

A-3



STATE OF NEW JERSEY

In the Matter of Marcus Fahnbulleh
 New Lisbon Developmental Center
 Department of Human Services

CSC DKT. NO. 2013-2876
 OAL DKT. NO. CSV 6080-13

FINAL ADMINISTRATIVE ACTION
 OF THE
 CIVIL SERVICE COMMISSION

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ISSUED: NOVEMBER 6, 2014 BW

The appeal of Marcus Fahnbulleh, Human Services Assistant, New Lisbon Developmental Center, Department of Human Services, removal effective October 24, 2012, on charges, was heard by Administrative Law Judge Linda M. Kassekert, who rendered her initial decision on September 29, 2014. Exceptions and cross 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, at its meeting on November 6, 2014, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

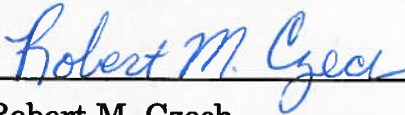
ORDER

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 Marcus Fahnbulleh.

Re: Marcus Fahnbulleh

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
NOVEMBER 6, 2014



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
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Henry Maurer
Director
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 6080-13

AGENCY DKT. NO. 2013-2876

**IN THE MATTER OF MARCUS
FAHNBULLEH, DEPARTMENT OF
HUMAN SERVICES, NEW LISBON
DEVELOPMENTAL CENTER.**

Michael Osborne, Esq., for appellant Marcus Fahnbulleh (The Osborne Law Firm, attorneys)

Robert Strang, Deputy Attorney General, for respondent Department of Human Services, New Lisbon Developmental Center (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: August 15, 2014

Decided: September 29, 2014

BEFORE **LINDA M. KASSEKERT, ALJ**:

STATEMENT OF THE CASE

Appellant, Marcus Fahnbulleh, appeals his removal as a human services assistant (HSA) effective April 22, 2013, by respondent, the Department of Human Services, New Lisbon Developmental Center (NLDC). The respondent contends that it removed the appellant for violations of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a

public employee, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically, a number of departmental policies. Appellant denies that the alleged violations occurred.

PROCEDURAL HISTORY

By Preliminary Notices of Disciplinary Action (PNDA) dated October 23, 2012,¹ and October 24, 2012, respondent proposed to remove appellant from employment. Appellant requested a departmental hearing, which was held on March 21, 2013. On April 22, 2013, appellant was served with a Final Notice of Disciplinary Action (FNDA) sustaining all charges and removing him from employment effective October 24, 2012. On April 29, 2013, appellant filed a timely appeal to the Civil Service Commission. This matter was transmitted to the Office of Administrative Law on May 6, 2013. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A hearing was held on July 21, and 30, 2014, and the parties requested the opportunity to file post-hearing submissions. Thereafter, upon receipt and review of the parties' filings, the record closed on August 15, 2014.

CHARGES

Appellant is charged with conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6), and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12), specifically, violation of various provisions of the New Jersey Department of Human Services Disciplinary Action Program (J-4): C.3-1—Physical or mental abuse of a patient, client, resident or employee; C.5-1—Inappropriate physical contact or mistreatment of a patient, client, resident or employee; C.8-1—Falsification: Intentional misstatement of material fact in connection with work, employment, application, attendance or in any record, report, investigation or other proceeding; B.7-1—Serious mistake due to carelessness which would result in danger and/or injury to persons or property; and E.1-1—Violation of a rule, regulation, policy, procedure, order or administrative decision. The specifications of the charges are as follows:

¹ The PNDA (J-1) issued on October 23, 2012, suspended the appellant pending a Loudermill hearing. The Loudermill hearing was held on October 24, 2012, at which point the appellant received the second PNDA, suspending him without pay effective that same day pending a full administrative hearing (J-2).

