Central Registry.

The **ALJ CONCLUDED** that respondent has proved by a preponderance of the undisputed, credible evidence that petitioner committed acts of verbal, and/or psychological abuse against T.A. and T.F., individuals with developmental disabilities, and her placement on the Central Registry was appropriate.

ORDER

The ALJ **ORDERED** that petitioner's appeal be **DENIED**.

The ALJ hereby **FILED** her Initial Decision with the **DIRECTOR OF THE OFFICE OF PROGRAM INTEGRITY AND ACCOUNTABILITY** for consideration. 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 a final decision in this matter. 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 shall become a final decision in accordance with N.J.S.A. 52:14B-10.

FINAL AGENCY DECISION

Petitioner's exceptions:

Petitioner disagrees with the finding and conclusion that she committed an act of abuse against T.A. and T.F. and that her actions were intentional, reckless or with careless disregard to the wellbeing of T.A. and T.F. Respondent did not meet its burden by a preponderance of the evidence that Petitioner committed an act of verbal and/or psychological abuse against individuals with developmental disabilities, and as such her name should not be placed on the Central Registry.

Respondent's exceptions:

STANDARD

"The head of the agency, upon review of the record submitted by the ALJ, shall adopt, reject or modify the recommended report and decision." N.J.S.A. 52:14B-10(c). The agency head "may not reject or modify any findings of fact as to issues of credibility, unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record" because, generally, it is the trier of fact who is "well-suited to make credibility determination[s] about witnesses' testimony." *H.K. v. N.J. Dep't of Hum. Servs.*, 184 N.J. 367, 384 (2005) In short, the standard at this stage is whether the "record supported the ALJ's findings." *H.K.*, 184 N.J. at 385.

INTRODUCTION

The Office of Administrative Law ("OAL") held hearings on April 22, 2022, May19, 2022, and September 21, 2022, which were followed by the parties' filings of their written summations. The OAL closed the record on May 17, 2023, and issued the Initial Decision on August 17, 2023, by concluding that Petitioner's conduct in both the T.A. and T.F. incidents constituted "abuse" with "intentional, reckless" and/or careless disregard through her "yelling and use of her belt" in an attempt to "control and intimidate T.A. and T.F."; that "it can be deduced that since O.K. used this conduct against two [members], then her conduct was intentional"; and that DHS "has proved by a preponderance of the undisputed credible evidence that petitioner committed acts of verbal and/or psychological abuse of T.A. and T.F., individuals with developmental disabilities, and her placement on the Central Registry was appropriate." Initial Decision, pgs. 1, 18-19.

Despite Petitioner's exceptions, the Director should affirm the Initial Decision in its entirety for two reasons. First, the exceptions fail to conform to the requirements under N.J.A.C. 1:1-18.4 and, consequently, should be rejected prior to any substantive review. Citing the extremely detailed testimony, it is unmistakably clear from the factual record, in both its documentary and testimonial aspects, that Petitioner committed acts of verbal and/or psychological abuse against T.A. and T.F. under the Central Registry Act. Thus, the Director should affirm the Initial Decision and uphold Petitioner's placement on the Central Registry.

THE DIRECTOR SHOULD AFFIRM THE INITIAL DECISION BECAUSE PETITIONER'S EXCEPTIONS FAIL TO MEET THE REQUIREMENTS OF N.J.A.C. 1:1-18.4 TO WARRANT REVIEW AND BECAUSE THE RECORD THOROUGHLY SUPPORTS THE INITIAL DECISION'S FINDINGS AND CONCLUSIONS.

Petitioner's Exceptions Do Not Meet the Requirements of N.J.A.C. 1:1-18.4. N.J.A.C. 1:1-18.4(b) states that "exceptions *shall*" specify "the findings of fact, conclusions of law or dispositions to which exception is taken"; "set out specific findings of fact, conclusions of law or dispositions proposed in lieu of or in addition to those reached by the judge"; and "set forth supporting reasons." (emphasis added). Moreover, it requires that exceptions "to factual findings shall describe the witnesses' testimony or documentary or other evidence relied upon," while exceptions "to conclusions of law shall set forth the authorities relied upon." *Id.* Petitioner has not

complied with these mandates.

Petitioner's exceptions consist of only two conclusory sentences stating, without any elaboration, that are merely statements of disagreement with the Initial Decision's "finding and conclusion" and that DHS "did not meet its burden." It does not make any citations to the record, nor does it specify "the findings of fact, conclusions of law or dispositions to which exception is taken." N.J.A.C. 1:1-18.4(b). It similarly does not "set forth supporting reasons" for its conclusory statements, including "describ[ing] witnesses' testimony or documentary or other evidence" or citing support from "authorities relied upon" as required. *Id.* Consequently, Petitioner's exceptions fall short of the regulation's requirements to warrant any substantive review. Thus, without more, the Director should reject Petitioner's exceptions for its noncompliance with N.J.A.C. 1:1-18.4 and uphold the Initial Decision in its entirety.

