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STATE OF NEW JERSEY

In the Matter of Abdugafaru Fasasi,
Department of Human Services

CSC Docket No. 2013-2691
OAL Docket No. CSV 6079-13

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: FEB 03 2015 (HS)

The appeal of Abdugafaru Fasasi, a Human Services Assistant at New Lisbon Developmental Center, Department of Human Services, of his removal, effective October 26, 2012, on charges, was heard by Administrative Law Judge Lisa James-Beavers (ALJ), who rendered her initial decision on November 21, 2014. Exceptions were filed on behalf of the appellant and the appointing authority and cross exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on December 17, 2014, did not adopt the ALJ's recommendation to modify the removal to a six-month suspension. Rather, the Commission upheld the removal.

DISCUSSION

The appointing authority removed the appellant on charges of conduct unbecoming a public employee; other sufficient cause; physical or mental abuse of a patient, client, resident or employee; inappropriate physical contact or mistreatment of a patient, client, resident or employee; falsification: intentional misstatement of material fact in connection with work, employment, application, attendance or in any record, report, investigation or other proceeding; serious mistake due to carelessness which would result in danger or injury to persons or property; and violation of a rule, regulation, policy, procedure, order or

administrative decision. Specifically, it asserted that on October 11, 2012, the appellant used an unauthorized personal restraint technique (PRT) that injured a patient and gave misleading statements during the investigation of that incident. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In her initial decision and based on the testimony of the witnesses, the ALJ found that the appellant was working the 3:30 p.m. to 12:00 a.m. shift in the men's dayroom with Marcus Fahnbulleh, a Human Services Assistant,[1] when W.R., a patient, asked for a cigarette from J.W., another patient. Fahnbulleh advised J.W. not to share the cigarette because he would run out before the end of the month. As a result, W.R. became angry, left the room, and gave Fahnbulleh the "finger." W.R. later returned and punched Fahnbulleh twice. Brenda Price, a Cottage Training Supervisor, and Josephine Peabody, a Senior Cottage Training Technician, were also in the dayroom at that time with the appellant, Fahnbulleh, W.R. and J.W. The appellant intervened after W.R. punched Fahnbulleh. The ALJ found that someone then called for help, and Michael Beach, a temporary Human Services Assistant, entered the dayroom and saw W.R. face-down on the floor with the appellant on W.R.'s right side and Fahnbulleh on W.R.'s left side. The appellant had W.R.'s right arm in the small of his back, and Fahnbulleh had W.R.'s left arm in the base of his neck. W.R. was saying, "Get off my neck," and cursing at Fahnbulleh. The ALJ found that Beach approached Fahnbulleh, Fahnbulleh stood up and got out of the way, and Beach took over the restraint and helped W.R. to sit up and get to his feet. The following day, Lynda Friggle, a Quality Assurance Specialist, Health Services, noted a circular bruise on W.R.'s neck.

Based on the foregoing, the ALJ dismissed the charge of physical abuse of a patient. Specifically, the ALJ noted that although she found that it was an improper technique to have W.R. face-down, the appellant only pinned W.R.'s arm down while W.R. was aggressively trying to get to Fahnbulleh. The ALJ also noted that although the "Handle with Care" training course manual stated that the prone position poses an "extreme health risk" and should not be used, the manual did not define the prone position to be physical abuse *per se* and the prone position was not listed in the definition of physical abuse. The ALJ did not deem holding a patient's arm down while the patient is face-down to fit with the other types of conduct noted in the definition of physical abuse, namely kicking, pinching, biting, punching, slapping, hitting, pushing, dragging or striking with an object. However, the ALJ upheld the charges of conduct unbecoming a public employee; inappropriate physical contact or mistreatment of a patient, client, resident or employee; serious mistake due to carelessness which would result in danger or injury to persons or property; and violation of a rule, regulation, policy, procedure, order or

[1] In *In the Matter of Marcus Fahnbulleh* (CSC, decided November 6, 2014), the Commission upheld Fahnbulleh's removal based on his involvement in the incident at issue here.

administrative decision. Specifically, the ALJ determined that pinning W.R.'s arm down while W.R. was in the prone position was clearly inappropriate physical contact since departmental policy forbade the use of the prone restraint technique. The ALJ indicated that the appellant's continuing to restrain W.R. after he went down on his stomach was a serious mistake that put W.R. at risk. The ALJ also upheld the charge of falsification, determining that the appellant's statements that W.R. had been placed in a standard PRT in his written reports and in Friggle's investigation of the incident were contrary to the ALJ's finding that W.R. was actually in a prone position on his stomach which was not a standard PRT. The ALJ concluded that since the charge of physical abuse was not upheld, removal was too harsh of a penalty and instead recommended a six-month suspension.

In its exceptions, the appointing authority argues that the ALJ incorrectly dismissed the charge of physical abuse since its policy defines physical abuse 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." It maintains that the tendency of a physical act to cause a patient "pain, injury, anguish and/or suffering" identified in the definition of physical abuse encompasses the "extreme health risk" of the prone position noted in the "Handle with Care" policy. It contends that the prone restraint is banned because of its propensity to cause pain or injury, the essential definition of abuse. The appointing authority also avers that the ALJ erred by reducing the penalty to a six-month suspension and that removal is warranted despite the absence of a disciplinary history. In this regard, it reiterates its contention that the appellant's actions constituted physical abuse and also notes that the charge of falsification was upheld. It argues that the appellant's falsification pertained to covering up patient abuse, manifesting a disregard for W.R.'s welfare and rendering him unsuitable to be charged with the care of developmentally disabled individuals.