On October 11, 2012, at approximately 8:40 p.m., while in the TV room, FAS 312 in Juniper Cottage, in response to certain actions by W.R., you restrained W.R. in an unapproved/unauthorized primary restraint technique (PRT). Specifically, you were witnessed to have been holding W.R. by the back of his neck, stomach side down, to the floor. You also had his arm pinned to the floor. W.R. repeatedly yelled for you to get off of him; however, you did not release W.R. until a co-worker came to assist with W.R. W.R. was subsequently examined by the nurse who noted that W.R. had a raised/reddened area on his wrist/forearm and a bluish purple bruise to the side of his neck. You were later interviewed regarding this incident and contrary to the facts, you made the following statements to mislead the investigator during the investigatory process, whereby stating, "At no time was W.R. on his stomach during the restraint. At no time was W.R. held by the neck during the restraint."

[J-2.]

TESTIMONY

For Respondent

Brenda Price

Brenda Price is a cottage training supervisor (CTS) at NLDC; she has been in this title since October 2010 and has worked at NLDC since 1979. On October 11, 2012, she was working overtime. A female staff member came in and told her that assistance was needed with one of the residents in Lounge 2. When she entered the room, she saw two staff members, Abdugalfaru Fasasi and the appellant, holding patient W.R. in the primary restraint technique (PRT) face down on his stomach. The appellant had restrained the upper part of W.R. and Fasasi had the lower part, including W.R.'s ankles and legs. Price saw that staff member Michael Beach was in the room and was lifting W.R. off the floor to a standing position. W.R. was clearly upset, yelling and screaming. The appellant was also standing, and he stated that W.F. had punched him. Price stated that she did not touch anyone, and that the entire

incident took less than five minutes. She stated that staff is not allowed to use a PRT where the patient is face down. She identified R-3, her Confidential Incident Statement.

On cross-examination, she stated that Josephine Peabody had notified her that assistance was needed in the lounge. She was not running, but walking fast. She did not hear any commotion until the staff came and got her. Mr. Beach was already there, and he entered the room first. He did not block her sight. Ms. Price identified A-2, the two-page incident report that she wrote. She stated that any time there is an incident, a staff member must write a report, and she wrote her report shortly after the incident occurred. She agreed that she did not use the word "illegal" when she referred to the fact that W.R. was held on the floor. After the incident she called a nurse to check W.R. for injuries. She identified a second Confidential Incident Statement that she wrote on October 12, 2012 (A-3). Lynda Friggle, the investigator, completed the statement for her. She was frustrated. She agreed that the second Confidential Incident Statement does not state that W.R. was on his stomach, or that W.R.'s head was struck on the ground, and does not identify this as an illegal restraint. After the duty officer came down, the appellant was taken off of client contact.

On re-direct examination, Price stated that she knew that a face-down PRT, putting the patient on his stomach, was illegal, but she did not write this. She asked Friggle to write it for her because she was upset. Friggle wrote it accurately.

On re-cross-examination, she was asked if it were unusual for Friggle to write statements, and not list the questions she was asked. She stated that it was unusual, but that filling out reports was part of the job.

Michael Paul Beach

Beach is an HSA at NLDC. He has been in this position for two years. Prior to that, he was a temporary employment service (TES) employee. That was his position in October 2012. That day he had foyer duty. This position required him to keep an eye on clients outside the building. He was called into the Juniper Cottage TV room,

where his assistance was needed. When he entered the room, he saw W.R. face down and two staff members restraining him, one holding his right arm and lower back and one holding his left arm and neck. The appellant was the staff member holding W.R.'s left arm and neck. He is 100 percent sure that W.R. was on his stomach. He stated that W.R. was very verbal and was cursing. The appellant was not yelling or cursing. He could see the tension between W.R. and the appellant. W.R. told the appellant he was going to "f—king kill [him]." Beach relieved the appellant and took over, turning W.R. over, and standing him up. This took about five to seven seconds. W.R. was still mad and went to call his sister. He stated, "Don't come around Browns Mills, I'll have you killed."

Beach identified R-1, his Confidential Incident Report made the night of the incident, and R-2, his Confidential Incident Statement made on October 16, 2012.

On cross-examination, he stated he was not sure who came to get him to respond to the situation in the lounge. He did not hear any commotion from the day room. He was trained with respect to a proper or improper PRT. He was not sure whether Price came into the room the same time or before. He agreed that R-1 did not mention Fasasi, and it also did not mention that W.R. was on his stomach. He agreed that his brother also works at NLDC, in a management position, but that he would not have done anything different in this situation. He identified R-2a, which was a diagram he drew of the room.