EVEN IF THE DIRECTOR WERE TO ENGAGE IN A SUBSTANTIVE REVIEW OF THE INITIAL DECISION, ITS FINDINGS AND CONCLUSIONS WERE EXCEEDINGLY SUPPORTED BY THE RECORD.

The applicable standard to Central Registry cases is a preponderance-of-the-evidence burden. It looks at whether "it is more likely than not" that the evidence reveals abuse occurred. The Director should find that the record supports the Initial Decision's findings and conclusions; that DHS has met its burden here. For instance, the ALJ heard testimony from Annie Bonnet, who was Petitioner's co-worker at the time of the incidents and, in fact, witnessed both altercations. (*See* Initial Decision, pg. 4). The record reflects that Bonnet heard T.A. and Petitioner "screaming and yelling at one another." *Id*. Bonnet also stated that T.A. was upset and crying as a result and that she did not witness Petitioner "attempt to de-escalate the situation at all." *Id.* Bonnet also said that Petitioner's claim that the T.A. incident did not occur "was not consistent with her observations because the incident happened right in front of her." *Id.* at pg. 5.

As for the T.F. incident, the record reflects that on November 3, 2020, Bonnet saw Petitioner and T.F. arguing about lowering the music on his phone; then, Petitioner "went over to T.F. first" and took off her belt while "look[ing] and sound[ing] very mad and angry." *Id.* at pg. 5. She held the belt in her hand while she continued to demand that T.F. give her his phone. *Id.* Notably, Bonnet stated that T.F. never made any threatening gesture toward Petitioner, nor did Petitioner give any impression that she was scared of T.F. at any point, as was her claim at the hearing. *Id.* T.F., however, did think Petitioner was "crazy" and "he thought she was going to hit him and that it scared him." *Id.* at pg. 10. In fact, consistent with Bonnet's testimony, Petitioner admitted "to taking off her belt" and to "trying to scare" T.F. *Id.* at pgs. 10,12. Finally, Bonnet confirmed that CAU did not permit any employee to yell in a member's face or use a belt to control a member. *Id.* at pg. 6.

Moreover, the ALJ relied upon, and the record reflects, the testimony of Natasha White, a CAU full-time trainer of employees. *Id.* at pg. 6. White testified that CAU trained employees to use "block or duck" techniques if they felt in physical danger or to call for help. *Id.* at pg. 7. CAU further trained employees on several de-escalation tactics, such as making a noise to gain the member's attention and allowing them to emotionally vent. *Id.* The training records admitted into evidence as R-9 confirmed Petitioner's proper training on these techniques, as well as her education on the different forms of abuse. *Id.* White importantly testified that CAU employees are "never trained or permitted to use a belt to respond to a member who is verbally or physically threatening them" because it is "degrading and disrespectful and inconsistent with the training

received on de-escalation tactics." *Id.* Furthermore, she testified that yelling at a member is not a permissible defensive technique because it could further escalate the situation. *Id.* at pgs. 7-8. And, she noted that "just displaying a belt to a member during an altercation is not consistent with CAU's code of ethics." *Id.* at pg. 8 (citing R-52). Shelia McDowell -- CAU's Managing Assistant Executive Director -- testified consistent with White that CAU considers yelling at a member and using an object, like a belt, to threaten a member as forms of abuse. *Id.* at pgs. 8, 10-11.

The record reflects that DHS Investigator, Mackenzie Wechsler, interviewed T.A., who "did not have a history of false allegations" and who told her that Petitioner "had threatened her with a belt." *Id.* at pg. 13. Moreover, Wechsler also interviewed K.A., who was T.A.'s roommate and saw Petitioner enter their room and threaten T.A. with the belt. *Id.* Likewise, she interviewed T.F., who did not have a history of making false allegations either and said that Petitioner yelled at him and threatened him with her belt. *Id.* at pgs. 13-14.

Petitioner testified that she was aware of the proper responses if a member was threatening to staff, such as calling 911 or blocking or running from the altercation. *Id.* at pg. 14. Petitioner admitted in her testimony that for her versions of both incidents to be true, Bonnet, T.A., K.A., and T.F. all have to be "lying or inaccurate" "because their [eyewitness] accounts contradict petitioner's." *Id.* at pg. 12.