In his exceptions, the appellant argues that he merely came to assist his colleague Fahnbulleh after W.R. threatened and physically attacked Fahnbulleh. He states that the record does not contain any photos of alleged injuries, videos of alleged altercations between the appellant and W.R., objective medical evidence showing injury to W.R. or police reports substantiating a physical altercation between the appellant and W.R. The appellant states that the testimony provided by Beach and Price differed from their initial reports of the incident in that neither witness initially noted that W.R. was belly down on the floor. He also states that the appointing authority did not produce the patient witnesses to testify at the hearing and that their statements were entered into evidence over his objection. The appellant avers that all charges should be dismissed and that he should be reinstated.

In reply, the appointing authority argues that the appellant's exceptions simply attempt to re-argue his case. It contends that the ALJ made correct

credibility determinations that the testimony of disinterested firsthand eyewitnesses Beach and Price that W.R. was restrained on his stomach were credible and convincing as opposed to the testimony of Fahnbulleh and the appellant. It argues that the Commission should defer to the ALJ's credibility determinations of Beach and Price derived from their testifying with certainty as to W.R.'s body position. With respect to the penalty, the appointing authority argues that the falsification charge alone would justify removal.

Initially, regarding the credibility of the witnesses, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). In this case, upon review, the Commission finds nothing in the record that convinces it that the ALJ's assessment of the credibility of the witnesses or her findings of fact based on those assessments were in error.

Additionally, based on its *de novo* review of the record, the Commission agrees with the ALJ's upholding of the charges of conduct unbecoming a public employee; inappropriate physical contact or mistreatment of a patient, client, resident or employee; falsification; serious mistake due to carelessness which would result in danger or injury to persons or property; and violation of a rule, regulation, policy, procedure, order or administrative decision. However, it does not agree with the ALJ's dismissal of the charge of physical abuse. In this regard, the ALJ dismissed that charge because the policy did not define the prone position to be physical abuse *per se* and because she did not find that the appellant's actions were akin to kicking, pinching, biting, punching, slapping, hitting, pushing, dragging or striking W.R. However, the appointing authority's policy defines physical abuse 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." The ALJ determined that the appellant's act of restraining W.R. face-down violated the "Handle with Care" policy prohibiting prone restraints because of the serious risk of injury that it poses and that the appellant's continued restraint of W.R. after he went down on his stomach put W.R. at risk. Therefore, based on these findings, the charge of physical abuse should also have been upheld. The appellant's use of an improper restraint on W.R.

was a physical act that could tend to cause injury, per the definition of physical abuse. Furthermore, the appointing authority persuasively argues that the tendency of a physical act to cause a patient "pain, injury, anguish and/or suffering" identified in the definition of physical abuse encompasses the "extreme health risk" of the prone position noted in the "Handle with Care" policy.

With regard to the penalty, the Commission does not agree with the ALJ's recommendation to modify the removal to a six-month suspension. In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. Moreover, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007). In this regard, in *In the Matter of Tammy Herrmann*, 192 *N.J.* 19 (2007), the State Supreme Court upheld the removal of Hermann, a Family Service Specialist Trainee with the Department of Youth and Family Services, who, during an investigation of alleged child abuse, flicked a lighted cigarette lighter in front of a special needs child. Herrmann had been employed for approximately six months at the time of the incident and had no prior discipline but her conduct "divested her of the trust necessary for her position" and "progressive discipline [was not] appropriate in this matter." *Id.* at 38. In the present matter, the appellant is responsible for a vulnerable population and holds a position of trust, *i.e.*, the care of developmentally disabled patients. This incident clearly demonstrates the appellant's lack of judgment.

In the instant matter, the ALJ concluded that removal was too severe based on her determination that the appellant did not commit physical abuse. However, as discussed above, the Commission does not agree that the physical abuse charge should have been dismissed. Nevertheless, it should be noted that even if the appellant's misconduct did not amount to physical abuse, the charges of inappropriate physical contact or mistreatment of a patient and falsification, both of which are serious offenses and which were sustained by the ALJ, combined with the

nature of the position and the appellant's very short period of employment,[2] would still be sufficient to uphold his removal. Moreover, the ALJ recognized the seriousness of the appellant's misconduct and the risk it posed to a patient. As a public employee, the appellant's interactions with a patient should be above reproach. Accordingly, the record does not evidence any reason to modify the penalty imposed by the appointing authority. Therefore, based on the totality of the record, the Commission concludes that removal is appropriate.

ORDER

The Civil Service Commission finds that the appointing authority's action in removing the appellant was justified. Therefore, the Commission affirms that action and dismisses the appellant's appeal.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF DECEMBER, 2014

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, NJ 08625-0312

Attachment

[2] Agency records indicate that the appellant was hired on May 23, 2011. Therefore, he was employed for approximately one year and five months prior to the date of the incident at issue here.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 6079-13
AGENCY DKT. NO. 2013-2691

IN THE MATTER OF ABDUGAFARU FASASI, NEW LISBON DEVELOPMENTAL CENTER, DEPARTMENT OF HUMAN SERVICES.

Michael Osborne, Esq., for petitioner (The Osborne Law Firm, LLC, attorneys)

Robert M. Strang, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: August 1, 2014 Decided: November 21, 2014

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

Appellant Abdugafaru Fasasi (appellant) appeals from the action of the respondent New Lisbon Developmental Center removing him from his position effective October 26, 2012.