Lynda Friggle

Friggle is a quality assurance specialist for NLDC. She has been in this position since 2011. She investigates complaints of abuse, neglect and exploitation at NLDC. She investigated the October 11, 2012, incident involving the appellant and W.R.

Friggle identified her Final Investigative Report (R-4), dated October 18, 2012. She noted two conclusions found on page 11 of the document. Conclusion #1 states²:

Mr. [R.'s] accounting of events is supported by information provided by two of his peers, [K.S.] and [J.W.], who were present in FAS #312 at the time of the event. [Mr. W.] corroborates the fact that [Mr. R.] was agitated, upset and verbally aggressive, as [Mr. R.] had self-reported. [Mr. W.] and [Mr. S.] corroborate Mr. Fahnbulleh was seated by the doorway on a chair and initiated the physical contact by placing his hands on [Mr. R.'s] neck. They described [Mr. R.] was being held face down on the ground. They did not believe was being done was a normal restraint.

Conclusion #3, found on the same page, states:

Two staff, Ms. Price and Mr. Beach, arrived after the hold was initiated, and confirm [Mr. R.] was being restrained on his stomach, face down, by Mr. Fahnbulleh and Mr. Fasasi. Mr. Beach also corroborates that Mr. Fahnbulleh had his hand on the base of [Mr. R.'s] neck. Their description of the events taking place support the scenarios described by [Mr. R.], [Mr. W.] and [Mr. S.]. Ms. Price and Mr. Beach are considered credible in their accounting of events.

Friggle stated that she interviewed two patients who were in the room at the time, as well as W.R. She identified R-5, which was W.R.'s statement. In it he stated that he was lying face down on his stomach. She also interviewed patient J.W. (R-6) and patient K.S. (R-7), who both stated that W.R. was on his stomach.³

Friggle next identified R-8, which was the nursing medical records for W.R. The report notes that a one-centimeter-by-one-centimeter mark was found on the left side of W.R.'s neck. It was "bluish purple," but no swelling or redness was noted. Friggle saw the mark on his neck during W.R.'s interview. Talisha Henry, the Juniper Cottage nurse, examined W.R. and completed the form. Also noted was an injury to W.R.'s

² All excerpts of memos, letters and other documents have been typed verbatim into this decision. It should be assumed that any typographical, grammatical and spelling errors are the products of the respective authors of these materials. Therefore, terms such as sic have not been utilized.

³ W.R., J.W. and K.S. did not testify.

right wrist. While W.R. reported that the staff banged his forehead on the floor, no injuries on his forehead were noted. Friggle also signed R-2, R-2a and R-3.

Friggle identified J-7, the Handle With Care Manual. She noted that the staff was not allowed to restrain a client on his stomach, and should this occur, the client was to be let go immediately. She also identified J-8, the NLDC policy with respect to emergency mechanical and chemical restraint, which she used in her investigation. The policy states, "Use of prone restraint as a personal control technique is prohibited." (J-8 at 2.) Prone restraint is defined as "holding an individual facedown on his/her stomach or chest." (Id. at 3.) Finally, she identified J-9, Division Circular #19, dated March 5, 2007, which changed the policy with respect to prone restraint; as of the date of the circular, prone restraint was prohibited by the Department of Human Services (DHS), Division of Developmental Disabilities (DDD).