Given the record of evidence and testimony, the Initial Decision both acknowledged the proper preponderance-of-the-evidence standard and correctly applied it. That is, the record reasonably and thoroughly supported the Initial Decision's findings and conclusions. More specifically, the ALJ properly found that Petitioner yelled at and used her belt against T.A. on one occasion, and then did the same against T.F. on another, which upset and/or scared them. *Id.* at pg. 17. Her repeated conduct deviated from CAU's policies and training and constituted verbal and/or psychological abuse. *Id.* at pg. 18. The ALJ also correctly determined that the evidence revealed that Petitioner acted with the requisite intent because she repeated her conduct during two different incidents demonstrating an absence of a mistake or accident. *Id.* at pgs. 18-19.

The ALJ importantly noted that the testimony from every witness, except Petitioner, was consistent regarding Petitioner using her belt to threaten both T.A. and T.F. on two separate occasions. *Id.* at pgs. 15-16. Thus, the ALJ reasonably concluded that they were "credible witnesses." *Id.* at pg. 16. Conversely, the ALJ also determined that Petitioner's motive to avoid being placed on the Central Registry and having potential immigration issues as a result rendered her testimony as lacking credibility. *Id.*

In other words, the Initial Decision gave due weight to the consistent versions of the several witnesses who either observed or were involved in the incidents with Petitioner, while reasonably discrediting Petitioner's biased, inconsistent versions. In that connection, a trier of fact may reject testimony when "it is inconsistent with other testimony" or it is "overborne" by the testimony of other witnesses. *Congleton v. Pura-Tex Stone Corp.*, 53 N.J. Super. 282, 287 (App. Div. 1958). Moreover, the choice of rejecting the testimony of a witness primarily rests with the trier of fact and will be "conclusive on appeal" when it is "reasonably made." *See Renan Realty Corp. v. Dep't of Cmty. Affairs*, 182 N.J. Super. 415, 421 (App. Div. 1981). Thus, the ALJ who heard all the testimony at the hearing acted within her scope to accept all but Petitioner's inconsistent testimony as credible. Her credibility assessments were reasonable and appropriate.

CONCLUSION

The Initial Decision properly assessed the evidence in the record. Here, multiple

disinterested witnesses provided essentially the same accounts regarding the central issue: That Petitioner yelled at and used a belt to threaten T.A. and T.F. Conversely, Petitioner's contradictory account stemmed from a high motivation to shade her testimony in her favor and avoid the consequences of her abusive conduct. The ALJ properly weighed the evidence in the record and acted within her proper discretion in making credibility determinations, findings of fact and conclusions of law. In all, the preponderance of the evidence showed that Petitioner committed acts of abuse against individuals with developmental disabilities with the requisite intent under N.J.S.A. 30:6D-74, N.J.S.A. 30:6D-77(b)(1) and N.J.A.C. 10:44D-1.2 and - 4.1(b). As such, the Director should affirm the Initial Decision in its entirety and uphold Petitioner's placement on the Central Registry due to committing verbal and/or psychological abuse.

FINAL AGENCY DECISION

Pursuant to N.J.A.C. 1:1-18.1(f) and based upon a review of the ALJ's Initial Decision and the entirety of the OAL file, I concur with the Administrative Law Judge's findings and conclusions. The ALJ had the opportunity to assess the credibility and veracity of the witnesses. I defer to the ALJ's opinions concerning these matters, based upon the extremely detailed and well-reasoned observations described in the Initial Decision, by the ALJ. The Petitioner's exceptions to the Initial Decision fell woefully short, failing to identify any flaws in the evidence, credibility evaluations, legal or logical interpretations – merely stating disagreement with the decision. The Respondent's exceptions were comprehensive and coherent; explaining the credible evidence as it applied to the elements of the Central Registry statute and regulations.

I **CONCLUDE and AFFIRM** that the Department has met its burden of proving by a preponderance of the evidence that O.K. committed acts of verbal, and/or psychological abuse against T.A. and T.F., individuals with developmental disabilities. Abuse is defined as "wrongfully inflicting or allowing to be inflicted physical abuse, sexual abuse, or verbal or psychological abuse or mistreatment by a caregiver upon an individual with a developmental disability." N.J.S.A. 30:6D-74; N.J.A.C. 10:44D-1.2. I **CONCLUDE and AFFIRM** that O.K.'s conduct in both the T.A. and T.F. incidents were intentional, reckless, and/or with reckless disregard. I **CONCLUDE and AFFIRM** that O.K. acted intentionally against individuals protected by N.J.S.A. 30:6D-73. I **CONCLUDE and AFFIRM** that O.K.'s placement on the Central Registry is appropriate.

Pursuant to N.J.A.C 1:1-18.6(d), it is the Final Decision of the Department of Human Services that **I ORDER** the placement of O.K.'s name on the Central Registry of Offenders Against Individuals with Developmental Disabilities, having intentionally committed physically abusive acts against T.A. and T.F.

Date: September 23, 2023

Deborah Robinson

Deborah Robinson, Director
Office of Program Integrity and Accountability