PROCEDURAL HISTORY

On October 26, 2012, respondent New Lisbon Developmental Center, New Jersey Department of Human Services (New Lisbon) issued a Preliminary Notice of Disciplinary Action (PNDA) suspending appellant with pay pending a Loudermill hearing. (J-1.) On the same date, New Lisbon issued a second preliminary notice suspending appellant without pay. (J-2.) On March 15, 2013, a Final Notice of Disciplinary Action (FNDA)issued upholding the charges of physical or mental abuse of a patient; inappropriate physical contact or mistreatment of a patient; falsification: Intentional misstatement of material fact in connection with work, employment, application attendance or in any record, report, investigation or other proceeding; serious mistake due to carelessness which would result in danger or injury to persons or property; violation of a rule, regulation, policy, procedure, order or administrative decision; 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. New Lisbon removed appellant effective October 26, 2012. (J-3.)

On April 11, 2013, appellant appealed to the Civil Service Commission. Upon receipt of the appellant's hearing request, the Civil Service Commission transmitted the matter to the Office of Administrative Law for determination as a contested case where it was filed on May 6, 2013, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The case was scheduled for a hearing on January 21, 2014. I heard the case on June 9 and June 23, 2014. The record closed after receipt of written submissions on July 21, 2014 and replies on July 31, 2014.

TESTIMONY

Michael Beach testified that he was a Human Services Assistant (HSA) working at New Lisbon Developmental Center as a temporary employee when the incident occurred on October 11, 2012. He was working the 3:30 p.m. to 12:00 midnight shift. He was out of the recreation room when someone got him to assist saying that an HSA

needed help. He did a fast jog back, about ten seconds, and saw what was happening. He saw patient W.R. face down. Appellant was on his right side. Marcus Fahnbulleh was on his left side. W.R. was stretched out on the floor on his stomach. Appellant had W.R.'s right arm in the small of his back and Fahnbulleh had the left arm in the base of his neck. W.R. was saying, "Get off my neck," and cursing profoundly. He was directing it to Fahnbulleh. What they were doing was not the personal restraint technique (PRT) that they had learned when you wrap your arms behind the patient to keep him safe. From what he saw, it was not supposed to be done that way. Beach approached Fahnbulleh and tried to remove Fahnbulleh. He relieved Fahnbulleh to get him out of there. Fahnbulleh stood up and got out of the way and Beach took over turning him over and sitting him up. He then stood behind him after he had put himself between Fahnbulleh and W.R. W.R. was still upset saying, "Don't let me see you in Browns Mills." With Beach still standing behind, W.R. went to the back where the phone is and called his sister. Beach shadowed W.R. to the phone. He did not see any injury to W.R. He went back to his post when the Que came. The Que is the team that comes into help with situations such as this. He identified his two reports. (R-1 and R-2.)

Beach continued testifying that there were five or more people in the room at the time of the incident. He believes it was the cottage training supervisor (CTS), Brenda Price, who called the Que. He admitted that his statement (R-1) does not say W.R. was belly down on the floor. The second report was to the incident review unit. Lynda Friggle told him to write down what happened and who was involved. No one asked him questions the night of the incident. During this incident, he had to redirect patient K.S., who may have tried to get involved in the incident. Beach clarified that when he approached Fahnbulleh he took W.R.'s left wrist and upper back in an attempt to lift him to his feet. Beach was not punished in any way as a result of his restraint on W.R.

Brenda Price testified that she is a cottage training supervisor (CTS) at New Lisbon and had been for twenty-two years at the time of this incident in October 2012. On October 11, 2012, she was called down to the lounge. When she got there, W.R. was on his stomach in the lounge. Appellant had one of his legs and the other

employee, Fahnbulleh, had him on the other side. Appellant was holding him by the ankles and Fahnbulleh had his upper body. She called for assistance to get W.R. up. She believes Beach was already there. He was getting W.R. off the floor. Appellant assisted Beach in getting W.R. off the floor. Fahnbulleh was in the back saying that W.R. had punched him. Fahnbulleh was upset. W.R. wanted to call the duty officer. The duty officer came in and put Fahnbulleh in "no client contact."

Price testified that the duty officer called the Que. She does not call the Que. She identified her statement (P-2) and admitted she did not list Beach as being present and did not write down that W.R. was on his stomach. She identified another statement that Lynda Friggle ended up writing for her when she got frustrated. She had been called up three times when she had already written statements. (R-3 and P-2.) She did not tell Lynda Friggle, but she had a headache. When she got to the lounge, Price recalled Peabody, patients J.W. and W.R. and Fahnbulleh being present in the lounge. She confirmed that W.R. was on his stomach even though it is not in her statement. Beach arrived after the incident. W.R. was agitated and still on the floor when Beach arrived. Although Price did not witness how appellant and Fahnbulleh took W.R. down, W.R. was on his stomach and she knows staff are not allowed to hold a patient down on his stomach.