On cross-examination, she agreed that in W.R.'s statement (R-5), he denied punching the appellant, while other witnesses, including the appellant, Fasasi and Peabody, all indicated that he had. Neither Beach nor Price was present at the time this occurred, although Price, in her statement, indicated that the appellant told her that W.R. had punched him. Friggle stated that she concluded that Fasasi, Peabody and the appellant were not credible. She agreed that the injuries she noted were a raised area on the wrist and the bruise on the neck. There were no injuries to W.R.'s head, although it was his contention that the appellant had pounded his head on the ground. She was shown A-1, a Restraint Information Form completed by Arthur Nitti with respect to this incident. Nitti is a behavior support technician and QUE⁴ at NLDC. Nitti indicated that W.R. and the staff (the appellant and Fasasi) fell when restraining W.R. in a standing position, and that W.R. continued to be a threat to himself and others. The incident lasted less than a minute. The form does not indicate that W.R. was placed on his stomach. Nitti wrote in the NLDC Active Treatment Notes, on October 11, 2012, at 9:30 p.m.:

Received call to Juniper at 8:46 p and arrived at 8:50 p.
When I arrived [W.] was sitting in dining area talking to duty

⁴ A QUE is a person at the facility who determines what restraints are appropriate.

officer. Myself and duty officer were able to calm [W.] and have him be seen by nurse. Earlier [W.] was in his room and began to verbally aggress towards staff. [W.] then became physical and began to swing at staff. Staff backed away, but [W.] continued to aggress. Staff placed [W.] in a non-standard t man PRT. Both staff and [W.] fell forward. [W.] continued to struggle and another staff was called to assist in a 2 man non-standard PRT. One on either side of [W.]. [W.] was in restraint from 8:43–8:44 p. When duty officer arrived at 8:47 p, [W.] was in back lounge speaking with sister. Duty officer spoke to [W.] until I arrived. [W.] asked to have Human Services Police called and HSP arrived at 8:58 to interview [W.] and staff involved. Staff who originally began restraint was placed at PRS operations. [W.] calmed and went to smoke a cigarette. All reports written, CTS notified, seen by nurse. HS-19 checked, no contradictions. Restraint approved by procedure.

[A-11.]

These notes are reflected in Friggle's Final Investigative Report (R-4).

Friggle was also asked about the two statements made by Price, the one made the night of the event in which she made no mention of W.R. being placed in a prone position (A-2), and the one Friggle completed, which stated "W.R. was in PRT on the floor" (A-3). It was also noted that R-1, Beach's Incident Report, did not state that an illegal or prone restraint was used.

On redirect examination, Friggle stated that she did not interview Nitti. Nitti's notes did not change her conclusion that W.R. had been placed on his stomach. She was asked if it made any difference if a patient strikes a staff member, and she said, "no," that a prone restraint where a patient is placed on his stomach could not be used.

For Appellant

Theresa Twegbe

Ms. Twegbe was a licensed practical nurse at NLDC from August 8, 2004, to May 11, 2014. In that position, she gave out medications, treated and monitored the health of NLDC residents, and updated their records. She was working on October 11, 2012, at Juniper Cottage. She treated W.R. on that date. She did a full-body assessment, looking for any injuries. She found one injury to his right wrist, which was slightly bruised; there was no bleeding or drainage. W.R. told her his head was struck on the ground more than once. She found no injuries to his head. She was asked if she found injuries to his stomach, and she answered that she did not.

On cross-examination, Twegbe stated that she did not know if W.R. was placed in a prone position. She agreed that sometimes bruises take time to develop. She was asked if she spoke to W.R., and she said that she did, because she needed to have an accurate history. At that point, W.R. had calmed down. She agreed that W.R. could be "aggressive, noncompliant and independent." She stated that he did not tell her he had been placed on his stomach.

Twegbe was asked about Talisha Henry's entry on the Confidential Incident Report of October 12, 2012, regarding a bruise on W.R.'s collarbone (R-8 at 2). Ms. Henry worked the 7:00-a.m.-to-3:00-p.m. shift, and did essentially what Twegbe did. She stated that if there were a bruise on W.R.'s neck she would have noticed it, but sometimes it takes a day for a bruise to show up.

Josephine Peabody

Peabody is a senior cottage training technician at NLDC. She has been at NLDC since June 19, 1998, and previously worked as an HSA. She was working the evening of October 11, 2012. W.R. was a patient who lives in Juniper Cottage. He is white. W.R. came into the back of the lounge. The appellant was there as a 1:1 staff

member with another patient, who was on suicide watch. W.R. approached the patient and asked him for a cigarette. He was not supposed to do this, as the patients could only get cigarettes by going shopping. The appellant counseled the patient by saying, "you know your program." W.R. got upset and walked out. He walked to the window and stuck his middle finger up at the appellant through the window. W.R. came back into the room, and he was very upset. He punched the appellant in the chest twice. As W.R. went to punch appellant a third time, Fasasi intervened. They put him in a restraint, as W.R. was combative and dangerous. They had to get the 1:1 patient out of the way. Peabody stated that W.R. was not held on his stomach. She prepared a statement at 8:45 p.m. on October 11, 2012, about the incident (A-5). She said that if he had been placed on his stomach she would have reported it.

On cross-examination, she stated that she knew patients could not be restrained on their stomachs. She has had the Handle With Care training. A client can be restrained standing up or seated, but not on his stomach, because it puts the patient at risk for getting hurt.

Ms. Peabody stated that she screamed for Fasasi to help. Beach and Price did not come in until after the incident. She was also concerned about J.W., who was the 1:1 patient; she pulled J.W. away, but did not leave the room. She denied that this action diverted her attention away from what was happening with W.R.

Abdugafaru Fasasi

Fasasi was an HSA at NLDC. He started working there in 2011. His duties included providing support and redirection to clients and helping them with their daily activities. He knows the appellant; they were coworkers. He knows resident W.R., and he has been assigned to watch W.R. The appellant was in the TV room with J.W., a patient on a suicide watch. W.R. requested a cigarette. The appellant counseled J.W. against giving W.R. a cigarette. J.W. was not allowed to go to the store; if he gave his cigarettes away he would not get any more. J.W. did not give W.R. the cigarette. W.R. began cursing at the appellant. He stormed out of the room and stuck his two middle

fingers up at the appellant from the window. The appellant did not respond. W.R. came back into the room and went towards the appellant, cursing at him. W.R. hit the appellant in the chest. He was very aggressive and it was difficult to anticipate his next move. Fasasi tried to block him. Neither Beach nor Price was in the room at this time. Fasasi grabbed W.R.'s arm and tried to bring him down into a seated position with his feet straight out. Beach and Price came in. The appellant left the room to deescalate the situation. Fasasi denied that W.R. was ever in a prone position on his stomach. He denied that either he or the appellant struck W.R. He stated that W.R.'s head never struck the ground. He identified the Confidential Incident Report he made on October 11 (A-8), and the Confidential Incident Statement he made on October 17, 2012 (A-4). In the Confidential Incident Statement, he stated, "I don't remember putting him on his stomach, or he was not put on his stomach during the PRT." (A-4.) He recalled being interviewed by Friggle.

On cross-examination, Fasasi agreed that he and the appellant were coworkers and that they got along. He agreed that he noted in his Confidential Incident Statement that Peabody left the room, and that there was inconsistency in his statements, but he reiterated that W.R. was never placed on his stomach. He stated that Beach and Price came later to relieve the appellant. He said that while W.R. lost his balance, he did not fall down, and Fasasi did not lose his hold on the patient. W.R. was both physically and verbally aggressive. He was asked if he and the appellant were related, which he denied.

Marcus Fahnbulleh

The appellant worked at NLDC since March 2010 as an HSA. On October 11, 2012, he was assigned as J.W.'s 1:1 staff member. He had worked with him before. W.R. asked J.W. for a cigarette. Part of J.W.'s supervision plan was to manage his personal items. J.W. needed his cigarettes to "last." The appellant verbally counseled J.W. not to give his cigarettes away, and J.W. did not give W.R. a cigarette. W.R. got upset, and he called the appellant a "black nigger." He cursed at him, and threatened to kill him or get him fired. The appellant said nothing. W.R. gave him the middle

finger. W.R. could be dangerous when he got upset. W.R. hit him in the chest twice. The appellant tried to block the punches. Fasasi stepped in and brought W.R. down on his butt to a seated position for one to two minutes. They asked W.R. if he was okay; he was still fighting so he was kept in a seated position. At this point Peabody was in the room, Beach and Price were not. They asked W.R. if he was okay a second time. Beach then came in and relieved appellant. He was placed on non-client contact. He identified, his Confidential Incident Report made on October 11, 2012, at 8:45 p.m. (A-12). He stated that he did not place W.R. in a prone PRT; he was never face down. Price came in after the restraint was over.