Lynda Friggle testified that at the time of the incident in question, October 11, 2012, she worked as a quality assurance specialist for the Department of Human Services. Her duty was to investigate abuse, neglect and exploitation of patients. She was asked to investigate an allegation that patient W.R. was abused by Fahnbulleh. Appellant was noticed as an alleged perpetrator as well. The allegation was that the two staff members restrained W.R. in a prone position on the patient's stomach with his face down. Such a position is a safety risk as noted in the "Handle with Care" manual. It is not allowed. Friggle investigated and took statements from patients. W.R. said that he was face down. Another patient, Mr. P., said W.R. was on his stomach face down and patient, Mr. B., said W.R. was on his stomach face down when the staff members restrained him. She interviewed W.R. by asking him questions that were numbered, which are followed by his answers. (R-5.) W.R. drew a diagram of where Fahnbulleh

was with his one-to-one client, J.W. It does not include everyone that was in the room at the time. J.W. gave a statement that W.R. was on his stomach. J.W. was never able to come testify as his condition does not allow him to be transported, according to Ms. Friggle. According to business records of New Lisbon, the next day, the nurse noted a circular bruise on W.R.'s neck. No injuries were noted on W.R.'s head or forehead, although W.R. said his head hit the floor. Friggle testified to the policies in question indicating that New Lisbon had stopped using the prone face-down techniques and it is prohibited now (J-7.) The manual specifically says, "Use of prone restraint as a personal control technique is prohibited." (J-8, at 2.) Prone restraint is defined as holding an individual face down on his or stomach or chest (J-8 at 3.)

On cross-examination, Friggle acknowledged that Arthur Nitti, Behavior Support Technician, reached a different conclusion than she did. Since Nitti was not present at the incident, she did not rely on his information or conclusion. W.R. did not say in his interview that he struck Fahnbulleh. She is aware that K.S. wrote in his statement supporting W.R. that he and W.R. were lovers. Her job was to look at the evidence objectively. Friggle considered Nitti's conclusion that he did not find an improper physical restraint, but it is not part of her conclusion. Beach told her he was part of the PRT. She does not recall why she had to finish writing the rest of Price's statement. (P-3.) It is rare, but not unusual that she does so. Friggle did not have anything to do with the drafting of the FNDA. However, she knows that appellant was charged with falsification because his statement contradicted that of the other staff and three individuals who said that W.R. was on his stomach. It did not matter to her that K.S. said that he and W.R. were lovers any more than it mattered that she was told appellant and Fahnbulleh eat together at lunchtime. She found appellant's statement that W.R. was placed in a seated position in a standard two-person PRT to be false. Nitti made no reference to W.R. being brought to a seated position in his report.

Josephine Peabody testified that she was a Senior Cottage Training Technician at the time of the incident. She was assigned to Juniper Cottage to relieve workers for breaks. W.R. is housed in Juniper because of his behavior and he is mentally challenged. She recounted how W.R. came to the lounge seeking a cigarette and

Fahnbulleh was telling his one-to-one not to give it to him. W.R. got and walked out and gave Fahnbulleh his middle finger. He came back in the room still upset and punched Fahnbulleh twice in the chest. . Fahnbulleh stood up between W.R. and his one-to-one, J.W. Appellant was there as well. No one else was there other than the two clients, appellant, Fahnbulleh and her. W.R. tried to hit Fahnbulleh a third time, but Fahnbulleh blocked the punch. Appellant intervened but W.R. was very combative. Appellant had to help Fahnbulleh get W.R. in restraints. She wanted to get J.W. out of the lounge and started screaming for help. Mr. Beach, who is a temporary part-time direct care worker, came in. He helped restrain W.R. as she yelled for help. Appellant and Fahnbulleh had W.R. standing up on his feet. Fahnbulleh left appellant and Beach in the room with W.R. Brenda Price was then pulled from another unit and she came into the lounge, but everything was done when she came in. Beach was part of the restraint of W.R. She did not see patient W.R. on his stomach.

On cross-examination, Peabody stated that Beach was there while the incident was occurring. He came to try and calm things down because they were getting out of hand. While she was there, W.R. was on his feet. When asked why she screamed if W.R. was on his feet and Fahnbulleh and appellant had him in a PRT, she said that they work as a team so when the environment becomes dangerous, she screamed to get more manpower. She reiterated that she never saw W.R. on his stomach. W.R. is a small guy, but dangerous. She wrote a report on the day of the incident and another one two days later.

Marcus Fahnbulleh testified that he was a Human Services Assistant (HSA) at New Lisbon on the day in question. He was working at Juniper Cottage on the 3:00 p.m. to 11:00 p.m. shift when the incident occurred. He was assigned one-to-one with J.W. who was on suicide watch. He recounted how W.R. came to J.W. and asked for a cigarette and Fahnbulleh counseled J.W. that he shouldn't give away all of his cigarettes. W.R. got upset and walked out of the room and gave him his middle finger through the window. W.R. then came back in the room very angry and hit Fahnbulleh in the chest. He made a shield between W.R. and J.W. and said W.R. can't do this. W.R. hit him a second time, but he was able to block W.R. when he tried to hit a third

time. Appellant was assigned to the dorm that night. Appellant intervened and struggled with W.R. from a standing position until he was seated on his butt. Mrs. Peabody, the Senior CTT, was present along with W.R., J.W. and appellant. They had W.R. in a seated position for a minute, but in the process of releasing him, W.R. swung and had to be restrained. Beach came in after the restraint was over. Beach came in when they stood W.R. up and Fahnbulleh let go of his side and let Beach relieve him. Brenda Price did not come into the room until after the restraint was over, according to Fahnbulleh. Fahnbulleh testified that he gave a statement. (P-5.) W.R. threatened to press charges against him and call appellant's family. W.R. used racial slurs against Fahnbulleh, but Fahnbulleh did not restrain W.R. on his stomach.

On cross-examination, Fahnbulleh said that he was on the right side of W.R. The kind of PRT they used was a non-standing PRT going from standing to seated. They secured W.R. with a standing PRT with him on the right side and appellant on the left. W.R.'s back would have been to him and appellant, such that if W.R. fell forward, Fahnbulleh would have been on his back. W.R. was at all times struggling and fighting, but not on his belly. Fahnbulleh confirmed that Beach arrived and relieved him from his position on the arm of W.R. He saw Beach arrive, but Price was not there when the restraint was occurring. He denied being upset and said he had to put the proper restraints in place. When asked why people were screaming, he said that it was to get as much help as possible. He admits W.R. was considerably smaller than he was then at 5'9", 170 pounds, but W.R. is very strong. He did not recall speaking to Mr. Nitti. He wrote his report and left.

Appellant subpoenaed Theresa Twegbe, apparently a nurse at New Lisbon; however, she did not appear to testify. Appellant was free to pursue any action against her for her nonappearance, but to my knowledge did not.

Appellant testified that he was hired in New Lisbon around May 2011 and became full-time in August 2011. He was hired as a HSA who provides direct care to the patients. These patients are high functioning and some have had criminal backgrounds. On October 11, 2012, his job was to check each client's room in Dorm 2

every fifteen minutes. He had come from doing his rounds and was leaning against the desk in the lounge conversing with staff and J.W. J.W. was Fahnbulleh's one-to-one. Ms. Peabody was there also. J.W. is a paraplegic who gets around by wheelchair or walker. When W.R. came to J.W. and asked for a cigarette, Fahnbulleh counseled him not to give his cigarettes out because he would run out before the end of the month. He has stated before, W.R. left the room and the building, but returned storming in. W.R. walked to the left of Fahnbulleh and punched Fahnbulleh when Fahnbulleh was sitting down. Fahnbulleh got up and pushed the chair back in and stood between W.R. and J.W. W.R. hit Fahnbulleh the second time and Fahnbulleh counseled him not to do it, but when he attacked the third time Fahnbulleh put him in a PRT. He could not do it, so appellant came on Fahnbulleh's left side and held W.R. While holding him in a standing PRT, appellant's hand was on W.R.'s upper left arm and his other hand was on his lower arm. W.R. was fighting. They were trying to maintain him, but W.R. lost his balance. They took a step back and brought him down easily and sat him down. The space was not sufficient for W.R. to lie down. So they sat him on his butt. They asked "are you okay, are you calm?" So they released him but W.R. went back to being combative. They then got him into a second restraint. They asked again "are you calm" and he said "yes." The two of them then stood W.R. up and at that time they were calling for other people to come in and that is when Beach and Price came in to de-escalate the situation. Beach relieved Fahnbulleh and appellant also turned W.R. over to r. Beach and left the room.

Appellant identified the statement he wrote that night (P-8) and also a statement he wrote on October 17, 2012. (P-4.) He denied ever putting W.R. on his stomach face-down on the floor or taking patient W.R.'s head and hitting it on the floor. It is standard protocol to write a statement the day of the incident. Price was not the regular supervisor, but was doing overtime in the building. He guessed that W.R. is approximately 5'2" or 5'3" in height and suffers from mental retardation. W.R. is very violent and has a martial arts background. He is physically fit. Fahnbulleh is not the first staff member that he attacked. He also attacked other residents.

On cross-examination, appellant would not define his relationship with Fahnbulleh as "friends," but they were co-workers who worked the same shift, except they were off different days. They would talk sometimes outside of work and would socialize when they were working. He denied ever getting together with Fahnbulleh to discuss what happened. He would not like to see Fahnbulleh or anyone else lose his job. Prior to New Lisbon, appellant worked for eight years at Woods Services in Pennsylvania. There, he was trained in Handle With Care just as he was trained at New Lisbon in June 2011. He clarified that when he got involved with W.R., W.R. stopped trying to punch Fahnbulleh. Appellant explained that they could not go to W.R.'s back because there was not enough space for them to position themselves on his back so they had to be on his sides. When W.R. lost his balance they brought him down to a sitting position. If they were restraining an individual face down, they would release him because it would be a prone restraint. There was screaming going on because people are needed to come around just in case. That is protocol. W.R. was also yelling and cursing. He was angry initially because he did not get the cigarette.

Appellant disagrees that Beach saw W.R. face down when he arrived. Appellant insists that W.R. was in a standing position when Beach came in and relieved Fahnbulleh. Brenda Price came in when the restraint was technically over and W.R. was already on his feet. They were still holding him and the restraint was still on, but it had already de-escalated. There was no conversation between Beach and Fahnbulleh or appellant that would lead Beach to know to relieve Fahnbulleh as the center of attention. The whole restraint lasted no longer than three minutes. W.R. was still yelling and screaming when appellant left the room. He was upset about having been restrained, not that there was anything abnormal about the restraint. Appellant had no idea how many other restraints he had performed in his year at New Lisbon. The only part of Fahnbulleh's testimony he disagreed with is when Fahnbulleh tried to demonstrate and went to the left side. He only did that so the judge could see, according to appellant.