On cross-examination, appellant stated that he knew that restraining a client in a prone position was a very serious violation. W.R. was verbally assaulting him, using hand gestures, and punched him. He believes W.R. was "trying to get a rise" out of him. He was asked about Beach's testimony, where Beach said that W.R. was on his stomach. He said that Beach was a part-timer at NLDC at the time and was trying to get a job. Price was not even in the room until after the restraint was over. He stated that during the restraint W.R. was both standing and seated. He was asked if W.R. could have lost his balance and fallen on his stomach. He stated that this would depend on how the client lost his balance. He felt that Price, Beach and Fasasi were intimidated to get them to change their statements.

FINDINGS OF FACT

Based on the testimony and the reports and statements submitted, the following is found as **FACT**:

1. The appellant was employed since March 2010 by the NLDC as an HSA.
2. On October 11, 2012, at approximately 8:40 p.m., an incident occurred in the TV room, FAS 312 in Juniper Cottage, NLDC, between the appellant and a patient, W.R.

3. The appellant was on a 1:1 watch with another patient, J.W. W.R. approached J.W. and asked for a cigarette. The appellant verbally counseled J.W. not to give his cigarettes away.

4. W.R. was angry and left the room. He stood outside the room and raised his two middle fingers to the appellant through the window. He came back into the room and continued to be verbally and physically abusive towards the appellant.

5. The appellant, with the assistance of Fasasi, attempted to control W.R. by restraining him. This restraint took W.R. to the floor.

6. The appellant and Fasasi restrained W.R. on his stomach, and in restraining him, the appellant held W.R. by the back of his neck.

7. When Beach entered the room he relieved the appellant and took over, turning W.R. over and standing him up.

8. W.R. sustained an injury on his wrist and had a 1cm-by-1cm bruise on his neck.

9. The appellant misled the investigator, Friggle, during the investigatory process by stating, "At no time was W.R. on his stomach during the restraint. At no time was W.R. held by the neck during the restraint."

LEGAL DISCUSSION

The Civil Service Act, N.J.S.A. 11A:1-1 et seq., governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Service Ass'n v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583

(App. Div. 1972); Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). The Act sets forth that State policy is to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). To carry out this policy, the Act authorizes the discipline (and termination) of public employees. N.J.S.A. 11A:2-6.

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Polk, 90 N.J. 550, 561 (1982).

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). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Delaware, Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933).

Appellant argues that the written statements of W.R., J.W. and K.S., all of whom were clients at NLDC, amount to hearsay, because those individuals were not produced at the hearing to give live testimony. Counsel for the appellant objected at the hearing to the admission of these statements.

Hearsay evidence is admissible in the trial of a contested case before the Office of Administrative Law. N.J.A.C. 1:1-15.5(a). Nonetheless, as provided by the residuum rule, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b); Clowes v. Terminix Intern., Inc., 109 N.J. 575, 599 (1988); Weston v. State, 60 N.J. 36, 51 (1972).

The statements of the three NLDC patients that were introduced at the hearing are hearsay. Counsel for the respondent argues that the statements are admissible because they are supported by the testimony of Beach and Price, who both testified that W.R. was restrained on his stomach in the prone position. I agree, and, further, W.R.'s statement that the appellant held him by his neck is supported by the medical finding that W.R. had a bruise on the left side of his neck. The appellant stated that he was on W.R.'s left side. As a result, I **CONCLUDE** that the statements of W.R., J.W. and K.S. are admissible in this proceeding.

Unbecoming Conduct

The NLDC charged the appellant with violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee. "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Suspension or removal may be justified where the misconduct occurred while the employee was off duty. Emmons, supra, 63 N.J. Super. at 140.