FINDINGS OF FACT

Appellant was a HSA for New Lisbon. He was hired on August 27, 2011. As of October 11, 2012, He was working the 3:30 p.m. to 12:00 a.m. shift in Juniper Cottage with Fahnbulleh, although they had different days off. He took many courses at New Lisbon, including "Handle with Care," on June 14, 2011. (J-6.) According to the "Handle with Care" manual given with the course, the training taught appellant that "The Center stopped using the prone (face-down) restraint technique because of the extreme health risks that this technique poses to the individual." (J-7 at 3A.) The training taught him how to do proper restraints on patients. (J-7 at 3A and 24, 25.) The New Lisbon Emergency Mechanical and Chemical Restraint Policy also sets forth that use of prone restraint as a personal control technique is prohibited. It defines a non-standard restraint as, "Situations when the standard Handle with Care personal control techniques do not control an individual sufficiently to protect him/her or others from harm." (J-8 at 2.) Division Circular #19 defines a "prone restraint" as "holding an individual facedown on their stomach or chest." (J-9 at 3.) The Circular indicates that prone restraints were prohibited by the Division of Developmental Disabilities effective March 5, 2007.

On October 11, 2012, patient W.R. asked for a cigarette from patient J.W. Fahnbulleh counseled J.W. not to give it to him because he would run out before the end of the month. W.R. became angry and left the room, giving Fahnbulleh the finger through the window. W.R. later returned and went after Fahnbulleh punching him twice. In the dayroom at that time in addition to appellant, Fahnbulleh, J.W. and W.R., were Brenda Price and Josephine Peabody. Client K.S. was not in the room, but could see W.R. from the hallway. Appellant intervened after W.R. punched Fahnbulleh twice. Someone called for help and Beach entered the dayroom. When he arrived, he saw patient W.R. face down. Appellant was on W.R.'s right side. Fahnbulleh was on W.R.'s left side. W.R. was stretched out on the floor on his stomach. Appellant had W.R.'s right arm in the small of his back and Fahnbulleh had the left arm andn the base of his neck. W.R. was saying, "Get off my neck," and cursing at Fahnbulleh. Beach

approached Fahnbulleh and Fahnbulleh stood up and got out of the way and Beach took over the restraint and helped W.R. to sit up then get to his feet.

The next day, Friggle noted a circular bruise on W.R.'s neck.

CONCLUSIONS OF LAW

In appeals concerning major disciplinary actions brought against classified employees, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is a preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). Appellant has been afforded a de novo hearing in accordance with the holding in Borough of East Paterson v. Department of Civil Service, 47 N.J. Super. 55, 64 (App. Div. 1975). The preponderance may be described as the greater weight of credible evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Appellant's guilt or innocence of the charges in the present matter rests largely on a credibility determination regarding the evidence and witnesses. Testimony, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

Beach's first statement was not very detailed, saying only that he arrived to the TV room and saw W.R. "P.R.T. on the floor." (R-1.) However, his second statement indicated that Fahnbulleh had W.R. by the base of the neck and had his left arm pinned to the ground. The second statement also clarified that appellant had W.R.'s right arm pinned to the ground. (R-2.) Beach's statement was consistent with appellant's statement in terms of the side of W.R. he was on and that W.R. remained aggressive and angry throughout the entire episode. Beach's testimony was also consistent with his written statements never wavering from having seen W.R. on the ground. There is no way to pin a patient's arms to the ground if he is not on the ground. I found Beach's testimony to be credible. Price also testified that when she entered the lounge area, she saw W.R. on his stomach. I found her testimony to be credible also, although she did not enter the scene until later. Appellant and Fahnbulleh would have a hard time

knowing exactly when she arrived given that they were preoccupied with W.R. She was still able to see W.R. prone on the ground.

Appellant objected to the statements of residents W.R. and J.W. as being hearsay. I admitted the statements because the written documents were business records of New Lisbon and the hearsay statements within them are admissible in administrative proceedings subject to the residuum rule, N.J.A.C. 1:1-15.5, which provides:

> (b) Notwithstanding the admissibility of hearsay evidence, 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.

The residuum of competent evidence to support the residents' statements was the testimony of Beach and Price that W.R. was on his stomach. In addition, Friggle testified that she saw a small, circular bruise on W.R.'s neck and asked the cottage nurse to examine him. (T155-6 to 14.) She did not need to be a medical professional to testify to seeing a bruise. Friggle's testimony is consistent with W.R.'s statement that Fahnbulleh grabbed him by the neck and brought him to the ground. W.R. told Friggle that once Fahnbulleh got him to the ground, Peabody and the other male staff helped Fahnbulleh restrain him. W.R. told Friggle he was face-down and on his stomach just as Beach and Price described. Notably, W.R. does not really mention appellant, although presumably appellant is the other male staff he refers to as helping restrain him. W.R. denied punching Fahnbulleh. Only appellant, Fahnbulleh, and Peabody testified to W.R. punching Fahnbulleh. Resident K.S. told Friggle in his statement that he and W.R. were lovers, so his statement did not have the assurance of reliability that would I would need to rely upon it. J.W., however, was a neutral witness to the events. He was the resident who asked for a cigarette at the beginning of the incident. According to J.W.'s account, Fahnbulleh took W.R. down to the ground by the neck and appellant helped hold W.R. down, along with Peabody. His statement indicates that W.R. kept trying to get up and appellant and Fahnbulleh kept taking him back down. This is actually somewhat consistent with appellant's statement, P-8. I find that the statements of W.R. and J.W. are credible and supported by the residuum of competent

evidence provided by the testimony of Beach and Price that W.R. was on his stomach and the testimony of Friggle that she saw a bruise on W.R.'s neck.

Appellant's own witness, Peabody, did not testify consistently with any other staff member or resident. I did not find her testimony to be credible. She is the only witness that said that, at all times, appellant and Fahnbulleh had W.R. in a standing PRT. Her testimony hurt the testimony of appellant and Fahnbulleh that W.R. fell and they took him down to a seated PRT. Peabody made their testimony less credible since by all accounts, she was right in the middle of the incident with them. She would have seen if appellant and Fahnbulleh took W.R. into a seated PRT. She did not confirm seeing W.R. on the ground, which every other witness testified he or she saw, even if it was seated rather than prone.

Because appellant and Fahnbulleh are the only witnesses to taking W.R. into a seated PRT and their testimony is self-serving, their testimony is less credible than that of the other staff members. Further, appellant's first statement on October 12, 2012, does not mention taking W.R. to a seated position, although he states that W.R. was placed in standard PRT. Appellant testified that when W.R. lost his balance, Fahnbulleh and he brought him down to sit on his butt. This testimony does not hold together because at all times, W.R. is being combative, according to appellant. So if W.R. is trying aggressively to get to Fahnbulleh and loses his balance, he is going to fall forward, not backwards into a seated position with his feet in front of him. What also does not make sense, using appellant's account, is why Peabody is yelling for help if appellant and Fahnbulleh are using a standard PRT into a seated position and it is working so well. Appellant was also very evasive talking about his relationship with Fahnbulleh asking how "friend" was defined when asked if he and Fahnbulleh are friends.

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Mack v. Dept. of Human Servs, Forensic Psychiatric Hospital, 96 N.J.A.R.2d (CSV) 369 (1996)(citing Congleton v. Pura-Tex Stone Corp., 53

N.J. Super. 282, 287 (App. Div. 1958). In the present case, the testimony of appellant and Fahnbulleh was overborne by that of Beach and Price, coupled with the statements of residents W.R. and J.W. The testimony of appellant and Fahnbulleh was not inherently incredible, but it was inconsistent with other testimony that was more believable under the circumstances of the incident.

Therefore, with respect to the charges under N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically those under the New Jersey Department of Human Services Disciplinary Action Program, I **CONCLUDE** the following. Regarding C.3-1, physical or mental abuse of a patient, client, or resident, the Program Manual defines physical abuse 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. Such acts include but are not limited to the individual, patient, or resident being kicked, pinched, bitten, punched, slapped, hit, pushed, dragged, and/or struck with a thrown or held object. [J-4 at Supplement 3]

Appellant's conduct did not rise to the level of physical abuse of W.R. It was an improper technique to have W.R. face-down as I have found, but all appellant did was pin W.R.'s arm down while W.R. was angrily and aggressively trying to get to Fahnbulleh. The "Handle with Care" manual says that the prone position poses an extreme health risk and should not be used, but it does not say that it is physical abuse per se nor is such action listed in the definition. Although the definition says the type of conduct that constitutes abuse is not limited to what is set forth, holding a patient's arm down while the resident is face down would not seem to fit in with the other types of conduct set forth therein. Under the circumstances, I **CONCLUDE** that appellant did not commit physical abuse of a resident under C.3.

The next charge under "other sufficient cause" is C.5-1, inappropriate physical contact or mistreatment of a patient, client, or resident. Pinning W.R.'s arm down while W.R. was in the prone position was clearly inappropriate physical contact. Both the "Handle with Care" manual and the New Lisbon Emergency Mechanical and Chemical

Restraint Policy set forth that the prone restraint technique is forbidden. I therefore **CONCLUDE** that the most appropriate charge for appellant's conduct is inappropriate physical contact or mistreatment of a patient, client or resident, C.5.

New Lisbon also charged appellant with C.8, falsification: Intentional misstatement of material fact in connection with work, employment, application, attendance or in any record, report, investigation or other proceeding. Appellant's first report on October 11, 2012, stated that W.R. was put in a standard PRT, which lasted for about a minute and he was released. The fact that the incident lasted about a minute was corroborated, but I have found that W.R. was not placed in a standard PRT. When appellant spoke to Friggle on October 12, 2012, he told her that W.R. was placed in a PRT by appellant and Fahnbulleh and they transitioned him to the ground to a seated PRT. Appellant told Friggle that W.R. was not on his stomach during the restraint. I have found, based on the testimony of Beach, Price, W.R. and J.W., that W.R. was indeed in a prone position on his stomach and it was not a standard PRT. In appellant's next report on October 17, 2012, appellant stated that W.R. was put in a standard PRT with Fahnbulleh and him holding W.R. on both sides. Appellant went on to say in the report that W.R. was placed in a seating standard two-person, hands-on-side PRT. He set forth that both of his hands were on W.R. as they brought him down to the seating position with his feet in front of him. I have found facts contrary to appellant's version based on the testimony of Beach and Price. Appellant's own witness, Peabody, did not support the above version of what happened to W.R. Based on the foregoing, I **CONCLUDE** New Lisbon proved by a preponderance of the credible evidence that appellant violated C.8, falsification, both in his written reports and in the investigation conducted by Friggle.

The next charge is B.7-1, serious mistake due to carelessness which would result in danger or injury to persons or property. This entire incident took place in less than two minutes during which W.R. was combative and angry. I **CONCLUDE** that New Lisbon proved the charge of serious mistake due to carelessness by a preponderance of the credible evidence in the record. Continuing to restrain W.R. after he went down on his stomach was a serious mistake that put W.R. at risk.