In this matter, appellant was charged with conduct unbecoming a public employee for an incident that occurred on October 11, 2012, at approximately 8:40 p.m. in the TV room, FAS 312 in Juniper Cottage:

in response to certain actions by W.R., you restrained W.R. in an unapproved/unauthorized primary restraint technique (PRT). Specifically, you were witnessed to have been holding W.R. by the back of his neck, stomach side down, to the floor. You also had his arm pinned to the floor. W.R. repeatedly yelled for you to get off of him; however, you did not release W.R. until a co-worker came to assist with W.R. W.R. was subsequently examined by the nurse who noted that W.R. had a raised/reddened area on his wrist/forearm and a bluish purple bruise to the side of his neck. You were later interviewed regarding this incident and contrary to the facts, you made the following statements to mislead the investigator during the investigatory process, whereby stating, "At no time was W.R. on his stomach during the restraint. At no time was W.R. held by the neck during the restraint."

[J-2.]

Having found as fact that the appellant restrained W.R. in a prone position on his stomach and held him by the back of the neck, which resulted in a bruise on W.R.'s neck, and that the appellant told the investigator that W.R. was not held by the neck or on his stomach, I **CONCLUDE** that the respondent has proven conduct unbecoming a public employee by a preponderance of the credible evidence. Although W.R.'s actions certainly contributed to what occurred, this in no way mitigates that W.R. was restrained by a prohibited, illegal method, an unapproved/unauthorized PRT, and was on his stomach.

Other Sufficient Cause

Appellant was also charged with a violation of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically, violation of various provisions of the New Jersey Department of Human Services Disciplinary Action Program (J-4): C.3-1—Physical or mental abuse of a patient, client, resident or employee; C.5-1—Inappropriate physical contact or mistreatment of a patient, client, resident or employee; C.8-1—Falsification: Intentional misstatement of material fact in connection with work, employment, application, attendance or in any record, report, investigation or other proceeding;

B.7-1—Serious mistake due to carelessness which would result in danger and/or injury to persons or property; and E.1-1—Violation of a rule, regulation, policy, procedure, order or administrative decision.

A determination must be made whether appellant's actions on October 11, 2012, in restraining client W.R. constituted violations of C.3-1—Physical or mental abuse of a patient, client, resident or employee, C.5-1—Inappropriate physical contact or mistreatment of a patient, client, resident or employee, and/or B.7-1—Serious mistake due to carelessness which would result in danger and/or injury to persons or property.

Pursuant to the Department of Human Services Disciplinary Action Program, "physical abuse" is defined as "a physical act directed at an individual, patient or resident of a type that could tend to cause pain, injury, anguish and/or suffering." (J-4 at Supplement 3.)

Specifically with regard to restraint techniques, on March 5, 2007, the DDD issued revised Division Circular #19 (J-9), which amended Section IV.G, and stated: "Use of prone restraint as a personal control technique shall be prohibited." The circular defines prone restraint to mean "holding an individual facedown on their stomach or chest." This change was made primarily because of concerns that restraining an individual on the individual's stomach could lead to serious injury or death. Employees are trained in the Handle With Care behavior management system, which states:

PLEASE BE ADVISED THAT NJ-DHS CURRENTLY DOES NOT ALLOW ITS DD FACILITIES TO USE FACE DOWN RESTRAINT REGARDLESS OF THE CIRCUMSTANCE. COMPLIANCE WITH THIS POLICY PROHIBITION REQUIRES THAT YOU LET GO OF THE CLIENT IMMEDIATELY IF YOU FIND YOURSELF IN A PRONE CONFIGURATION.

[J-7 at 25.]

Similarly, the NLDC policy dealing with Emergency Mechanical and Chemical Restraint states, "Use of prone restraint as a personal control technique is prohibited." (J-8 at 2.)

Obviously, the use of this type of technique could have very severe consequences for a patient, and this is precisely why it is prohibited. Having found that appellant restrained W.R. on his stomach, which could tend to cause pain, injury, anguish and/or suffering, I **CONCLUDE** that respondent has proven by a preponderance of the credible evidence that the appellant violated C.3-1—Physical or mental abuse of a patient, client, resident or employee. By extension, the use of prone restraint constitutes inappropriate physical contact and an action that could result in danger to persons, and, as a result, I **CONCLUDE** that the respondent has proven by a preponderance of the credible evidence that the appellant violated C.5-1—Inappropriate physical contact or mistreatment of a patient, client, resident or employee, and B.7-1—Serious mistake due to carelessness which would result in danger and/or injury to persons or property.