In addition, New Lisbon charged petitioner with E.1, violation of a rule, regulation, policy, procedure, order or administrative decision. The "Handle with Care" policy says that prone restraints are disallowed because they pose a serious risk of injury to resident. It would violate that policy to restrain a resident face-down. I have found that appellant did exactly that. I therefore **CONCLUDE** that New Lisbon proved by a preponderance of the credible evidence that appellant violated E.1, violation of a policy.

Last, New Lisbon argues that appellant violated 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 Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). When one considers all of the substantial credible evidence in the record in this case, one must conclude that appellant's conduct was such that would have a tendency to destroy public respect in the delivery of government services. The public has to know that the residents of developmental centers will be cared for appropriately and safely. Appellant did not treat W.R. with the appropriate standard of care according to the policy. Therefore, I **CONCLUDE** that New Lisbon met its burden of proving by a preponderance of the credible evidence in the record that appellant violated N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee.

PENALTY

A civil service employee who commits a wrongful act related to his or her duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:2-14, 11A:2-6, N.J.A.C. 4A:2-2.2, -2.3(a). In West New York v. Bock, 38 N.J. 500, 523 (1962), the New Jersey Supreme Court stated that a public employee's prior disciplinary record may be referred to, where appropriate, in assessing the reasonableness of a penalty for a current offense. Depending upon the incident complained of and/or the employee's past record, major discipline may include removal. Id. at 522-24.

New Lisbon's clients suffer from a range of developmental disabilities and it is reasonably foreseeable that they sometimes will be difficult, obstinate and even violent with the staff members who are charged with their direct monitoring and care. When confronted with or witness to such a client's belligerent behavior, a staff member must carefully control the client to avoid harm. As set forth above, appellant's conduct did not rise to the level of physical abuse—the only charge that sets forth a penalty of removal for a first offense in the Program Manual. The range of penalties for inappropriate physical contact is official reprimand to removal; the range for falsification is counseling to removal; and the range for violation of a policy is counseling to removal. The charge of conduct unbecoming encompasses all of the above, so the range of penalties should be similar, from official reprimand to removal.

Appellant was an employee at New Lisbon for only a year and five months when this incident occurred. He had no prior disciplinary infractions. While one can say that the short time works against him since he does not have a long distinguished history of service, it also is a mitigating factor since he was still in the process of learning how to deal with New Lisbon residents who sometimes get angry and act out. The program manual sets forth that the Table of Offenses and Penalties represents "the Department's policies of corrective rather than punitive actions, progressive discipline, a progressive range of penalties for a specific type of offense, and the consideration of appropriate and demonstrable mitigating factors." (J-4 at Supplement 1.) Because I have concluded that appellant did not commit physical abuse, the penalty of removal is too harsh. Where there is an acceptable range of penalties for a first offense for each of the charges New Lisbon proved, major discipline short of removal is appropriate. I **CONCLUDE** that a penalty of six months adequately recognizes the seriousness of the offense and the potential risk of placing a resident in a prone position while still acknowledging the concept of progressive discipline and policy of corrective action set forth in the manual. In addition, as appellant notes, appellant was not immediately placed on "no client contact" as Fahnbulleh was. Indeed, appellant continued working with residents from October 12 to October 26, 2012, when he was suspended.

Therefore, New Lisbon did not appear to consider him such a danger that he had to be removed immediately.

ORDER

I **ORDER** the appellant's appeal **GRANTED** on the charge of C.3-1, physical abuse of a resident and his appeal **DISMISSED** as to the charges of C.5-1, inappropriate physical contact; C.8-1, falsification; B.7-1, serious mistake due to carelessness and E.1-1, violation of a policy, and N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming a public employee, which are **UPHELD**. I further **ORDER** the discipline **MODIFIED** to have appellant **SUSPENDED** for a period of six months.

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

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

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

November 21, 2014
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 11/21/14

Date Mailed to Parties: 11/21/14

cmo/mph

APPENDIX

WITNESSES

For appellant:

Josephine Peabody
Marcus Fahnbulleh
Abdugafaru Fasasi

For respondent:

Michael Beach
Brenda Price
Lynda Friggle

LIST OF EXHIBITS:

Joint Exhibits:

J-1 Form 31-A, dated October 26, 2012
J-2 Form 31-A with box checked
J-3 Form 31-B, dated March 15, 2013
J-4 Administrative Order 4:08 (Program Manual)
J-5 Hire date and title of appellant
J-6 List of courses taken by appellant
J-7 Handle with Care course manual
J-8 New Lisbon Emergency Mechanical and Chemical Restraint Policy
J-9 DHS Division Circular

For appellant:

P-1 Restraint Information Form
P-2 Incident Report by Brenda Price, October 11, 2012
P-3 Incident Report by Brenda Price, October 12, 2012
P-4 Statement of appellant, dated October 17, 2012
P-5 Statement of Mr. Fahnbulleh
P-6 Statement of Mr. Fahnbulleh, October 23, 2012
P-7 For identification only
P-8 Statement of appellant, October 11, 2012

For respondent:

R-1 Michael Beach's Report dated October 11, 2012
R-2 Michael Beach's Report dated October 16, 2012
R-3 Statement of Brenda Price, dated October 16, 2012
R-4 Investigation Report, dated October 18, 2012
R-5 Statement of W.R. dated October 12, 2012
R-6 Statement of J.W. dated October 12, 2012
R-7 Statement of K.S. dated October 15, 2012
R-8 For identification only