Finally, having found that the appellant misled the investigator by stating "At no time was W.R. on his stomach during the restraint. At no time was W.R. held by the neck during the restraint," I **CONCLUDE** that respondent has proven by a preponderance of the credible evidence that the appellant violated C.8-1—Falsification: Intentional misstatement of material fact in connection with work, employment, application, attendance or in any record, report, investigation or other proceeding.

Each of these offenses constitutes violation of E.1-1—Violation of a rule, regulation, policy, procedure, order or administrative decision. I therefore **CONCLUDE** that the respondent has proven the charge of other sufficient cause by a preponderance of the credible evidence.

PENALTY

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 the 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. Ibid.

There was no record of any prior discipline submitted by the respondent. As stated above, the concept of progressive discipline must be considered. However, as is the case in this matter, where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate regardless of the individual's disciplinary history. Moreover, the DHS Disciplinary Action Program provides that "for a first infraction/incident of physical abuse, [an] employee is to be removed from employment." (J-4 at Supplement 3.)

As a result of the foregoing, I **CONCLUDE** that the removal of appellant from his position as a human services assistant was justified and warranted.

ORDER

It is hereby **ORDERED** that the charges of conduct unbecoming a public employee and other sufficient cause against the appellant, Marcus Fahnbulleh, are **SUSTAINED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision

within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, 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.

September 29, 2014
DATE



LINDA M. KASSEKERT, ALJ

Date Received at Agency:

9/29/14

Date Mailed to Parties:

9/29/14

/lam

LIST OF WITNESSES

For Respondent:

Brenda Price
Michael Paul Beach
Lynda Friggle

For Appellant:

Theresa Twegbe
Josephine Peabody
Abdugalfaru Fasasi
Marcus Fahnbulleh

LIST OF EXHIBITS

Joint:

- J-1 PNDA, dated October 23, 2012
- J-2 PNDA, dated October 24, 2012
- J-3 FNDA, dated April 22, 2013
- J-4 NJ DHS Disciplinary Action Program
- J-5 NLDC Personal Screen for Marcus Fahnbulleh
- J-6 NLDC Employee Courses taken by Marcus Fahnbulleh
- J-7 Handle With Care Manual
- J-8 NLDC Emergency Mechanical and Chemical Restraint
- J-9 NJDHS DDD Division Circular #19

For Appellant:

- A-1 Restraint Information Form
- A-2 Confidential Incident Report-Brenda Price, dated October 11, 2012
- A-3 Confidential Incident Statement-Brenda Price, dated October 12, 2012
- A-4 Confidential Incident Statement-Abdugalfaru Fasasi, dated October 17, 2012

- A-5 Confidential Incident Report--Josephine Peabody, dated October 15, 2012
- A-6 Not used
- A-7 Not used
- A-8 Confidential Incident Report-Abdugalfaru Fasasi, dated October 11, 2012
- A-9 Not used
- A-10 Not used
- A-11 NLDC Active Treatment Notes for W.R.
- A-12 Confidential Incident Report-Marcus Fahnbulleh, not dated
- A-13 Confidential Incident Statement-Marcus Fahnbulleh, dated October 23, 2012

For Respondent:

- R-1 Confidential Incident Report-Michael Beach, dated October 11, 2012
- R-2 Confidential Incident Statement-Michael Beach, dated October 16, 2012
- R-2a Hand-drawn layout of TV room
- R-3 Confidential Incident Statement of Brenda Price, dated October 16, 2012
- R-4 DHS Office of Integrity and Accountability Final Investigative Report
- R-5 Confidential Incident Statement of W.R., dated October 12, 2012
- R-6 Confidential Incident Statement of J.W., dated October 12, 2012
- R-7 Confidential Incident Statement of Kenneth Smith, dated October 15, 2012
- R-8 Confidential Incident Report regarding W.R., dated October 11, 2012, Nursing or Medical Staff Review of Injuries